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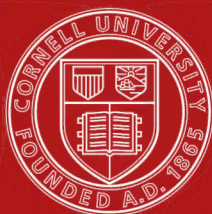
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A  
TREATISE ON THE LAW  
OF  
EXECUTORS AND ADMINISTRATORS

BY  
SIR EDWARD VAUGHAN WILLIAMS,  
*(Late one of the Judges of her Majesty's Court of Common Pleas).*

**Ninth English Edition**

BY  
SIR ROLAND L. VAUGHAN WILLIAMS, KNT.,  
*(One of the Justices of her Majesty's High Court of Justice).*

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**Seventh American Edition**

BY  
JOSEPH F. RANDOLPH AND WILLIAM TALCOTT,  
*(Editors of Jarman on Wills),*  
OF THE NEW JERSEY BAR.

*IN THREE VOLUMES.*

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VOLUME I.

---

JERSEY CITY.  
FREDERICK D. LINN & CO., LAW PUBLISHERS.  
1895.

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RAHWAY, N. J.



# PREFACE

TO THE

## SEVENTH AMERICAN EDITION.

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WILLIAMS ON EXECUTORS has been for more than twenty-five years an unexhausted and unsurpassed fountain of authority. It is no disadvantage that it dates from a day when cases were properly examined, accurately and fully stated, carefully weighed, and judiciously discussed. These considerations give to this book a permanent value, which its English and somewhat antiquated form cannot take from it. No text-book of this century has been more cited in the most recent arguments and decisions of our own courts.

The American Editors have, at the request of the English publishers, and with the assignment of their copyright in the United States, taken up the heavy but pleasant task of adding an American volume to the work for American use. In doing this we have endeavored to give a complete and accurate statement of the law as expressed in all the states, avoiding *dicta* and necessarily striving after the utmost brevity.

The references in the English notes to English editions of text-books are not changed, but the American references are to last American editions. The citations of Jarman on Wills refer to the fifth American (R. and T.) edition, in three volumes.

In the midst of the task Mr. Talcott was stricken with serious illness, and he has died before its completion after doing much hard and honest work in the early part of the book.

JOS. F. RANDOLPH.

JERSEY CITY, 1894.





# PREFACE

TO THE

## NINTH EDITION.

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It is with great diffidence that I offer to the profession this edition of my father's great work.

In the last edition, the Editors, in their desire to leave as much as possible unaltered the text of the Author, did not attempt to do more than note up the cases and statutes which had been decided and passed since the last edition, for which Sir Edward Vaughan Williams was personally responsible, was published. What was done in the way of alteration was chiefly the work of my late brother, Walter Vere Vaughan Williams.

The lapse of a quarter of a century since the last edition by Sir Edward Vaughan Williams has made it impossible to avoid altogether alterations of and additions to the text of the Author. It was impossible to introduce into the new edition, by means of notes only, great changes, of which the Judicature Acts and the Married Women's Property Acts are examples, and the text, therefore, had necessarily to be somewhat altered ; but feeling how much the authority of the book depends on the maintenance of the old text, I have tried to make these alterations as small as possible, and I hope that critics will indulgently remember that the problem how to maintain the text and yet introduce the new matter was one of great difficulty, and which could not be worked out with absolute uniformity. Moreover, day by day, as the work of this new edition proceeded, I became more and more filled with admiration for the original, and more impressed with my own inability as Editor to supply my father's place. This it is which makes me ask the indulgence of the profession toward what has been a great effort on my part. I, personally, have made every addition and alteration, except that my friend Mr. Eustace Smith, of the Chancery Bar, was good enough to re-draft for me the chapters upon Equity Practice.

I have also to thank my friend and late pupil, Mr. John Ogle, of the Inner Temple, for constant assistance throughout the whole of the necessarily long period devoted to the preparation of this edition. Mr. Wasey Sterry, of Lincoln's Inn, prepared the Index for me and has also afforded me much assistance by his conscientious work and lawyer-like accuracy when acting as my amanuensis. My friend and late pupil, Mr. E. W. Hansell, of the Inner Temple, also gave me his assistance, especially with the chapters on Common Law Practice. In conclusion I wish to say that I finished my work shortly before the Spring Circuit, and therefore, so far as I am concerned, the cases and statutes only come down to that date.

I am happy to say, however, that the publishers have arranged with my friend Mr. John Ogle to prepare the Addenda, which will be found after the Index of Cases. In this he has given references to all the cases lately decided, and has also dealt with the Trustee Act, 1893, which was passed during the present session of Parliament, and which comes into force on January 1st, 1894. This act, while it in no way alters the law affecting the powers and liabilities of trustees, consolidates the various statutes relating to those subjects which have been passed from time to time.

A table will be found at the end of the Addenda setting out the short effect of each section of the new act, and indicating the various sections of preceding statutes repealed and re-enacted by it.

R. V. W.

*November, 1893.*

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# THE STATUTE 1 VICT. c. 26.

*An Act for the Amendment of the Laws with respect to Wills.*<sup>1</sup>  
[3rd July, 1837.]

Be it enacted, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows : (that is to say), the word "Will" shall extend to a testament, and to a codicil, and to an appointment by Will or by writing in the nature of a Will in exercise of a power, and also to a disposition by Will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and liveries and tenures*, in capite and by knights service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof, or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and liveries and tenures* in capite and by knights service, and to any other testamentary disposition ; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein ; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for

Meaning of certain words in this Act :

"Will :"

12 Car. II. c. 24.

14 & 15 Car. II. (I).

"Real estate :"

"Personal estate :"

1. For a very full statement of American statutes covering the subject of this act, see 3 Jarman on Wills, pp. 721-805.

money (not being real estates) debts, choses in action, rights, credits,  
 1 Vict. c. 26. goods, and all other property whatsoever which by law  
 devolves upon the executor or administrator, and to any  
 share or interest therein; and every word importing the singular num-  
 ber only shall extend and be applied to several persons  
 Number: or things as well as one person or thing; and every  
 Gender: word importing the masculine gender only shall extend  
 and be applied to a female as well as a male.

II. And be it further enacted, That an Act passed in the thirty-  
 second year of the reign of King Henry the Eighth,  
 intituled *The Act of Wills, Wards, and Primer Seisins,*  
 Repeal of the Statutes of Wills, 32 H. VIII. c. 1, and 34 & 35 H. VIII. c. 5. *whereby a Man may devise Two parts of his Land;* and  
 also an Act passed in the thirty-fourth and thirty-fifth  
 years of the reign of the said King Henry the Eighth, intituled *The*  
*Bill concerning the explanation of Wills:* and also an Act passed in  
 the Parliament of Ireland, in the tenth year of the reign of King  
 Charles the First, intituled *An Act how Lands, Tene-*  
 10 Car. I. Sess. 2, c. 2 (I). *ments, etc., may be disposed by Will or otherwise, and*  
*concerning Wards and Primer Seisins;* and also so  
 Sects. 5, 6, 12, 19, 20, 21 & 22 of the Statute of Frauds, 29 Car. II. c. 3; 7 W. III. c. 12 (I). much of an Act passed in the twenty-ninth year of the  
 reign of King Charles the Second, intituled *An Act for*  
*Prevention of Frauds and Perjuries,* and of an Act passed in the  
 Parliament of Ireland in the seventh year of the reign of King  
 William the Third, intituled *An Act for Prevention of Frauds*  
*and Perjuries,* as relates to devises or bequests of lands or tene-  
 ments, or to the revocation or alteration of any devise in writing  
 of any lands, tenements, or hereditaments, or any clause thereof, or to  
 the devise of any estate *pur autre vie*, or to any such estates being  
 assets, or to nuncupative Wills, or to the repeal, altering, or changing  
 of any Will in writing concerning any goods or chattels or personal  
 estate, or any clause, devise, or bequest therein: and also so much of  
 an Act passed in the fourth and fifth years of the reign of Queen  
 Anne, intituled *An Act for the Amendment of the Law*  
 Sect. 14 of 4 & 5 Anne, c. 16. *and the better Advancement of Justice,* and of an Act  
 passed in the Parliament of Ireland in the sixth year of the reign of  
 Queen Anne, intituled *An Act for the Amendment of*  
 6 Anne, c. 10 (I). *the Law and the better Advancement of Justice* as  
 1 Vict. c. 26. relates to witnesses to nuncupative Wills: and also so  
 much of an Act passed in the fourteenth year of the reign of King  
 George the Second, intituled *An Act to Amend the*  
 Sect. 9 of 14 G. II. c. 20. *Law concerning Common Recoveries, and to explain*

and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled "*An Act for Prevention of Frauds and Perjuries*," as relates to estates *pur autre vie*: and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled *An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations in America*, except so far as relates to his Majesty's colonies and plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates*; and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will*, shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any Wills or estates *pur autre vie*, to which this Act does not extend.

25 G. II. c. 5  
(except as to colonies).

25 G. II. c. 11 (D).

55 G. III. c. 192.

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, all real estate and all personal estate (a) which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator: and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his Will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a Will or otherwise, could not at law have been disposed of by Will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a Will or a

All property may be disposed of by will:

1 Vict. c. 26.

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised:

(a) See *infra*. p. \*2.

surrender to the use of a Will should continue in force for a limited time only, or any other special custom, could not have been disposed of by Will according to the power contained in this Act, if this Act had not been made : and also to estates *pur autre vie* (b), whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament ; and also to all contingent, executory, or other future interests in any real or personal estate (c), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or Will ; and also to all rights of entry for conditions broken, and other rights of entry ; and also to such of the same estates, interests and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his Will (d).

IV. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a Will, and the testator shall not have surrendered the same to the use of his Will, no person entitled or claiming to be entitled thereto by virtue of such Will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the Will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the Will of such testator : Provided also, That where the testator was entitled to have been admitted to such real estate, and might if he had been admitted thereto have surrendered the same to the use of his Will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such Will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and

As to the fees and fines payable by devisees of customary and copyhold estates.

1 Vict. c. 26.

(b) See *infra*, p. \*601.

(d) See *infra*, pp. \*3, \*4, \*174.

(c) See *infra*, p. \*771, *et seq.*

sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the Will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterward surrendered the same to the use of his Will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by Will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the Will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor: and when any trusts are declared by the Will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such Will: and when any such real estate could not have been disposed of by Will if this Act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

Wills or extracts of Wills of customary freeholds to be entered on the court rolls:

1 Vict. c. 26.

and the lord to be entitled to the same fine, &c., when such estates are not now devisable as he would have been from the heir in case of descent.

VI. And be it further enacted, That if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal here-

Estates *pur autre vie*.

ditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*e*).

No Will of a person under age valid;

VII. And be it further enacted, That no Will made by any person under the age of twenty-one years shall be valid (*f*).

1. Vict c 26.

nor of a *feme covert*, except such as might now be made.

VIII. Provided also, and be it further enacted, That no Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act (*g*).

IX. And be it further enacted, That no Will shall be valid unless it shall be in writing and executed in manner herein-after mentioned (*h*); (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction (*hh*), and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary (*i*).

X. And be it further enacted, That no appointment made by Will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every Will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by Will, notwithstanding it shall have been expressly required that a Will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner, or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act (*k*).

Appointments by Will to be executed like other Wills, and to be valid, although other required solemnities are not observed.

Soldiers' and mariners' Wills excepted.

(*e*) See *infra*, pp. \*601, \*1540.

(*f*) See *infra*, p. \*12.

(*g*) See *infra*, pp. \*46, \*179, \*309.

(*h*) See *infra*, p. \*63.

(*hh*) See *infra*, pp. \*64, \*72.

(*i*) See *infra*, pp. \*73, \*81.

(*k*) See *infra*, pp. \*63, \*104, *et seq.*, \*332.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth, and the first year of the reign of his late Majesty King William the Fourth, intituled *An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy*, respecting the Wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect to services in her Majesty's navy.

Act not to affect certain provisions of 11 Geo. IV. & 1 Wm. IV. c. 20, with respect to petty officers and seamen and marines.

1 Vict. c. 26.

XIII. And be it further enacted, That every Will executed in manner hereinbefore required shall be valid without any other publication thereof (l).

Publication not to be requisite.

XIV. And be it further enacted, That if any person who shall attest the execution of a Will shall at the time of the execution thereof or at any time afterward be incompetent to be admitted a witness to prove the execution thereof such Will shall not on that account be invalid.

Will not to be void on account of incompetency of attesting witness.

XV. And be it further enacted, That if any person shall attest the execution of any Will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will (m).

Gifts to an attesting witness to be void.

XVI. And be it further enacted, That in case by any Will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such Will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such Will, or to prove the validity or invalidity thereof.

Creditor attesting to be admitted a witness.

(l) See *infra*, pp. \*63, \*78.

(m) See *infra*, pp. \*898, \*899.

**XVII.** And be it further enacted, That no person shall, on account of his being an executor of a Will, be incompetent to be admitted a witness to prove the execution of such Will, or a witness to prove the validity or invalidity thereof (*n*).

1 Vict. c. 26.

Executor to be admitted a witness.

**XVIII.** And be it further enacted, That every Will made by a man or woman shall be revoked by his or her marriage (*o*) (except a Will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

Will to be revoked by marriage.

**XIX.** And be it further enacted, That no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances (*p*).

No Will to be revoked by presumption.

**XX.** And be it further enacted, That no Will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*q*).

No Will to be revoked but by another Will or codicil, or by a writing executed like a Will, or by destruction.

**XXI.** And be it further enacted, That no obliteration, interlineation, or other alteration made in any Will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; but the Will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will (*r*).

No alteration in a Will shall have any effect unless executed as a Will.

1 Vict. c. 26.

(*n*) See *infra*, p. \*284.

(*o*) See *infra*, p. \*160.

(*p*) See *infra*, pp. \*156, \*161.

(*q*) See *infra*, pp. \*110, \*111, \*120, \*125, \*153.

(*r*) See *infra*, pp. \*110, \*111, \*123.



part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any Will or codicil which shall be partly revoked, and afterward wholly revoked, shall be revived, such revival shall not extend to so much thereof, as shall have been revoked before the revocation of the whole thereof unless an intention to the contrary shall be shown (s).

No Will revoked to be revived otherwise than by re-execution or a codicil to revive it.

XXIII. And be it further enacted, That no conveyance or other Act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an Act by which such Will shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death (t).

A devise not to be rendered inoperative by any subsequent conveyance or Act.

XXIV. And be it further enacted, That every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will (u).

A Will shall be construed to speak from the death of the testator.

XXV. And be it further enacted, That unless a contrary intention shall appear by the Will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such Will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such Will (v).

A residuary devise shall include estates comprised in lapsed and void devises.

XXVI. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his Will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be

1 Vict. c. 26.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

(s) See *infra*, pp. \*152, \*163, \*168, \*172.

(u) See *infra*, pp. \*175, \*1193, \*1298.

(v) See *infra*, p. \*1318.

(t) See *infra*, pp. \*1192, \*1193.

construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the Will (*w*).

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his Will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the Will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the Will (*x*).

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a contrary intention shall appear by the Will.

(*w*) See *infra*, p. \*929.

(*x*) See *infra*, p. \*1321, *et seq.*

# PART THE FIRST.

OF THE APPOINTMENT OF EXECUTORS AND ADMINISTRATORS.

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## BOOK THE FIRST.

OF THE ORIGIN OF WILLS OF PERSONAL ESTATE: AND  
OF THEIR NATURE AND INCIDENTS.

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### CHAPTER THE FIRST

OF THE ORIGIN OF WILLS OF PERSONAL ESTATE.

Although from the time of the Norman Conquest, until the passing of the Statute of Wills (32 & 34 H. VIII.), a subject of this realm had, generally speaking, no testamentary power over *land*; yet the power of making a will of *personal property* appears to have existed and continued from the earliest period of our law.<sup>1</sup> And, under the

1. "The view of a Will which regards it as conferring a power of diverting property from the family, or of distributing it in such uneven proportions as the fancy or good sense of the testator may dictate, is not older than the latter portion of the Middle Ages, in which feudalism had completely consolidated itself. When modern jurisprudence first shows itself in the rough, Wills are rarely allowed to dispose with absolute freedom of a dead man's assets. . . Curiously enough, the dower of lands proved a more stable institution than the analogous and more ancient reservation of certain shares of personal property to the widow and children." Maine's Ancient Law, pp. 223, 224.

Necessary or forced heirs were un-

known to the English common law, except widows' and children's *rationabiles partes* of the personal estate. These provisions were brushed away in nearly all of the states by the earliest statute of wills. In *Louisiana* the code of 1825 (ed. 1870, §§ 1617-1624) establishes "forced heirs" as by civil law, allowing them to be disinherited only for cause expressed in the will and proved by the heir. It also provided (§ 1493) that donations should not exceed two-thirds of testator's estate if he left one legitimate child, one-half if two legitimate children, one-third if three or more, two-thirds if no children but father or mother surviving.

For other statutes no longer in force see 3 Jarman on Wills 733, note.

description of personal property so disposable, are not only to be considered goods and chattels, but also terms for years and chattel interests in land, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were disposable by will(a).

But this power, it seems, did not extend to the whole of a man's personal estate, unless he died without either wife or issue; for by the common law, as it stood, according to Glanvil, in the reign of Hen. II., a man's goods were to be divided into three equal parts; one of which went to his \*heirs, or lineal descendants, another to his wife, and the third was at his own disposal: or if he died without a wife, he might then dispose of one moiety, and the other went to his children: and so, *é converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal(b). The shares of the wife and children were called their reasonable parts: and the writ *de rationabili parte bonorum* was given to recover them(c).

*Writ de rationabili parte bonorum.*

This writ lay for the wife against the executors of her husband, and was founded on a complaint that the said executors unjustly detained from the plaintiff her reasonable part of the goods and chattels which were of the deceased, and refused to render the same to her(d). And the sons and daughters were entitled to the like writ against the executors in case their third part was withheld(e).

In England, the law of wills was rapidly perfected by ecclesiastics learned in the Roman law, from which circumstance, undoubtedly, came the jurisdiction of ecclesiastical courts in matters of probate.

The colonists who came from England and founded the American colonies, brought with them the established testamentary laws of the mother country, and, after the revolution, when the American colonies ceased to be colonies and became independent states, and by the adoption of the federal constitution formed the United States of America, the English law regarding wills became a part of the earliest statutes of this country, so that

to the United States the origin of wills, both of real and personal estate, is England. But in the United States, the courts exercising jurisdiction in matters of testamentary disposition have never been ecclesiastical courts properly so called, notwithstanding that some of the titles of the judiciary in such courts may be a relic of the spiritual courts of Great Britain.

(a) Co. Lit. 111, b, n. (1), by Hargrave.

(b) 2 Bl. Comm. 492.

(c) F. N. B. 122, L. 9th edit.; 2 Saund. 66, n. (9).

(d) F. N. B., *ubi supra*.

(e) The word "*pueri*," was used in the writ, but was taken as meaning children

It must, indeed, be remarked that there has been a controversy whether this was the general law of the land, or only such as obtained in particular places by custom (*f*); the law, however, whether general or prevailing in particular places only by custom, was altered by imperceptible degrees, and by a succession of statutes the old common law was utterly abolished throughout all the kingdom of England, so that a man might devise the whole of his chattels as freely as he formerly could his third part or moiety.

Controversy whether this was the general law, or only obtaining in particular places by custom.

Alteration of the law.

And now, by Stat. 1 Vict., c. 26, (which, however, does not extend to any will made before Jan. 1, 1838,) it is enacted that it shall be lawful for every person to devise, bequeath or dispose of, by his will executed as required by that act, all real estate and all personal estate which he shall be \*entitled to, either at law or in equity, at the time of his death (*g*).

The Wills Act, 1 Vict., c. 26.

of both sexes, it being held that sons and daughters might join in the writ: Co. Lit. 176 b. n. (3), by Hargrave.

(*f*) As to this controversy and the gradual alteration of law, see the former editions of this work and the authorities therein collected. Pt. I., bk. I., ch. I.

(*g*) See this enactment (s. 3), *verbatim*, preface. The interpretation clause (s. 1) enacts that the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts,

choses in action, rights, credits, goods and all property whatsoever which by law devolves upon any executor or administrator, and to any share or interest therein. But the third section does not intend to make any kind of personalty bequeathable which was not bequeathable before, but only to regulate the form of executing wills: Bishop *v.* Curtis, 18 Q. B. 878; by Lord Campbell, 881. Therefore a testator cannot bequeath a promissory note made to him, so as to pass the right to sue in respect of it. Such right is in the executor. *Ib.*

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## \*CHAPTER THE SECOND.

OF THE NATURE AND INCIDENTS OF WILLS AND CODICILS OF  
PERSONAL PROPERTY.

A last will and testament is defined to be “the just sentence of our will touching what we would have done after our death”(a); and in strictness, perhaps, the definition might be narrowed by adding “respecting personal estate.”<sup>1</sup> For a devise of *lands* is considered by our courts not so much in the nature of a testament, as of a conveyance by way of appointment of particular lands to a particular devisee (b): and upon that principle it was established that a man could devise those lands only which he had at the time of the date of such conveyance, and no after-purchased lands

(a) Swinb. Pt. 1, s. 2; Godolph. Pt. 1, c. 1, s. 2; 2 Black. Comm. 499.

1. Shep. Touch. 399, 400; 7 Bac. Ab. tit. Wills, 299 a; 4 Kent 501; 1 Redf. Wills 4, 168; Best on Evidence, § 222; Theobald on Wills 64; Walkem on Wills 9; Jarman on Wills (5th Am. ed.) 26, and notes.

The some time distinction between “will” and “testament” seems to have practically passed away, and the use of one word or the other at present is without particular significance. Hence, any investigation of the old authorities on this distinction is scarcely more than an interesting inquiry into an ancient use of words.

The word “will” includes *prima facie* all instruments of a testamentary character which could go to make the will. Crosby v. MacDoual, 4 Ves. 610; Gordon v. Lord Reay, 5 Sim. 274; Aaron v. Aaron, 3 DeG. & Sm. 475. See Estate of Wood, 36 Cal. 75; Ragsdale v. Booker, 2 Strobb. Eq. 348, 352; McGee v. McCants, 1 McCord 517, 522; Lucas v. Parsons, 24 Ga. 640; Jackson v. Betts, 9 Cow. 208.

Whatever be the form or nature of the document, if it have no operation *inter vivos*, but depend entirely upon the death

of the maker for validity, it must be taken to be a will. Carey v. Dennis, 13 Md. 1.

A will need not be dated, but the actual time of its execution may be proved by parol. Wright v. Wright, 5 Ind. 389; Deakins v. Hollis, 7 Gill & J. 311. But when the will is dated, the presumption is that it was made at the time of its date. Sawyer v. Sawyer, 7 Jones L. 134. Nor is it necessary that a will should show where it was made. This is a matter *dehors* the will, and may be proved like any other fact. Succession of Hall, 28 La. Ann. 57. The *onus* is upon the proponent of the will to establish all those facts which the statute requires, in order to impress upon the instrument a testamentary character. Roberts v. Welch, 46 Vt. 164.

(b) Harwood v. Goodright, Cowp. 90, by Lord Mansfield. 1 Saund. 277, e. note (4) to Duppa v. Mayo. It is said by Lord Coke, Co. Lit. 111, u. that in law, most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum*, when it concerneth chattels. See, also, to the same effect, Godolph. Pt. 1, c. 6, s. 7.

would pass, whatever words might be used(c); whereas a will and testament would operate upon whatever personal estate a man died possessed of, whether acquired before or since the execution of the instrument.<sup>2</sup> And now by Stat. 1 Vict., c. 26, s. 3, which, however,

(c) 1 Saund. 277, *c. n.* (4); *Wind v. Jekyl*, 1 P. Wms. 575. It did not turn upon the construction of the statute of wills (32 H. VIII., c. 1, and 34 H. VIII., c. 5), which say that any person *having* land may devise (as it has sometimes been said, see Toller on Executors, p. 2); for the same rule held before the statute, where lands were devisable by custom: *Harwood v. Goodright*, Cowp. 90, by Lord Mansfield; *Brunker v. Cook*, 11 Mod. 122; *Brydges v. Duchess of Chandos*, 2 Ves. 427; 1 Wms. Saund. 277, *c. n.* (4).

2. Formerly the same construction prevailed in the United States as in England as to after-acquired lands. *George v. Green*, 13 N. H. 521; *Brewster v. McCall's Devisees*, 15 Conn. 273; *Kemp's Exrs. v. McPherson*, 7 Harr. & J. 320; *Hays v. Jackson*, 6 Mass. 149; *Minuse v. Cox*, 5 Johns. Ch. 441; *Meador v. Sorsby*, 2 Ala. (N. S.) 712; *Girard v. City of Philadelphia*, 4 Rawle 323; *Ballard v. Carter*, 5 Pick. 112; *Brigham v. Shattuck*, 10 Id. 306, 309; *Varick v. Jackson*, 2 Wend. 166; *Ross v. Ross*, 12 B. Mon. 437. But, in South Carolina, if testator had an equitable interest the lands would pass by the will, *Thompson v. Scott*, 1 McCord Ch. 32; while in Alabama the rule of law was the same whether the title was legal or equitable. *Meador v. Sorsby*, 2 Ala. (N. S.) 712. After-acquired real estate passes by statute in Alabama (1852); Arkansas (1815); California (1850), if such intention appear; Colorado (1877); District of Columbia (1857), if intention appear; Connecticut (1831); Delaware (1852); Georgia (1858); Illinois (1829); Indiana (1843), if such intention appear; Iowa (1843), if such intention appear; Kansas (1859), if such intention appear; Kentucky (1797);

Maine (1871), if such intention appear; Maryland (1849), if intention appear in wills executed before June, 1850, and unless contrary appear in wills executed after June, 1850; Massachusetts (1836), if such intention clearly appear; Michigan (1857), if such intention is clear; Minnesota (1851), if such intention appear; Mississippi (1821); Missouri (1808); Nebraska (1855), if such intention appear; Nevada (1862), if such intention appear; New Hampshire (1842), if such intention appear; New Jersey (1851), "unless a contrary intention be manifest on the face of the will;" New York (1829); North Carolina (1845); Ohio (1808), if such intention clearly appear; Pennsylvania (1833), unless a contrary intention appear; Rhode Island (1857), if such intention appear; South Carolina (1858); Tennessee (1842); Texas (1840); Vermont (1851), if such intention appear; Virginia (1835); West Virginia (1868); Wisconsin (1849), if such intention appear; Wyoming (1882), if clearly the intention. In Louisiana, if no time be expressed, the will is construed to speak from its date. In North Carolina the act of 1844, ch. 83, making devises to operate upon such land as testator may own at his death, does not apply to a will made before the passage of the act. *Den d. Battle v. Speight*, 9 Ired. L. 288. Whether an estate passes under a will is matter of *law*, but where that estate lies, or what is the extent of it, is matter of *fact*. *Humes v. McFarlane*, 4 Serg. & R. 427, 436. But before the passage of the act in Alabama the *quære* was raised as to whether after-acquired lands would not pass by a will clearly indicating such intention. *Meador v. Sorsby*, *ubi supra*.

does not apply to any will made before \*1 Jan. 1838, the power of disposing by will, executed as required by that act, is extended to all such real and personal property as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

In strictness, according to the older authorities of the ecclesiastical law, the appointment of an executor was essential to a testament. "The naming or appointment of an executor," says Swinburne(*d*), "is said to be the foundation, the substance, the head, and is, indeed, the true formal cause of the testament, without which a will is no proper testament, and by the which only the will is made a testament." So, Godolphin observes(*e*), that "the appointment of an executor is the very foundation of the testament, whereof the nomination of an executor, and the *justa voluntas* of the testator, are two main essentials." And the common law judges, in *Woodward v. Lord Darcy*(*f*), laid down that, "without an executor, a will is null and void." However, this strictness has long ceased to exist(*g*), as it will appear in the subsequent chapter, respecting the form and manner of making the will(*h*).<sup>3</sup> And even by the old authorities above mentioned, an instrument which would have amounted to a testament, if an executor had been nominated, was recognized as obligatory on him who had the administration of the goods of the deceased, under the appellation of a codicil: which is accordingly defined by Swinburne(*i*) and Godolphin(*j*), to be "the just sentence of our will, touching that which we would have done after our death, *without the appointing of an executor*:" and hence a codicil was called "an unsolemn last will"(*k*). It was termed codicil, *codicillus*, as a diminutive of a testament, *codex*(*l*).<sup>4</sup>

(*d*) Pt. 1, s. 3, pl. 19.

(*e*) Pt. 1, c. 1, s. 2.

(*f*) Plowd. 185.

(*g*) *Wyrall v. Hall*, 2 Chanc. Rep. 112.

(*h*) *Post*, Pt. I. Bk. II. Ch. II. § III.

3. The appointment of an executor is not, as it formerly was, an essential of a will. *Brady v. McCrosson*, 5 Redf. 431.

(*i*) Pt. 1, s. 5, pl. 2.

(*j*) Pt. 1, c. 6, s. 2.

(*k*) Swinb. Pt. 1, s. 5, pl. 4. Godolph. Pt. 1, c. 6, s. 2.

(*l*) Godolph. Pt. 1, ch. 6, s. 1.

4. A codicil is a supplement to a will,

by which the will is either enlarged or restricted. It may add to or subtract from, alter, explain, confirm, re-execute, revive or republish any will with which it can be incorporated. There may be many codicils, but there can be but one will. In construing a will with codicils, all the papers are to be taken together, as parts of one instrument, and if there be a codicil, which appears to have been executed and attested at the same time and place with the will itself, it would undoubtedly be taken to constitute a part of the original will. *Negley v. Gard*, 20



But although it appears that "codicils" might be made by \*those who died without testaments(*m*), yet the more frequent use of a codicil was, as an addition made by the testator, <sup>Codicil. Modern interpretation of word.</sup> and annexed to, and to be taken as part of a testament, being for its explanation or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator(*n*): in which sense the term codicil is applied in modern acceptation.<sup>5</sup>

A codicil, in this latter sense of it, is part of the will, all making but one testament(*o*). A strong illustration of this principle may be found in the case of *Sherer v. Bishop*(*p*), where the testator gave the residue of his personal estate among such of his relations only *as were mentioned in that his will*: he afterwards made a codicil which he directed to be taken as part of his will; and a second, by which he gave legacies to two of his relations, but gave no such direction: and it was held by Lord Commissioner Eyre (*dubitantibus* Ashhurst, J., and Wilson, J.) that as every codicil was a part of the testamentary disposition, though not part of the instrument, the relations named in the second codicil were entitled to a share of the residue(*q*). But, in

Ohio 310. The codicil recognizes the existence of the original, changing it in part and affirming it in those parts in which it is not altered. *Beale v. Cunningham*, 3 B. Mon. 390.

(*m*) Swinb. Pt. 1, s. 5, pl. 9; Godolph. Pt. 1, c. 6, s. 3.

(*n*) Swinb. Pt. 1, s. 5, pl. 5; Godolph. Pt. 1, c. 6, s. 1.

5. An instrument which disposes of no property, but simply declares an intention to revoke a previous will, is neither a will nor a codicil, and is not entitled to probate. In the *Goods of Fraser*, 39 L. J. Prob. 20; 2 L. R. P. & D. 40; 21 L. T. (N. S.) 680. Where a testator made a codicil, reciting that it was a codicil to his will of a certain date, and after his death a will is found but of a different date, the codicil cannot be attached to the latter will, and, therefore, it must fail; it cannot stand as a separate testamentary instrument. *Will of Pinckney*, Tuck. 436.

(*o*) *Fuller v. Hooper*, 2 Ves. Sen. 242, by Lord Hardwicke.

(*p*) 4 Bro. C. C. 55.

(*q*) This decision has been considered as carrying the principle too far: and in *Hall v. Severne*, 9 Sim. 515, 518, Shadwell, V. C., said he could not accede to it. In the latter case, the testator, by his will, gave pecuniary legacies to several persons, and directed his residue to be divided amongst his before-mentioned legatees in proportion to their several legacies therein before given: By a codicil, which he directed to be taken as part of his will, he gave several pecuniary legacies to persons, some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil were given to the therein-mentioned legatees in addition to what he had given to them or any of them by his will: and the V. C. held, that none of the legatees under the codicil were entitled to share in the residue in respect of

*Fuller v. \*Hooper*(*r*), where a person by will gave legacies to all her nephews and nieces, *except those thereafter named*, and desired her executors to look upon all memoranda in her handwriting as parts of, or a codicil to, her will; and then bequeathed the residue to the children of her sisters; and by a codicil she gave legacies to some other nephews and nieces; Lord Hardwicke held, that the nephews and nieces mentioned in the subsequent part of the will, *and not those mentioned in the codicil*, were excluded from the first mentioned legacies; because the testatrix meant to refer, not to her will or testament, which takes in all the parts, but to the particular instrument(s).

\*A will is in its nature a different thing from a deed, and although the testator happen to execute it with the formalities of a deed; *e. g.*, though he should seal it, which is no part

A will is different in its nature from a deed :

their legacies under the codicil. Where a testator devised property to the children of B. in like manner as they were entitled under the will of B., it was held that the testator referred to the will and codicils of B., as the whole together must be taken to be his will: *Pigott v. Wilder*, 26 Beav. 90. If a man by codicil ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it, and this even though the will be described by its date: *Green v. Tribe*, 9 C. D. 231; *Crosbie v. Macdoul*, 4 Ves. 619; In the Goods of *De la Saussaye*, L. R. 3 P. & D. 42; but not necessarily if the earlier codicil through want of attestation or otherwise has no proper vigor of its own, but derives its force (if at all) from the later codicil: *Burton v. Newbery*, 1 C. D. 234, disapproving *Gordon v. Reay*, 5 Sim. 274. In the one case the question is whether the later codicil revokes an earlier operative one: in the other whether the later codicil sets up an earlier inoperative one. The intention to revoke a bequest once operative must be clear: *Follett v. Pettman*, 23 C. D. 337, 343.

(*r*) 2 Ves. Sen. 242, and supplement by *Belt*, 333.

(*s*) *So*, in *Early v. Benbow*, 2 Coll. 354,  
[\*7] [\*8]

the testator, by his will, directed that the legacies "hereinbefore by me bequeathed" should be paid free of legacy duty: By a codicil which he directed might be taken as part of his will, he gave other legacies: and *Knight Bruce*, V. C., held that the legacies given by the codicil were not given free of legacy duty, his Honor being of opinion that the word "*herein*" was meant to refer to no more than the particular instrument in which it was contained. However, several cases may be found, where an additional legacy, given by a codicil, though not so expressed, has been held subject to the same incidents as the original legacy given by the will: See *Day v. Croft*, 4 Beav. 561; *Warwick v. Hawkins*, 5 DeG. & Sm. 481. See also the other decisions with respect to the legacy duty, collected *infra*, Pt. III. Bk. V. Ch. III. Where a testator executed a codicil to his last will, and by such codicil absolutely revoked and made void all bequests and dispositions in the will and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the will, it was held by Lord Penzance that the will was not revoked: In the Goods of *Howard*, L. R. 1 P. & D. 636.

or ingredient of a will;<sup>6</sup> yet it cannot in such case be considered as a deed(*t*).

It is also a peculiar property in a will, as it will hereafter more fully appear, that by its nature it is in all cases a revocable instrument, even should it in terms be made irrevocable(*u*);<sup>7</sup> for it is truly said, that the first grant and the last will is of the greatest force(*v*).

Another essential difference between a will and a deed may be mentioned, that there cannot be a conjoint or mutual will: <sup>in all cases revocable;</sup> there cannot be a joint will. an instrument of such a nature is unknown to the testamentary law of this country(*x*). But there are several authorities

6. In New Hampshire a will must be executed under seal. So, too, in Nevada. But a seal is not necessary to give validity to a will unless it be required by statute. New Hampshire, Nevada and Delaware alone require a will to be sealed, but formerly it was necessary to seal a will in Massachusetts, Ohio and Vermont.

(*t*) Lord Darlington *v.* Pulteny, 1 Cowp. 260; Attorney-General *v.* Jones, 3 Price 368. See *post*, Pt. I. Bk. II. Ch. II. § III., as to what instruments are testamentary.

(*u*) Vynior's Case, 8 Co. 82 *a*. See *post*, Pt. I. Bk. II. Ch. III.

7. The intention of the maker of the instrument determines whether it shall be taken to be a will. Lyles *v.* Lyles, 2 Nott & McC. 531; Means *v.* Means, 5 Strobbh. 167; Brown *v.* Shand, 1 McCord 409; Estate of Wood, 36 Cal. 75; Wright *v.* Brotherton, 2 Rawle 133; Atwood *v.* Geiger, 69 Ga. 498.

This intention is to be ascertained in three ways: 1. When it is expressed on the face of the instrument. 2. When the instrument, not being a will in form, but being a deed, letter, memorandum or other writing containing an actual disposition of the estate, to take effect after death, is in effect and operation a will. 3. By parol proof, when the instrument is doubtful, and the intention cannot be collected from the face of the paper. But the general rule is that this intention must be gathered

from the contents of the whole instrument. McGee *v.* McCants, 1 McCord 517; Asay *v.* Hoover, 5 Pa. St. 21; Barker's Appeal, 72 Id. 421; Cook *v.* Weaver, 12 Ga. 47; Jackson *v.* Hoover, 26 Ind. 511; Olmstead *v.* Harvey, 1 Barb. 102; Clark *v.* Preston, 2 La. Ann. 581; Hawley *v.* Northampton, 8 Mass. 3; Parker *v.* Wasley, 9 Gratt. 477; Lytle *v.* Beveridge, 58 N. Y. 592; Sorsby *v.* Vance, 36 Miss. 564; Johnson *v.* M. E. Church, 4 Iowa 180; Guery *v.* Vernon, 1 Nott & McC. 69; Augustus *v.* Seabolt, 3 Metc. (Ky.) 155; Tappan *v.* Deblois, 45 Me. 122; Hall *v.* Chaffee, 14 N. H. 215; Stokes *v.* Tilly, 1 Stock. 130; Bowly *v.* Lamont, 3 Harr. & J. 4; Capal *v.* McMillan, 8 Porter (Ala.) 197; Gillis *v.* Harris, 6 Jones Eq. 267. And the presumption is against an informal paper, and in every case the burden is upon the party producing such paper to prove that it is not only the act of the deceased but that it was executed *animo testandi*. Combs *v.* Jolly, 2 Gr. Ch. 625; Frew *v.* Clarke, 80 Pa. St. 170; Stein *v.* North, 3 Yeates 324; Brunson *v.* King, 2 Hill (S. C.) Ch. 483; Phipps *v.* Hope, 16 Ohio St. 586.

(*v*) Co. Lit. 112 *b*.

(*x*) 1 Cowp. 268, in Lord Mansfield's judgment. Hobson *v.* Blackburn, 1 Add. 277: but see *post*, Pt. I. Bk. II. Ch. III., as to the validity of such a will in equity.

which appear to show that this doctrine does not go further than to deny that a conjoint or mutual will can be made with the characteristic quality of being irrevocable, unless with the concurrence of the joint or mutual testators. Such a will is certainly revocable (*y*). But if either of the testators die without revoking it, the will is valid and entitled to probate as far as respects his property (*z*). Where, however, two testators made a joint will containing devises and legacies to take effect after the decease of both of them, it was held that probate could not be granted of the will during the lifetime of either (*a*).<sup>8</sup>

(*y*) But see *post*, Pt. I. Bk. II. Ch. III., as to the irrevocability of such a will in equity.

(*z*) In the Goods of Stracey, Dea. & Sw. 6. In the Goods of Lovegrove, 2 Sw. & Tr. 453.

(*a*) In the goods of Raine, 1 Sw. & Tr. 144, *coram* Sir C. Cresswell. But *quære*, whether the delay of the effect of the will interfered with its title to immediate probate as the will of the deceased testator.

8. In Ohio a joint will is unknown to the law. *Walker v. Walker*, 14 Ohio St. 157. But in other states of the United States such wills are recognized. *Schumacher v. Schmidt*, 44 Ala. 454; *Ex parte Day*, 1 Bradf. 476; *Breathitt v. Whitaker*, 8 B. Mon. 530; *In re Diez*, 50 N. Y. 88. And it would seem that while such an instrument is revocable as a will, it

is irrevocable as a compact. *Gould v. Mansfield*, 103 Mass. 408; *Evans v. Smith*, 28 Ga. 98; *Clayton v. Liverman*, 2 Dev. & Bat. L. 558. So, too, as to an agreement to make mutual wills. *Izard v. Middleton*, 1 Desaus. 116. A will made jointly by husband and wife was, on the death of the husband, sustained as *his* will. *Rogers, Applt.*, 11 Me. 303; and also in Connecticut the joint will of two sisters was sustained as the will of the one who died first. *Lewis v. Scofield*, 26 Conn. 452. But where two persons agree to make mutual wills, bad faith in one, either in failing to make the will or in destroying it, will not prevent the probate of the will of the other party. *Bynum v. Bynum*, 11 Ired. L. 632. See *Flood on Wills* 431; *Walkem on Wills* 170; 1 Redf. on Wills 182; *Dixon on Probate* 45.

## \*BOOK THE SECOND.

### OF THE MAKING, REVOCATION AND REPUBLICATION OF WILLS OF PERSONAL ESTATE.

#### CHAPTER THE FIRST.

##### WHO IS CAPABLE OF MAKING A WILL OF PERSONALTY.

It may be laid down generally, that all persons are capable of disposing of their personal estate by testament, who have sufficient discretion, their own free will, and who have not been guilty of certain offences(*a*). Wherefore there are three grounds of incapacity; 1, the want of sufficient legal discretion; 2, the want of liberty or free will; 3, the criminal conduct of the party.<sup>1</sup>

(*a*) Swinb. Pt. 2, s. 1.

1. As a general proposition, apart from the disabilities to be considered in the following pages, every person has the right to make a will and to dispose of his property in any manner and to any persons that he may elect, however unjust, inequitable or absurd the disposition made may seem to others. He may do as he chooses with what he has. Wood v. Bishop, 1 Dem. 512; Seguire v. Seguire, 3 Keyes 663, 671; Potter v. McAlpine, 3 Dem. 108, 115; Reynolds v. Root, 62 Barb. 250; Clapp v. Fullerton, 34 N. Y. 190; Clark v. Ellis, 9 Oreg. 128; Nicholas v. Kershner, 20 W. Va. 251; Pierce v. Pierce, 38 Mich. 412; Billing's Appeal, 49 Conn. 456; Fraser v. Jennison, 42 Mich. 206; Coffman v. Hedrick, 32 W. Va. 119.

And this power to do as he will in the distribution of his property constitutes one of the most valuable parts of the testamentary right. Kitchell v. Beach, 8 Stew. (N. J.) 446. He may give all his property to strangers and disinherit his relatives. He may divide his estate un-

equally among his children, or he may devise it to others. Potter v. McAlpine, *ubi supra*; Horn v. Pullman, 72 N. Y. 269; Hollis v. Drew Theological Seminary, 95 Id. 166; Sheiley v. Sheiley, 81 Ky. 240; Spratt v. Spratt, 76 Mich. 384; Wisener v. Maupin, 2 Baxt. 342; Schneider v. Manning, 121 Ill. 376. And this power of disposition is coterminous with his life. Potter v. McAlpine, *ubi supra*. And this power is spoken of as a sovereign right, recognized by the law. Coffman v. Hedrick, *ubi supra*.

It is his privilege, in this regard, to be guided by his prejudices, or his caprices, or even to indulge his passions, and it is not within the province of any court, either of law or equity, to give judgment against the exercise of this privilege, because to such court the provisions of his will may seem to be unjust or unreasonable, or to be prompted by unworthy motives, or to be the result of prejudice or passion. Marvin v. Marvin, 3 Abb. Ct. App. Dec. 192; Clark v. Ellis, *ubi supra*; Rice v. Rice, 50 Mich. 448; Salisbury v. Aldrich, 118 Ill. 199; Cha-

This may be the proper place to mention two cases which do not come, in strictness, under any one of these heads. Formerly alien friends, or such whose countries were at peace with ours, might make wills to dispose of their personal estate (although being incapable of holding real property, they were of course equally so of devising it);<sup>2</sup> but alien enemies, unless they had the king's license, express or implied, to reside in this country, were in-

*Aliens.*  
*ney v. Bryan*, 16 Lea 63; *Carter v. Dixon*, 69 Ga. 82.

In the absence of other evidence, the mere fact that the testator discarded all of his relatives and devised all his property to mere friends, is of no weight in support of a claim that the testator lacked capacity. *Smith v. James*, 72 Iowa 515.

And in cases where the division is unequal, it is wholly immaterial whether the testator had any reasons therefor or not. *Freeman v. Easley*, 117 Ill. 317; *Stover's Will*, 28 Minn. 9; *Carpenter v. Calvert*, 83 Ill. 62.

However, it is absolutely requisite that the person making a will should know and appreciate its contents, otherwise it is not his will. *Taylor v. Cresswell*, 45 Md. 422.

It is as much the duty of courts to uphold the right of the owner of property to dispose of it by will, according to his pleasure, as it is to see that he is not imposed upon in the exercise of that right. *Dumont v. Dumont*, 1 Dick. 223.

2. Alien friends, or those whose countries are at peace with ours, may make wills to dispose of their personal estate (but where they are incapable of holding real estate, they are equally so of devising it); but alien enemies, unless they have the privilege, express or implied, to reside in this country, are incapable of making any testamentary disposition of their property. 1 Redf. on Wills 8, *et seq.*; 2 Kent 53, 54; 2 Sugden on Vendors (8th Am. ed.) 401, 402; Theobald on Wills 19. By statutes in many of the American states, the rights and privileges of aliens

have been greatly enlarged, and in some of them the ancient distinctions against aliens have been wholly removed. 2 Kent 69, *et seq.* But these provisions are strictly local, and will not extend beyond the boundaries of the enacting state. Therefore, an alien, who may have been admitted to privileges in one state, subsequently moving into another, can claim no greater privileges therein than those granted by the statute law of that state. Nor would the United States admit any foreigner, before he had been duly naturalized according to the act of congress, to any privileges other than those to which he is entitled by treaty, or the law of nations, or the statute law of the state in which he lives. In New York, aliens are made capable, by statute, of taking real estate by descent. *Sutliff v. Forgey*, 1 Cowen 89; *Howard v. Moot*, 64 N. Y. 262, 270. And a grant, by the legislature, of lands to an alien and his heirs, enables the heirs, although aliens, to inherit. *Jackson v. Etz*, 5 Cowen 314. This is also so in Massachusetts. *Commonwealth v. Andre*, 3 Pick. 224. But where the lands of an alien escheat, the state has no right to enter and take possession until office found. *Jackson v. Adams*, 7 Wend. 367. It is said by Chase, C. J.: "The court are of opinion, on the first point, that the title of Thomas McCreery, an alien friend, is good against everybody but the state, and that his right and possession could not be divested but by office found, or some act done by the state to acquire possession." *McCreery v. Allender*, 4 H. & McH. 409, 412. But see

capable of making any testamentary disposition of their property (b). Now by sec. 2 of the Naturalization Act, 1870, real and personal property of every description may be taken, ac-

33 & 34 Vict. c. 14.

*Slater v. Nason*, 15 Pick. 345. But an alien may take by purchase and hold until office found. *Mooers v. White*, 6 Johns. Ch. 360, 366; *Fox v. Southack*, 12 Mass. 143; *Montgomery v. Dorion*, 7 N. H. 475. He may also convey. *Mooers v. White*, *ubi supra*; *Montgomery v. Dorion*, *ubi supra*; *Marshall v. Conrad*, 5 Call 364. The treaty of 1794, between the United States and Great Britain, provides that subjects of either power could hold land within the territory of the other, and it was not annulled by a subsequent war between those powers. *Fox v. Southack*, *ubi supra*; *Fiott v. Commonwealth*, 12 Gratt. 564. But by Gen. Stats., ch. 90, § 38, in Massachusetts, aliens may take lands by descent, and no distinction is made between resident and non-resident aliens. *Lumb v. Jenkins*, 100 Mass. 527. But if lands be devised to trustees, in trust to sell the same, and pay the whole proceeds to an alien *cestui que trust*, it is, in equity, a bequest of personalty, and the alien may take and hold the proceeds, and can compel an execution of the trust, even as against the state. *Craig v. Leslie*, 3 Wheat. 563. See also, *Dawson v. Godfrey*, 4 Cranch 321; *Gouverneur's Heirs v. Robertson*, 11 Wheat. 332; *Rubeck v. Gardner*, 7 Watts 455; *Scanlan v. Wright*, 13 Pick. 523; *Waugh v. Riley*, 8 Metc. 290; *People v. Conklin*, 2 Hill (N. Y.) 67; *Foss v. Crisp*, 20 Pick. 121; *Wilbur v. Tobey*, 16 Pick. 177.

Statutes enabling aliens to give by devise have been enacted in Alabama (Laws 1875, 120, § 1; Code 1876, § 2860); California (Code 1850, § 671; ed. 1872, § 5671; amds. 1874, 217); Colorado (Laws 1861, 57; 1867, 45; 1877, 90); Florida (Laws 1829, Duv. 363);

Georgia (Code 1873, § 1661), but before 1875 this was restricted to one hundred and sixty acres, and conditioned on his taking oath to improve the lands (Code, § 2676, repealed 1875, P. L. 21); Idaho (1887, Rev. Stats., § 2327); Illinois (Laws 1829, 207, § 48; 1833, 626); Iowa (1839, P. L., 486, § 49; Code 1873, § 1908); Kansas (Const. 1859, Bill of Rights, § 17); Kentucky (1873, P. L., 190, amending G. S. 1873, ch. 14, §§ 4, 5, which restricted holding for residence or business purpose to twenty-one years and under a devise to eight years); Maine (1871, R. S., 559, c. 73, § 2); Maryland (1874, Code, 354; 1878, Rev. Code, 398; 1791, c. 45, § 6, applicable also to District of Columbia); Massachusetts (1852, P. L., 17; 1869, G. S., 473, c. 90, § 38); Michigan (Rev. 1827, 272, 2 T. L. 333; 2 Comp. L. 1871, § 4305); Minnesota (1866, G. S., c. 75, § 23; 1878, G. S., 820, c. 75, § 41); Mississippi, restricted to resident aliens (Code 1871, § 2322); Montana (1887, Com. Stats., § 553); Nebraska (1866, R. S., 292, c. 43, § 59; 1873, G. S., c. 61, § 54); New Hampshire, restricted to resident aliens (R. S. 1842, 129, § 4; C. S. 1853, 135, § 5; G. S. 1867, 121, § 17; G. L. 1878, 325, c. 135, § 16); New Jersey (1817, P. L., 4; 1874, Rev., 6, § 3); North Carolina (Laws 1879, c. 255, § 1; Bat. Rev. 1873, c. 3, § 1); Ohio (1804, 29 L. 463; 1880, Rev., § 4173); Oregon (1872, L., § 1; 1874, G. L., 588, § 35); Pennsylvania (Purd. Dig. 66; act of 1791, § 1, 3 Sm. 4); Rhode Island (1872, G. S., 348, c. 161); South Carolina (1872, XV., 72, 73, G. S., §§ 1768, 1847); Texas (Tex. Civ. S., art. 1658; L. 1848, 2 Leg. 129; 1854, 5 Leg. 98, P. D. 44, 45, 46); Virginia (1866, P. L., 643, § 1; 1872, P. L., 174;

(b) Wentw. c. 1, p. 35, 14th edit.; Vin. Abr. Devise, G. 17; Bac. Abr. Wills, B. 17.

quired, held and disposed of by an alien in the same manner in all respects as by a natural born British subject(c). But although the words \**“disposed of by an alien in the same manner in all respects as a natural-born British subject”* include a disposition by will, they do not affect the form of the will nor enable a foreigner to make a will which is not in conformity with the law of his own country: and such a will executed abroad according to the formalities required by English law is invalid, notwithstanding the provisions of the Naturalization Act, 1870(d).

With respect to the power of the reigning sovereign to make a will of his or her personal property;—it appears by the rolls of parliament that, in the sixteenth year of King Richard the Second the bishops, lords and commons, assented in full parliament, that the king, his heirs and successors, might lawfully make their testaments(e). And the statute 39 & 40 George III. c. 88, s. 10, enacts, “that all such personal estate of his Majesty, and his successors

The king or queen.

1873, Code, 130, § 18); Washington (1889, Const., art. 2, § 33); West Virginia (Const., 1872, art. 2, § 5, as to resident aliens; 1872, P. L., c. 48, § 2· 1878, R. S., c. 3, § 2); Wisconsin (1878, R. S., 631, § 2200); Wyoming (C. L. 1876, c. 42, § 5); District of Columbia (Code 1816, 87, § 103; Rev. Code 1857, c. 47, § 2; and see laws of Maryland, *ubi supra*).

And after declaration as to naturalization papers, in Arkansas (R. S., 1838, c. 7; 1847, c. 9, § 1; 1873, § 225); Delaware (Code 1852, c. 81, § 1; ed. 1874, 493; and see Rev. Code, §§ 1581–6, and 3 Stat. 68, A. D. 1799, and Id. 386, A. D. 1805, validating devises prior to 1805); Indiana (act of 1818, R. S. 1838, c. 3; restricted to “*bona fide* residents of the United States,” 1 R. S. 1852, 232, c. 23, § 1); Missouri, may acquire “by descent or purchase,” hold and alienate (1825, R. S., 126; 1835, R. S., 66; 1845, R. S., 113, c. 6; 1855, R. S., 186, c. 5); Tennessee (1871, C. S., §§ 1998, 1999, and see Laws 1853, c. 42, § 2); and naturalization papers taken out, New York (1 R. S. 1830, 720; 2 Id. 57, § 4).

Except as to subjects of the Chinese Empire, in Nevada. (Laws 1879, 51.)

In Connecticut the statute expressly says, “and Frenchmen.” (G. S. 1875, 4.)

Also, as to devises by aliens in New York, see *Duke of Cumberland v. Graves*, 9 Barb. 595; S. C., 3 Seld. 305; *People v. Snyder*, 51 Barb. 589; S. C., 41 N. Y. 397; *Howard v. Moot*, 64 N. Y. 262. In Texas, *Settegart v. Schrimpf*, 35 Tex. 323.

(c) But it is provided by subsect. 3 of sect. 2, “that this sect. shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately in possession or expectancy in pursuance of any disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act.”

(d) In the *Goods of Von Buseck*, 6 P. D. 211. See also *Bloxam v. Favre*, 8 P. D. 101; 9 P. D. 130.

(e) 4 Instit. 335. Whether kings and sovereign princes can make their testaments, says Godolphin (Pt. 1, c. 7, s. 4), is resolved in the affirmative; but of what things, is such a *questio status*, as is safest resolved by a *noli me tangere*. See also Swinb. Pt. 2, s. 27.



respectively, as shall consist of monies which may be issued or applied for the use of his or their privy purse, or monies not appropriated to any public service, or goods, chattels or effects, which have not or shall not come to his Majesty or shall not come to his successors respectively, with or in right of the crown of this realm, shall be deemed and taken to be personal estate and effects of his Majesty and his successors respectively, subject to disposition by last Will and Testament, and that such last Will and Testament shall be in writing, under the sign manual of his Majesty and his successors respectively, or otherwise shall not be valid; and that all and singular the personal estate and effects whereof or whereunto his Majesty or any of his successors shall be \*possessed or entitled at the time of his and their respective demises, subject to such testamentary disposition as aforesaid, shall be liable to the payment of all such debts as shall be properly payable out of his or their privy purse, and that subject thereto, the same personal estate and effects of his Majesty and his successors respectively, or so much thereof respectively as shall not be given or bequeathed or disposed of as aforesaid, shall go in such and the same manner, on the demise of his Majesty and his successors respectively, as the same would have gone if this Act had not been made.”

But it should seem that the court has no jurisdiction to grant any probate of the will of a deceased sovereign. On one occasion (f), an application was made to the Prerogative Court of Canterbury for its process, calling on the proctor of his majesty, King George IV., to see and hear an alleged testamentary paper of his late majesty King George III. propounded and proved: but the court refused the application, on the ground that in substance the process was prayed, and a demand adversely made, against the reigning sovereign; contrary to the established doctrine, that no action or suit, even in civil matters, can be brought against the king: The learned judge, Sir John Nicholl, in the course of his judgment, observed that the history of the wills of sovereigns, from Saxon times, from Alfred the Great down to the present day, had been dilligently searched and examined; but no instance had been produced of any sovereign having taken probate in the Archbishop's Court, or of any sovereign's will having been proved there (g); nor any in\*stance of any successor of any intestate sovereign

(f) In the Goods of His Late Majesty George III., 1 Add. 255.

(g) One single instance occurs in the

rolls of parliament of something like a reference to this jurisdiction in respect of a royal will. In the 1st of Henry V.

[\*11]      [\*12]

coming to the court for letters of administration; which the learned judge considered as furnishing decisive evidence that the court had no jurisdiction whatever therein (*h*). This decision was subsequently approved and acted on by Sir Cresswell Cresswell (*i*).

## SECTION I.

### PERSONS INCAPABLE FROM WANT OF DISCRETION.

In this class are to be reckoned infants, with respect to whom it is enacted by Stat. 1 Vict. c. 26, s. 7, which, however, does not apply to wills made before 1 Jan., 1838, "that no will made by any person under the age of twenty-one years shall be valid."<sup>3</sup>

It is stated that Henry IV. having made a will, and appointed executors thereof, those executors, fearing the assets would be insufficient, declined to act. It is then recited that under these circumstances the effects would be *at the disposal of the Archbishop of Canterbury as Ordinary*, who should direct them to be sold. But Henry V., instead of allowing the effects to be sold, took to them, and agreed to pay their appraised value: 1 Add. 263; 4 Inst. 335. The only will of a sovereign deposited in the registry of the Prerogative Court is the will of Henry VIII. That is understood to be a copy merely, and there is no appearance of any probate of it having been taken. It was probably deposited there for safe custody, or as a place of notoriety for such a purpose: 1 Add. 263.

(*h*) 1 Add. 262, 264, 265.

(*i*) In the Goods of His Late Majesty Geo. III., 3 Sw. & Tr. 199.

3. In regard to testamentary age, there is a distinction made between real and personal property. As to the latter, the ecclesiastical courts of England followed the rule of the civil law. "A boy after the age of 14 years, and a wench after the age of 12 years, may make a testament

and dispose of their goods and chattels, and that not only without the authority or consent of their curator or guardian, but also without the authority and consent of the father, if he or she have any goods of his or her own." Swinb., pt. II., § 2. See also, 2 Black. Comm. 497. By the Statute of 34 & 35 Hen. VIII., c. 5, § 14, devises of real property by an infant under the age of twenty-one years were declared to be invalid. The common law, as above stated, remained unchanged at the time of the settlement of the American colonies. It was not changed in England, except as to appointment of testamentary guardian, until the act of 1 Vict. The testamentary age for both males and females, and for both real and personal property, is twenty-one years in Ohio, Pennsylvania, Delaware, Florida, Indiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, South Carolina, Kentucky, Texas, Wyoming, Washington and Minnesota. In New York a person must have attained the age of twenty-one to make a will of realty, but males at eighteen and females at sixteen may dispose of personalty. In Alabama, Arkansas, Missouri, Virginia,

An idiot, that is, a fool or madman from his nativity who never has any lucid intervals(*k*), is incapable of making a will.

Such a one is described to be a person who cannot num-<sup>Idiots.</sup>ber twenty, tell the days of the week, does not know his own father or mother, his own age, &c.(*l*). But these, though they may be evidences, yet they are too narrow, and conclude not always(*m*): for whether idiot or not is clearly a question of fact referable to the individual circumstances of each particular case.<sup>4</sup> If an idiot should make his testament so well and wisely in appearance that the same may seem rather

West Virginia, Rhode Island, Oregon and Kansas wills of realty may be made at twenty-one and of personalty at eighteen. But see *Banks v. Sherrod*, 52 Ala. 267. In California, Tennessee, Idaho, Montana and Colorado a will may be made by any person at eighteen, and in the latter state at seventeen if it be of personalty only. Males at twenty-one and females at eighteen may make wills of real estate in Iowa, Maryland, Illinois, Vermont and the District of Columbia. The testamentary age is fixed at eighteen in Connecticut, the Dakotas, Nevada and Utah.

In Georgia no person under fourteen can make a will. *O'Byrne v. Feeley*, 61 Ga. 77. In Wisconsin the age is fixed at twenty-one, except that a married woman may make a will at eighteen. The statute of Iowa provides that all persons shall attain majority by marriage.

By the Revised Statutes of 1873, in Alabama (§ 3034) it is provided that a female shall be of age for all purposes at eighteen. In Colorado an unmarried female of the age of eighteen years may devise real property. Prior to 1850 the common law rules as to wills of personal property obtained in New Jersey. In Texas any person "who may be or may have been lawfully married," may make a will. In Vermont the common law rule was restored in 1851 as to personalty.

(*k*) 1 Hale P. C. 29. Bac. Abr. Idiots, &c. A. 1. *Beverley's Case*, 4 Co. 124 b.

(*l*) 1 Hale P. C. 29. Bac. Abr. Idiots, &c. A. Swinb. Pt. 2, s. 4.

(*m*) 1 Hale P. C. 29.

4. It being universally admitted that no idiot can make a valid will, the proper inquiry in this connection is, who are considered idiots in the law. The particulars named in the text are undoubtedly evidences which go to prove the imbecility or idiocy of the party, but we apprehend that no universal rule can be laid down by which it may be determined whether a man be an idiot or not, but that this question is evidently one of fact, and must be determined by the attendant circumstances of each particular case. It is hardly possible to give a definition of an idiot. Idiots are wholly incapacitated for the transaction of any business, and as a general thing are incapable of performing any labor whatever. They generally—nay, almost invariably—have an unmeaning expression of countenance, and are wholly incapable of improvement or advancement. What we find them by nature, that they ever remain, so far as knowledge or mental powers are concerned. It is, however, sometimes claimed that they have some degree of memory. Yet we hardly think that the vague recurrence to them of what may have happened in the past should be called memory. It is impossible for them at will to recall anything. They seem to be wholly without powers of perception or

to be made by a reasonable man than by one void of discretion, yet this testament is void in law (n).

One who is deaf and dumb from his nativity is, in presumption of law, an idiot, and therefore incapable of making \*a will; but such presumption may be rebutted, and if it sufficiently appears that he understands what a testament means, and has a desire to make one, then he may by signs and tokens declare his testament(o). One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then in case he shall be able to write, he

reflection. Dr. Ray, Med. Jur. Insan., § 54, says: "Idiocy is that condition of the mind in which the reflective, and all or a part of the affective, powers, are either entirely wanting, or are manifested to the slightest possible extent. In reasoning power many idiots are below the brutes. Unable to compare two ideas together, nothing leads them to act but the faint impressions of the moment and these are often insufficient to induce them to gratify even their instinctive wants." In the case of persons so circumstanced there is no power to make any kind of a contract, and they are not held to be responsible for crime. In determining whether any person be an idiot or not, one very important point is whether the party was capable, unaided, of transacting any business, and whether he did so transact any business. See also, remarks of Dr. Lushington in *Bannatyne v. Bannatyne*, 14 Eng. L. & E. 581, 590, 591. See also *Potts v. House*, 6 Ga. 324, 326; *Stewart's Exr. v. Lispenard*, 26 Wend. 255; *Delafield v. Parish*, 25 N. Y. 9; *Converse v. Converse*, 21 Vt. 168; *Comstock v. Hadlyme*, 8 Conn. 254; *Moore v. Moore*, 2 Bradf. 261; *Kinne v. Kinne*, 9 Conn. 102; *Cordrey v. Cordrey*, 1 Houst. 269; *Harrison v. Rowan*, 3 Wash. C. C. 580. Although the most common cases of idiocy are those where the party is so from his birth, yet this is

not an essential quality of this affliction. In some cases those who have enjoyed reason absolutely lose it, and become beyond a doubt idiots. This may be the result of sudden shock unseating the intellect, but more commonly it is the result of insanity. The characteristics of the malady are not essentially different, whether it be natural or acquired.

But an adjudication of the idiocy of a testator, made two years after the date of the execution of the will, is neither conclusive nor binding upon the Probate Court. *Townsend v. Bogart*, 5 Redf. 93. But such an adjudication in a case of idiocy would have greater weight than in a case of lunacy, because the lunacy might proceed from sickness or accident, which is hardly possible as in idiocy. *Townsend v. Bogart*, *ubi supra*. But an order adjudging a man "incompetent to have care of his property," and appointing a guardian, is not *prima facie* evidence that he lacks testamentary capacity, nor does it become so by the recital that he is insane. *Rice v. Rice*, 50 Mich. 448.

(n) *Swinb*. Pt. 4, s. 4, pl. 5, 7. *Bac. Abr. Wills*, B. 12.

(o) *Swinb*. Pt. 2, s. 4, pl. 2; *Godolph. Pt. 1, c. 11. 4 Burn E. L. 60*. See, also *Dickenson v. Blisset*, 1 Dick. 268; and the judgment of *Wood, V. C.*, in *Harrod v. Harrod*, 1 Kay & J. 4, 9. Where a testator, who was deaf and dumb, made his will by communicating

may with his own hand write his last will and testament(*p*). But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, *i. e.*, if he have understanding he may make his testament by signs, otherwise not at all(*q*). Such as can speak and cannot hear, they may make their testaments, as if they could both speak and hear, whether that defect came by nature or otherwise(*r*). Such as be speechless only, and not void of hearing, if they can write, may very well make their testament themselves by writing: if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present(*s*).<sup>5</sup>

It is laid down in the old text books of the ecclesiastical law, that although he that is blind may make a nuncupative testament(*t*), by declaring his will before a sufficient number Blind persons. of witnesses; yet that he cannot make his testament in writing, unless the same be read before witnesses, and in \*their presence acknowledged by the testator for his last will(*u*): And that, therefore, if a writing be delivered to the testator, and he not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same he would not own it(*x*). And the civil law expressly required that the will should be read over to the testator, and approved by him, in the presence of all the subscribing witnesses. But in England this strictness is not required, and it is sufficient if

his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him: In the Goods of Owston, 2 Sw. & Tr. 461. In the Goods of Geale, 3 Sw. & Tr. 431.

(*p*) Swinb. Pt. 2, s. 10, pl. 2; Godolph. Pt. 1, c. 11.

(*q*) Swinb. Pt. 2, s. 10, pl. 2; Godolph. Pt. 1, c. 11.

(*r*) Ibid.

(*s*) Swinb. Pt. 2, s. 10, pl. 4; Godolph. Pt. 1, c. 11.

5. As to the former state of the law in regard to the competency of deaf and dumb persons to execute contracts and

wills, see *Brown v. Fisher*, 4 Johns. Ch. 441. As to the present state of the law on the same point, see *Weir v. Fitzgerald*, 2 Bradf. 42, 68; *Potts v. House*, 6 Ga. 324; *Gombault v. Pub. Admr.*, 4 Bradf. 226.

When the testator is deaf and dumb and not able to read or write or speak, there must be not only proof of the *factum*, but, also, that the mind of the testator accompanied the act, and that the instrument executed speaks his language and really expresses his will. *Rollwagen v. Rollwagen*, 63 N. Y. 504, 517.

(*t*) See *post*, chap. II., s. VI. as to the restrictions on nuncupative wills.

(*u*) Swinb. Pt. 2, s. 11; Godolph. Pt. 1, s. 11.

(*x*) Ibid. See also *Barton v. Robins*, 3 Phillim. 455, n. (b).

there is satisfactory proof before the court of the testator's knowledge and approval of the contents of the will which he executed (y): And it is not necessary to produce evidence that the identical paper, which the testator executed as his will, was ever read over to him (z).<sup>6</sup>

And what precautions are necessary for authenticating a blind man's will, seem in like degree requisite in the case of a person who cannot read. For though the law in other cases may presume, that the person who executes a will knows and approves of the contents thereof; yet that presumption ceases, where by defect of education, he cannot read or by sickness he is incapacitated to read the will at that time (a).

A lunatic, that is, a person usually mad, but having intervals of reason (b), during the time of his insanity, cannot make a testament, nor dispose of anything by will (c). And "so strong

(y) 4 Burn E. L. 60; Moore Paine, 2 Cas. temp. Lee, 595. See also *In re Axford*, 1 Sw. & Tr. 540. The single oath of the writer has been allowed sufficient by the Court of Delegates to prove the identity of the will: *Ibid*.

(z) *Fincham v. Edwards*, 3 Curt. 63: affirmed on appeal, 4 Moo. P. C. 198. See also *Longchamp v. Fish*, 2 Bos. & Pull. N. R. 415. *Post*, Pt. I. Bk. IV. Ch. III. § V.

6. The older writers all looked upon blindness as an almost insurmountable obstacle to the testamentary power. But the extent to which persons blind, even from birth, can be fitted for the duties and business which they may desire to perform, has changed the attitude of the law toward blind testators. The reason of particular scrutiny on the part of a court of probate when the will of a blind person is propounded is not on account of any disparagement of the testamentary capacity of such a person, but in order that the court may be assured that no imposition was practiced upon the testator by those who prepared the will. The court being satisfied that a blind testator was acquainted with the contents of the instrument by him executed, the will

will be admitted to probate as readily as the will of any other person.

As to what proof of the testator's knowledge is required, see *Harrison v. Rowan*, 3 Wash. C. C. 580; *Carr v. McCamm*, 1 Dev. & Bat. 276; *Wampler v. Wampler*, 9 Md. 540. It is only essential to be satisfied that the paper propounded is the last will of the deceased. *Clifton v. Murray*, 7 Ga. 564. See, also, *Cunliffe v. Cross*, 32 L. J. (N. S.) Prob. Cas. 60; *Reynolds v. Reynolds*, 1 Speers 253; *Weir v. Fitzgerald*, 2 Bradf. 42; *Martin v. Mitchell*, 28 Ga. 382; *Davis v. Rogers*, 1 Houst. 44; *Guthrie v. Price*, 23 Ark. 396; *Ray v. Hill*, 3 Strobb. 297; *Lewis v. Lewis*, 6 Serg. & R. 489; *Collins v. Osborn*, 7 Stew. (N. J.) 511. Even where all the infirmities of blindness, deafness and extreme age combine, the will may be sustained. *Marshall's Estate*, 16 Phila. 393; *Wilson v. Mitchell*, 101 Pa. St. 495.

(a) 4 Burn E. L., p. 61; *Barton v. Robins*, 3 Phillim. 455, n. (b). See *post*, Pt. I. Bk. IV. Ch. III. § V.

(b) *Beverley's Case*, 4 Co. 124 b.

(c) *Swinb. Pt. 2*, s. 3; *Godolph. Pt. 1*, c. 8, s. 2.

is this impediment of insanity of mind, that if the testator make his testament, after his *furor* has overtaken him, and while as yet it possesses his mind, although the *\*furor* after departing or ceasing, the testator recover his former understanding, yet does not the testament made during his former fit recover any force or strength thereby”(d).

If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity by the clearest and most satisfactory proofs (e). The burthen of proof rests upon the person attempting to invalidate what, on its face, purports to be a legal act (f). Sanity must be presumed till the contrary is shown (g). Hence, if there is no evidence of insanity at the time of giving the instructions for a will, the commission of suicide, three days after, will not invalidate the instrument by raising an inference of previous derangement (h).<sup>7</sup>

(d) Swinb. Pt. 2, s. 3, pl. 2; Godolph. Pt. 1, c. 8, s. 2. But a will is not revoked by the subsequent insanity of the testator: Swinb. Pt. 11, s. 3, pl. 3; 4 Co. 61, b. *Post*, Pt. I., Bk. II. Ch. III. § V.

(e) The law seems unsettled as to how far, in cases of alleged unsoundness of mind, hereditary constitutional insanity may be pleaded: *Frere v. Peacocke*, 3 Curt. 664.

(f) 2 Phill. Ev. 293, 7th edit.

(g) *Groom v. Thomas*, 2 Hagg. 434.

(h) *Burrows v. Burrows*, 1 Hagg. 109. See also *Hoby v. Hobv*, 1 Hagg. 146.

7. Evidence of an hereditary tendency to insanity, in a testator, does not establish that insanity manifested was probably congenital, or that it declared itself at any particular stage of his career. *Bristed v. Weeks*, 5 Redf. 529. On a question of sanity it is competent to prove that testator's father, mother, or perhaps his ancestors in a more remote degree, were of unsound mind, by the evidence of a person speaking from his own personal knowledge and observation, but not by tradition or hearsay testimony. *Coughlin v. Poulson*, 2 McArth. 308.

But it is held in Illinois that, when the testator was deranged from disease, it is not competent to show the same disease in his ancestors. *Meeker v. Meeker*, 75 Ill. 260. But it is competent to show sanity at various times in the course of a progressive disease supposed to have affected the mind of testator. *Estate of Dalrymple*, 67 Cal. 444. But symptoms of insanity which are perceptible to a physician only, and which have no apparent effect upon one's ability to transact business, are not sufficient to vitiate the will. *Fraser v. Jennison*, 42 Mich. 206. On the trial of an issue as to sanity, proof of insanity at time either prior or subsequent is admissible. *Estate of Toomes*, 54 Cal. 509. So, on such an issue, evidence showing the state of mind of the testator on the day previous to the day of execution of the will is admissible. *Dyer v. Dyer*, 87 Ind. 13.

It has been held that suicide is not proof *per se* of insanity. *McElwee v. Ferguson*, 43 Md. 479. A judicial decision, under section 40 of the California Code, that a person is of unsound mind is only *prima facie* evidence of incapacity to make a will. *Estate of Johnson*, 57 Cal. 529. So, in

But it must be borne in mind, that the presumption of sanity is not to be treated as a legal presumption, but, at the utmost, as a mixed presumption of law and fact (if not as a mere presumption of fact), that is, an inference to be made by a jury from the absence of evidence to show that the testator did not enjoy that soundness which experience shows to be the general condition of the human mind.<sup>8</sup> If, therefore, a will is produced before a jury and its execution proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will. And if the party opposing the will gives some evidence of incompetency, the jury may nevertheless, if it does not disturb their belief in the competency of the testator, find in favor of the will. And in each case, the presump-

Pennsylvania, the finding of an inquisition of lunacy is not conclusive. *Dyre's Estate*, 12 Phila. 156. And it seems that if there be no evidence of insanity at the time of the *factum* of the will, the fact that the testator took his own life soon thereafter will not invalidate the instrument by raising the presumption of previous derangement. *Duffield v. Morris*, 2 Harr. (Del.) 375, 383; *Brooks v. Barrett*, 7 Pick. 94.

8. The presumption of sanity exists until the contrary is shown. *Den d. Trumbull v. Gibbons*, 2 Zab. 117; *Jackson v. King*, 4 Cowen 207; *Banker v. Banker*, 63 N. Y. 409; *Baxter v. Abbott*, 7 Gray 71; *Rush v. Megee*, 36 Ind. 69; *Shaw's Will*, 2 Redf. 107, 125; *Potter v. McAlpine*, 3 Dem. 108, 115; *Taylor's Estate*, 16 Phila. 274; *Chrisman v. Chrisman*, 16 Oreg. 127.

And in the courts of the various states of the United States it is almost uniformly held to be a presumption of law. Until the contrary appears sanity is to be presumed. *Jackson v. Van Dusen*, 5 Johns 144. *This rule of law* is taken for granted in all the adjudged cases. *Id.* He who impeaches the will must overcome the presumption which the law raises of the sanity of the testator. *Sloan v. Maxwell*, 2 Gr. Ch. (N. J.) 580. The first principle is that the presumption of the law is in favor of

capacity. *Turner v. Cheeseman*, 2 McCart. 243. The decedent must be presumed to be competent to make a will until the contrary is proved. *Browne v. Molliston*, 3 Whart. 129. The case is *prima facie* established by the production of the will and the inference of law in favor of sanity. *Chandler v. Ferris*, 1 Harr. (Del.) 454. The presumption of law is always in favor of sanity. *Clark v. Ellis*, 9 Oreg. 128; *Taylor v. Cresswell*, 45 Md. 422. Competency will be presumed until the contrary is shown. *Howard v. Moot*, 64 N. Y. 262. If the will is properly proved "*the presumption of law*" makes one a *prima facie* case for proponents. *Milton v. Hunter*, 13 Bush 163; *Hawkins v. Grimes*, 13 B. Mon. 257.

Every man is presumed to be sane until there is some evidence shown to rebut that presumption. *Pettes v. Bingham*, 10 N. H. 515; *Perkins v. Perkins*, 39 Id. 163. The presumption of sanity always exists. *Banker v. Banker*, 63 N. Y. 414; *Brooks v. Barrett*, 7 Pick. 94, 98; *Duffield v. Morris' Exr.*, 2 Harr. (Del.) 375; *Dean v. Dean*, 27 Vt. 746; *Mayo v. Jones*, 78 N. C. 402; *Turner v. Cook*, 36 Ind. 129; *Higgins v. Carlton*, 28 Md. 115, 141; *Shaw's Will*, *ubi supra*. The presumption in favor of sanity may operate to decide the question otherwise in equipoise. *Hawkins v.*



tion of competency \*would prevail. Still, the *onus probandi* lies, in every case, on the party relying on a will, and he must satisfy the jury that it is the will of a capable testator (i): and when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the will is the will of a competent testator, they ought not to affirm by their verdict that it is so.<sup>9</sup> Accordingly, where,

Grimes, 13 B. Mon. 270. But in Minnesota, by statutory provision, (G. S. 1878, c. 47, §§ 15-17) the *onus* is upon the party who offers the will for probate. Layman's Will, 40 Minn. 371. It is said, however, that this does not change the rule that the proponent need to make only a *prima facie* case; the contestant then introduces evidence of insanity, which the proponent rebuts. Layman's Will, *ubi supra*. So, too, in Arkansas, the production of a properly executed will makes a *prima facie* case for the proponent, the *onus* is then on the contestant to show incapacity, which may be rebutted by the proponent. McCulloch v. Campbell, 49 Ark. 367.

The *onus probandi* lies upon the person who asserts unsoundness of mind, unless a previous state of insanity has been established, in which case the burden is shifted to him who claims under the will. Robinson v. Hutchinson, 26 Vt. 38; Grabill v. Barr, 5 Pa. St. 441; Chandler v. Barrett, 21 La. Ann. 58; Cotton v. Ulmer, 45 Ala. 378; Parrand v. Jones, 1 Cal. 488; Dickie v. Carter, 42 Ill. 376; Mullins v. Cotrell, 41 Miss. 291; Ean v. Snyder, 46 Barb. 230; Ford v. Ford, 7 Humph. 92; Goble v. Grant, 2 Gr. Ch. (N. J.) 629; Guthrie v. Price, 23 Ark. 396; Terry v. Buffington, 11 Ga. 337; In the Matter of Coffman, 12 Iowa 491; Copeland v. Copeland, 32 Ala. 512; Thompson v. Kyner, 65 Pa. St. 368; Shaw's Will, *ubi supra*; Pickie v. Van Vleck, 5 Redf. 284; Potter v. McAlpine, 3 Dem. 108, 115; Delafield v. Parrish, 25 N. Y. 9; Brown v. Taney, 24 Barb. 583; Miller v. White, 5 Redf. 320; In

re Hardy's Will, 12 Phila. 22; McCulloch v. Campbell, 49 Ark. 367; Chrisman v. Chrisman, 16 Oreg. 127; Allen v. Griffin, 69 Wis. 529; Egbert v. Egbert, 78 Pa. St. 326; Taylor v. Cresswell, 45 Md. 422; Torrey v. Blair, 75 Me. 548; Stephenson v. Stephenson, 62 Iowa 163. But it seems that in Missouri the *onus* as to sanity is on the party propounding the will. Jones v. Roberts, 37 Mo. App. 163. And in Illinois the proponents must, in the first instance, show capacity; but after giving in evidence the will and the proofs by the subscribing witnesses, the *onus* shifts. Pendlay v. Eaton, 130 Ill. 69.

Unsoundness of mind can only be predicated upon some actual manifestation or development of irrationality. La Bau v. Vanderbilt, 3 Redf. 384. An unequal or unjust will raises no presumption of unsoundness of mind, nor does radical change from previous testamentary dispositions. La Bau v. Vanderbilt, *ubi supra*; Potter v. McAlpine, 3 Dem. 108, 118; McLaughlin v. McDevitt, 63 N. Y. 213; Horn v. Pullman, 72 Id. 269; Sherley v. Sherley, 81 Ky. 240; Spratt v. Spratt, 76 Mich. 384; Salisbury v. Aldrich, 118 Ill. 199. Nor does mere eccentricity. Will of J. B. Smith, 52 Wis. 543; Will of Blakely, 48 Id. 294.

(i) And *a fortiori* when it appears that the testator was subject to delusions: Smee v. Smee, 5 P. D. 84.

9. The general rule as to capacity is, that a testator must be able to comprehend the condition of his property, and his relation toward the persons who are or might be objects of his bounty, and

in an action by heir-at-law against devisees,—the question in issue being as to the capacity of the testator to make a will,—the judge in his summing up told the jury “that the heir-at-law was entitled to

the scope and bearing of the provisions of his will. *Wade v. Holbrook*, 2 Redf. 378, 387; *Delafield v. Parish*, 25 N. Y. 9; *Van Guysling v. Van Kuren*, 35 Id. 70; *Kinne v. Johnson*, 60 Barb. 69; *Ean v. Snyder*, 46 Id. 230; *Reynolds v. Root*, 62 Id. 250; *Bundy v. McKnight*, 48 Ind. 502; *Stancell v. Kerran*, 33 Ga. 56; *La Bau v. Vanderbilt*, 3 Redf. 384, 436; *Townsend v. Bogart*, 5 Id. 93; *Will of McGuire*, Tuck. 196, 201; *Horn v. Pullman*, 72 N. Y. 276; *Cornwell v. Riker*, 2 Dem. 354; *Hathorn v. King*, 8 Mass. 371; *Kinne v. Kinne*, 9 Conn. 102; *Blanchard v. Nestle*, 3 Dem. 37; *Stevens v. Van Cleve*, 4 Wash. 267; *Converse v. Converse*, 21 Vt. 168; *Yoe v. McCord*, 74 Ill. 33; *Horne v. Horne*, 9 Ired. L. 99; *Higgins v. Carlton*, 28 Md. 115; *Lowder v. Lowder*, 58 Ind. 538; *Potter v. McAlpine*, 3 Dem. 108. Mere imbecility or weakness of mind does not incapacitate if there be sufficient understanding to satisfy the above general rule. *Wade v. Holbrook*, *ubi supra*; *Meeker v. Meeker*, 75 Ill. 260; *Potter v. McAlpine*, *ubi supra*; *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Chrisman v. Chrisman*, 16 Oreg. 127; *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 Id. 659; *Clark v. Ellis*, 9 Oreg. 128; *Will of Bindon*, 14 Phila. 332; *Shaver v. McCarthy*, 110 Pa. St. 339; *In re Lewis' Will*, 51 Wis. 101; *Godden v. Burke*, 35 La. Ann. 160; *Sheeley v. Sheeley*, 81 Ky. 240; *Whitney v. Twombly*, 136 Mass. 145; *Brinkman v. Ruegersick*, 71 Mo. 553. Neither does mere eccentricity and the disbelief in any specific religious doctrines. *Hartwell v. McMaster*, 4 Redf. 389; *Will of J. B. Smith*, 52 Wis. 543; *Godden v. Burke*, 35 La. Ann. 160. Nor caprice, fretfulness or suspicions. *Holden v. Meadows*,

31 Wis. 284; *Will of Chafin*, 32 Id. 557. And the courts will not sustain a will unless it believes that the testator freely intended to make the disposition made by the will, and was capable of knowing what he was doing, and understood to whom he was giving his property and in what proportion he was disposing of it. *Wisener v. Maupin*, 2 Baxt. 342; *Nowling v. Nowling*, 2 Sneed 634; *Blaubien v. Cicotte*, 11 Mich. 459. But the testator is not required to know fully the legal effect of all the provisions of his will upon the interests and estates devised. *Young v. Ridenbaugh*, 67 Mo. 574.

In *Rice v. Rice*, 50 Mich. 448, it is said that the same degree of mental capacity is required to make a will as to make a contract, or to attend to the ordinary affairs of life. *Freeman v. Easley*, 117 Ill. 317; *Stewart v. Elliott*, 2 Mackey 307; *Carpenter v. Calvert*, 83 Ill. 62. And where it is claimed that the testator is deranged, such derangement will not invalidate the will unless it is such as to render him incapable of understanding the effect and consequences of his acts. *Meeker v. Meeker*, 75 Ill. 260.

The above general rule is qualified in *Philadelphia Trust Co. v. Drinkhouse*, 17 Phila. 23, by saying that the testator's affections must not be perverted or his judgment misled by any delusions as to the persons or the property with whom and which he is dealing. And it is said that if a testator be of sound mind and executed the will without fear, fraud or undue influence, knowing its contents and intending it for his last will, it cannot be avoided by showing that he did not know the extent or location of his property, or that he did not come within the principle of the above general rule in

recover unless a Will was proved, but that, when a Will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator, and that if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendants.”<sup>10</sup> This was held to be a misdirection (*k*).

If a lunatic person have clear or calm intermissions (usually called lucid intervals), then during the time of such quietness and freedom of mind, he may make his testament, ap- Will made during a lucid interval:

other respects. *Jenness v. Hazelton*, 58 N. H. 423. In *Burkhart v. Gladish*, 123 Ind. 337, in addition to the above general rule, it is laid down that testator must have sufficient memory to retain all these matters in his mind while the will is being drawn; so too in *Spratt v. Spratt*, 76 Mich. 384. But the necessity to hold all these things in his mind at the same time seems to be doubted in *Carpenter v. Calvert*, 83 Ill. 62.

That the testator wrote or dictated his will, and without suggestions or assistance from others, and disposed of all his property, makes a strong case in favor of testamentary capacity. *Spratt v. Spratt*, *ubi supra*. See also *Beaubien v. Cicotte*, 12 Mich. 490; *Aitken v. Weckelly*, 19 Id. 492; *Kempsey v. McGinniss*, 21 Id. 142. Failure of memory is not sufficient to create incapacity, unless it be quite total. *Van Alst v. Hunter*, 5 Johns. Ch. 148; *Bleecker v. Lynch*, 1 Bradf. 458; *Mairs v. Freeman*, 3 Redf. 181, 207; *Nicholas v. Kershner*, 20 W. Va. 251. Want of recollection of names is one of the earliest symptoms of the decay of memory. *Van Alst v. Hunter*, *ubi supra*. The memory is the first faculty to wane in the progress of age. *Bleecker v. Lynch*, *ubi supra*; *Cornwell v. Riker*, 2 Dem. 354, 375. Mere forgetfulness alone will not disqualify one from making a will. *Mairs v. Freeman*, 3 Redf. 208.

Nor does an active belief in the modern doctrine of spiritualism, unless it appears that the will was the offspring of that delusion. *La Bau v. Vanderbilt*, 3 Redf. 384, 390; *Will of J. B. Smith*, 52 Wis. 543; *Billings' Appeal*, 49 Conn. 456; *Otto v. Doty*, 61 Iowa 23. Nor does the entertaining of any preposterous belief. In *re White*, 121 N. Y. 406.

10. But all that is required of the proponents of a will is to show the *factum* and general testamentary capacity; accordingly, where the charge was that proponents must show entire freedom from insanity of *any kind*, it was held to be a misdirection. *Wetler v. Habersham*, 60 Ga. 193.

The attestation of the will by witnesses is presumed to be a tacit expression of the belief of the witnesses that the testator was sane at the time of the *factum*, therefore their testimony that he was not of a disposing mind is to be received with great suspicion. *Estate of Cook*, 16 Phila. 322; *Young v. Bamer*, 27 Gratt. 96; *Cheatam v. Hatcher*, 30 Id. 561. See, also, *Critz v. Pierce*, 106 Ill. 167.

(*k*) *Sutton v. Sadler*, 3 C. B. (N. S.) 87. See also *Accord. Symes v. Green*, 1 Sw. & Tr. 401. As to the onus of showing sanity at the time of mutilation, in order to set up a revocation, see *Harris v. Ber-rall*, 1 Sw. & Tr. 153; *post*, p. \*36.

pointing executors, and disposing of his goods at pleasure<sup>(l)</sup>.<sup>11</sup> "If you can establish," said Sir Wm. Wynne, in the case of *Cartwright v. Cartwright*<sup>(m)</sup>, "that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption; for until proof of an habitual \*insanity is made, the presumption is that the party agent, like all human creatures, was rational; but where an habitual insanity of the mind of the person who does the act, is established, there the party who would take advantage of an interval of reason must prove it"<sup>(n)</sup>.<sup>12</sup>

(l) *Swinb. Pt. 2, s. 3, pl. 3. Godolph. Pt. 1, c. 8, s. 2. Wentw. c. 1, p. 33, 14th ed. Hall v. Warren, 9 Ves. 610. Rodd v. Lewis, 2 Cas. temp. Lee, 176.*

11. There can be no doubt that during an intermission of the disease the testamentary capacity is restored. *Gombault v. Public Administrator, 4 Bradf. 226; Boyd v. Eby, 8 Watts 66; Lucas v. Parsons, 27 Ga. 593; Clark v. Fisher, 1 Paige 171; Rush v. Megee, 36 Ind. 69; Harden v. Hays, 9 Pa. St. 151; Wright v. Lewis, 5 Rich. 212; Chandler v. Barrett, 21 La. Ann. 58; Wood v. Sawyer, Phill. L. (N. C.) 251; Townshend v. Townshend, 7 Gill 10; Goble v. Grant, 2 Gr. Ch. (N. J.) 629; Halley v. Webster, 21 Me. 461.*

But it is maintained by some that there is no such thing as a lucid interval. Those who so hold claim that what is ordinarily called a lucid interval is not a remission of the disease, but simply an absence of the symptoms. *Hammond Insanity in its Medico-Legal Relations, 45 et seq.* However, the fact of the lucid interval must be proved, and, to prove it, it is necessary to show such restoration of the faculties as to enable the testator "soundly to judge of the act." *Boyd v. Eby, ubi supra.* But one under a commission of lunacy may have a lucid in-

terval; if so, he may then make a will. *Gangwere's Estate, 14 Pa. St. 417; Morrison v. Smith, 3 Bradf. 209.*

(m) 1 *Phillim. Rep. 100.* See the particulars of this case, *post*, p. \*18.

(n) See also the same doctrine laid down by Lord Thurlow in *Attorney-General v. Parnter, 3 Bro. C. C. 443*, and Sir W. Grant in *Hall v. Warren, 9 Ves. 611.* See also *Swinb. Pt. 2, s. 3, pl. 7*, where it is said, that if it be proved that the testator was once mad, the law presumeth him to continue still in that case, unless the contrary be proved. See also *Godolph. Pt. 1, c. 8, s. 2.* But where the attesting witnesses, disinterested medical men, speak strongly to sanity, the court will not set aside a will on proof by interrogatories, but without plea, that the deceased many years before had been under an insane delusion: *Kemble v. Church, 3 Hagg. 273.*

12. "So although the law in general presumes against insanity, yet when the fact of insanity has been shown its continuance will be presumed; and the proof of a subsequent lucid interval lies on the party who asserts it." *Best Ev. § 405.* See, also, 2 *Greenl. Ev. § 689.* But this rule does not apply to insanity which may have arisen from a violent disease. *Hix v. Whittemore, 4 Metc. 545.*

But although the law recognises acts done during such intervals as valid, yet it is scarcely possible to be too strongly im-pressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval (o); and such proof is matter of extreme difficulty, for this, among other reasons, viz., that the patient is, not unfrequently, rational to all outward appearance without any real abatement of his malady (p). On the other hand, if the deceased was subject to attacks producing temporary incapacity, and was at other times in full possession of his mental powers, such attacks may naturally create in those who only happen to see him when subject to them, a strong opinion of his permanent incapacity.<sup>13</sup> These considerations, while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the court to rely but little upon mere opinion, to look at the grounds upon which opin-

(o) By Sir John Nicholl in *White v. Driver*, 1 Phillim. Rep. 88.

(p) By Sir John Nicholl in *Brogden v. Brown*, 2 Add. 445, and in *Ayrey v. Hill*, 2 Add. 210.

13. "To constitute what is called a *lucid interval* absence of the disease itself, not of the particular delusion only, must be shown, and the party must freely and voluntarily, and without any design at the time of pretending sanity and freedom from delusion, be able to confess his delusion." Flood on Wills 388; Walkem on Wills 107 *et seq.* The test as to a lucid interval appears to be different where a person is laboring under an insane delusion from that where the party is afflicted with habitual insanity unaccompanied with delusions. In the former case his sanity is to be tested by directing his attention to the subject-matter of the delusion; in the latter by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them and with regard to the conduct of individuals. *Nichols v. Binns*, 1 Sw. & Tr. 239.

Dr. Combe says: "But however calm and rational the patient may appear to be during the lucid intervals, as they are

called, and while enjoying the quietude of domestic society, or the limited range of a well-regulated asylum, it must never be supposed that he is in as perfect possession of his senses as if he had never been ill. In ordinary circumstances, and under ordinary excitement, his perceptions may be accurate and his judgment perfectly sound; but a degree of irritability of brain remains behind, which renders him unable to withstand any unusual emotion, any sudden provocation, or any unexpected and pressing emergency. Were not this the case, it is manifest that he would not be more liable to a fresh paroxysm than if he had never been attacked. And the opposite is notoriously the fact; for relapses are always to be dreaded, not only after a lucid interval, but even after a perfect recovery. And it is but just, as well as proper, to keep this in mind, as it has too often happened that the lunatic has been visited with the heaviest responsibility for acts committed during such an interval, which, previous to the first attack of the disease, he would have shrunk from with horror." *Observations on Mental Derangement* 241.

In doubtful cases the reasonableness or

ions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgments of others (*q*).<sup>14</sup>

In *Ex parte Holyland* (*r*), Lord Eldon observed, that in the case of the *Attorney-General v. Parnter*, “Lord Thurlow \*said that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property or with reference to such a case as this; for suppose the strongest mind reduced by the delirium of a fever or any other cause, to a very inferior degree of capacity, admitting of making a will of personal estate (to which a boy of the age of fourteen is competent), the conclusion is not just that as that person is not what he had been, he should not be allowed to make a will of personal estate.” It must be observed that Sir W. Grant, in *Hall v. Warren* (*s*), does not appear to have understood Lord Thurlow in the same sense as Lord Eldon did in the preceding remarks, nor indeed does the report in *Brown* of the *Attorney-General v. Parnter* bear any such construction. “If general lunacy,” said Sir W. Grant, “is established, they will be under the necessity of showing, according to the *Attorney-General v. Parnter*, that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the party soundly to judge of the act.”

In the case of *Cartwright v. Cartwright* (*t*), it appeared that the testatrix was early in life afflicted with the disorder of her mind. She afterwards was supposed to be perfectly recovered, and continued for several years to conduct a house and establishment of her own as a rational person; but her habit and condition of body, and her manner for several months before the date of her will, were those of a person afflicted with many of the

Proof of lucid interval arising from the act of making a rational will.

tatrix was early in life afflicted with the disorder of her mind. She afterwards was supposed to be perfectly recovered, and continued for several years to conduct a

not of the will, in its various provisions, is entitled to great weight. *Clark v. Fisher*, 1 Paige 171. Where actual insanity is proved to have once shown itself, it is necessary to prove very satisfactorily either perfect recovery, or, at least, a lucid interval at the time of the *factum*, in order to allow any *alleged* testamentary instrument to be pronounced for as a valid will. *Halley v. Webster*, 21 Me. 461; *Lucas v. Parsons*, 27 Ga. 593; *Morrison v. Smith*, 3 Bradf. 209. And

such insanity may be predicated of the delirium arising from fever. *Halley v. Webster*, *ubi supra*.

(*q*) By Sir John Nicholl in *Kindleside v. Harrison*, 2 Phillim. Rep. 459.

14. The opinions of experts are of little weight as against proof of facts showing mental capacity. *Burley v. McGough*, 115 Ill. 11.

(*r*) 11 Ves. 11.

(*s*) 9 Ves. 611.

(*t*) 1 Phillim. 90

worst symptoms of insanity, and continued so after making the will. She was attended by Dr. Battie, who desired the nurse and other servants to prevent her from reading and writing, as such occupation might disturb her head, and in consequence thereof she was for some time kept from the use of books and writing materials. However, some time prior to writing the will, she \*became very importunate for the use of pen and paper, and frequently asked for them in a very clamorous manner. Dr. Battie, in order to quiet and gratify her, consented that she should have them, telling her nurse and another servant that it did not signify what she might write, as she was not fit to make any proper use of them. As soon as Dr. Battie had given permission, pen, ink and paper were carried to her, and her hands, which had been for some time kept constantly tied, were let loose, and she sat down at her bureau and desired her nurse and servant to leave her alone while she wrote. They went into an adjoining room and watched her. At first she wrote upon several pieces of paper, and got up in a wild and furious manner and tore the papers and threw them into the fire one after another. After walking up and down the room many times in a wild and disordered manner, muttering to herself, she wrote the will. She inquired the day of the month, and an almanack was given to her by one of the nurses, and the day pointed out to her. She then called for a candle to seal the paper, which was given to and used by her for that purpose, although they used generally to be cautious not to trust her with a candle, and were forced to hold it at a distance from her if she read the newspaper. The survivor of the two witnesses to the transaction deposed that, in her opinion, the testatrix had not then sufficient capacity to be able to know what she did, and that during the time she was occupied in writing, which was upwards of an hour, she by her manner and gestures showed many signs of insanity. The will was written in a remarkably fair hand, and without a blot or mistake in a single word or letter: *and it was a proper and natural will, and conformable to what her affections were proved to be at the time, and her executors and trustees were very discreetly appointed.* Two months after this writing of the will, in a conversation with the mother of the parties benefited by the will, the testatrix mentioned that she had made such a will, and ordered her servant to bring it, and she then delivered it to the mother, observing that there was no need of witnesses as the estate \*was all personal, and the will in her own handwriting. Sir Wm. Wynne pronounced the will to be the legal will

of the deceased, and further said, that in his apprehension the forming of the plan, and pursuing and carrying it into effect with propriety and without assistance, would have been sufficient to have established an interval of reason if there had been no other evidence; but it was further affirmed, by the recognition and the delivery of the will. From this sentence an appeal was interposed to the High Court of Delegates—who affirmed the judgment of Sir Wm. Wynne(u). That very eminent judge, in the course of giving sentence below, after remarking that the court did not depend on the opinions of the witnesses, but on the facts to which they deposed, delivered the following observations:

“The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the Will. That I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved.<sup>15</sup> What can you do more to establish the act? because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act, ration-

(u) 1 Phillim. 122.

15. Frequently it occurs that the evidence of a lucid interval which the will itself affords is the strongest feature of the case. In the conflict of opinions that may arise in the trial of such an issue, as to whether the mind of the alleged testator was really lucid at the time of the *factum*, the production of a perfectly rational will, a will which appears to all as the act of a well-balanced mind, is entitled to the greatest weight and generally, though not universally, determines the conflict in favor of the lucid interval at the time of the *factum*. *Clark v. Fisher*, 1 Paige 171; *Pancoast v. Graham*, 2 McCart. 274; *Clifton v. Clifton*, 2 Dick. 227; *Whitman v. Morey*, 63 N. H. 448.

In *Stewart v. Lisenard*, 26 Wend. 231, 313, it is said: “But in almost every case of disputed capacity, whether in relation to testamentary disposition or to contracts and conveyances *inter vivos*, the act or will itself has, in its nature and effect, been judicially regarded as an

essential and most important part of the evidence of capacity.” *Jackson v. King*, 4 Cowen 207. So, in *Duffield v. Morris*, 2 Harr. (Del.) 375, where the will was disputed on account of the intemperate habits of the testator, it was held that the will itself was strong evidence of sanity; and in *Davis v. Calvert*, 5 Gill & J. 269, it was remarked, that the contents of the will itself is important evidence to be submitted to the jury on a question of sanity. While, in *Tomkins v. Tomkins*, 1 Bailey 92, it is said that where the capacity of the testator is doubtful, the reasonableness of the will itself is a circumstance in favor of capacity. And it is laid down in *Ross v. Christman*, 1 Ired. L. 209, that where there is evidence of fraud or imposition, jurors are at liberty to consider the disposition of the property made by the will as to the question of capacity. Again, in *Peck v. Cary*, 27 N. Y. 9, it is held that, for the purpose of ascertaining the testator's condition, the will itself may be examined,



ally done (v). In my apprehension, where you are able completely to establish that, the law does not require you to \*go further; and the citation from Swinburne states it to be so. The manner he has laid it down is (it is in the part in which he treats of what persons may make a Will)(w): ‘The last observation is, If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his clear and calm intermissions, and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.’ Unquestionably there must be a complete and absolute proof that the party who had so formed it did it without any assistance. If the fact be so, that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don’t know, unless the gentleman could prove by any authority or law what the length of the lucid

And, in *Baker v. Lewis*, 4 Rawle 355, it is stated that it is error to instruct the jury that the contents of the instrument itself are not evidence, however absurd and unreasonable its provisions may be.

On the other hand, the unreasonableness of the will is not intrinsic proof of the want of a disposing mind. *Munday v. Taylor*, 7 Bush 491. And, on a question of testamentary capacity in general, apart from the question of lucid intervals, the will itself is strong evidence of capacity. *Young v. Barner*, 27 Gratt. 96; *Anderson v. Irwin*, 101 Ill. 411. So, clear, sensible and perfectly coherent letters written by the testator upon business and other matters, shortly before the *factum*, are entitled to considerable weight in determining the question. *Will of Blakely*, 48 Wis. 294.

(v) It is not, however, to be supposed that the learned judge here considers

that every rational act rationally done is sufficient to prove a lucid interval. It is the particular manner in which the act was done in this case which leads the judge to the conclusion that there was a lucid interval: 2 Curt. 447, by Sir H. Jenner Fust, in *Chambers v. The Queen’s Proctor*. In *Bannatyne v. Bannatyne*, 2 Roberts. 472, 501, Dr. Lushington, referring to the above passage in the judgment of Sir W. Wynne, said, “Though I cannot say I altogether agree to that *dictum*, still it is entitled to great weight, and, to a certain extent, a rational act done in a rational manner, though not, I think, ‘the strongest and best proof’ of a lucid interval, does contribute to the establishment of it.” See also the observations of Sir C. Cresswell, in *Nicholls v. Binns*, 1 Sw. & Tr. 239.

(w) Swinb Pt. 2, s. 3, pl. 14.

interval is to be, whether an hour, a day, or a month. I know no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact, that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient." Accordingly, Sir John Nicholl, in *Scruby v. Fordham* (x), lays it down as a general rule, that where a will is traced into the hands of a testator, whose sanity is fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to the will there is no direct evidence, the agent is to be inferred rational, or the contrary, from the character broadly taken, of his act (y).

\*In the case of *M'Adam v. Walker* (z), Lord Chancellor Eldon mentioned that he had been concerned as counsel, in a cause where a gentleman who had been for some time insane, and who had been confined till the hour of his death in a madhouse, had made a will while so confined. The question was, whether he was of sound mind at the time of making this testament. It was a will of large contents, proportioning the different divisions with the most prudent and proper care, with a due regard to what he had previously done to the objects of his bounty, and in every respect pursuant to what he had declared, before his malady, he intended to have done. It was held, that he was of sound mind at the time.

In the cases above stated, the act was not only done and completed by the testator himself, *but the will was proper and natural*. In another case, *Clarke v. Lear and Scarwell* (a), where the instrument, although written with great accuracy by the testator himself, was made in favour of a person to whom he had no good cause whatever to give a benefit, it was held that the act of framing such an instrument furnished no proof of the existence of a lucid interval. That was the case of a man who had been certainly disordered in his mind for a length of time. He went to Little Hampton to bathe in the sea, and there he saw a young woman at the house where he boarded, of whom he had no prior knowledge, and wanted to marry her, at a time when

(x) 1 Add. 90.

(y) See also *Chambers v. Queen's Proctor*, 2 Curt. 415, 451, Accord. See also the address of Sir C. Cresswell to the jury in *Nicholls v. Binns*, 1 Sw. & Tr. 239.

(z) 1 Dow. 178.

(a) March, 1791, cited in 1 *Phillim.* 119, by Sir Wm. Wynne.

he was insane; and being brought to London in a strait waistcoat, he there wrote a paper, by way of codicil, giving her a legacy (b).

With respect to the comparative facility of proving a lucid \*interval, there is a great distinction to be observed, with respect to a case of delirium, set up in opposition to a will, as contradistinguished from fixed mental derangement, or permanent proper insanity. The reason for this is given

Distinction, as to proof of lucid interval between delirium and insanity.

with peculiar force and precision of language, by Sir John Nicholl, in *Brogden v. Brown* (c). "In cases of permanent proper insanity, the proof of a lucid interval is matter of extreme difficulty, as the court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is not unfrequently rational to all outward appearance, without any real abatement of his malady: so that, in truth and substance, he is just as insane, in his apparently rational as he is in his visible raving fits. But the apparently rational intervals of persons, merely delirious, for the most part are really such. Delirium is a fluctuating state of mind, created by temporary excitement, in the absence of which, to be ascertained by the appearance of the patient, the patient is, most commonly, really sane.<sup>16</sup> Hence, as also, indeed, from their greater presumed frequency in most instances in cases of delirium, the probabilities, *à priori*, in favour of a lucid interval are infinitely stronger in a case of delirium, than in one of permanent proper insanity; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case, and has always been so held by this court" (d).

The great case of *Dew v. Clark* (e), which obtained the most complete

(b) See also the observations of Sir J. Nicholl, in *Evans v. Knight*, 1 Add. 237, 238; and for further cases as to the proof of the existence of lucid intervals, at the time of doing testamentary acts, see *Attorney-General v. Parnter*, 3 Bro. C. C. 441; *Coghlan v. Coghlan*, cited in 1 Phillim. 120. *Williams v. Goude*, 1 Hagg. 577. *Borlase v. Borlase*, 4 Notes of Cases, 106; and Lord Brougham's observations in *Waring v. Waring*, 4 Moo. P. C. 351.

(c) 2 Add. 445.

16. When one is under intense excitement in anticipation of a dangerous

surgical operation amounting to apprehension of death, and even when such excitement is aggravated by a quarrel with a member of the family, this will not constitute legal incapacity to make a will. *Linton's Appeal*, 104 Pa. St. 228. Nor can suffering from physical pain destroy testamentary capacity. *Torrey v. Blair*, 75 Me. 548.

(d) See also the observations of Dr. Lushington in *Dimes v. Dimes*, 10 Moo. P. C. 422, 426.

(e) 1 Add. 279; 3 Add. 79. See also Dr. Haggard's Report from the judge's notes.

and solemn consideration, led to a full investigation of that which has often been called "Partial Insanity," 17 but which would, perhaps, be better described by the phrase "insanity, or unsoundness, always existing, although only occasionally manifested" (f). There the case pleaded by an only daughter in a responsive allegation, in the Prerogative \*Court, in opposition to her father's will, was, that besides labouring under mental perversion in some other particulars, especially on religious subjects, the deceased had an *insane* aversion to his daughter, and was actuated solely by that illusion to dispose of his property in the manner in which it was purported to be conveyed by the contested will. This allegation was opposed, as inadmissible, on behalf of residuary legatees named in the will. But Sir John Nicholl admitted it; and after remarking that the case set up was one of partial insanity—of insanity *quod hoc*, upon a particular subject, or rather, perhaps *quod hanc*, as to a particular person,—and that the possible occurrence of such a case of partial insanity, and the consequent invalidity of a will, which is fairly presumable to have been made under its operation, must be admitted on the authority of Greenwood's Case (g); the learned judge pro-

17. "A person may be partially insane; that is, he may have an insane belief or delusion as to one or more subjects and not as to others." Forman's Will, 54 Barb. 289. "Partial insanity renders a will null and void if it can be proved or plainly inferred that the will is immediately founded in, or upon such partial insanity." Flood on Wills 389; Trumbull v. Gibbons, 2 Zab. 117; Townshend v. Townshend, 7 Gill 10; Potts v. House, 6 Ga. 324; Lucas v. Parsons, 27 Id. 598; Denson v. Beasley, 34 Tex. 191; Merrill v. Rolston, 5 Redf. 220; Robinson v. Adams, 62 Me. 369; Gardner v. Lamback, 47 Ga. 133; Benoist v. Murrin, 58 Mo. 307; Brick v. Brick, 66 N. Y. 144; Coit v. Patchen, 77 Id. 533; Stackhouse v. Horton, 2 McCart. 202; Estate of Drinkhouse, 14 Phila. 291; Will of Cole, 49 Wis. 179. But if the will is not "sounding in folly" partial insanity will not render it void. Kingsbury v. Whitaker, 32 La. Ann. 1055.

If the will be the immediate offspring of the mania in case of a monomaniac, it should be rejected without regard to the question of his general capacity. Boyd v. Eby, 8 Watts 71; Tawney v. Long, 76 Pa. St. 106.

In Gardner v. Lamback, 47 Ga. 133, the charge to the jury, that if the testator was partially insane and the will was in any way the effect or result of that insanity it was void, was sustained.

(f) 6 Moo. P. C. 350, by Lord Brougham.

(g) The following statement of this case is to be found in Lord Erskine's speech on the trial of Hadfield: "The deceased, Mr. Greenwood, whilst insane took up an idea that his brother had administered poison to him, and this became the prominent feature of his insanity. In a few months, however, he recovered his senses, and returned to his profession, which was that of a barrister, &c., but could never divest his mind of

ceeded to observe, with respect to the daughter, "She must be appraised, however, as well that the burthen of proof rests with her, as that this burthen, in my judgment, is from the very nature of the case, a pretty heavy one. The present, indeed, may be less difficult to make out than Greenwood's Case, in one respect, as the delusion under which the deceased is charged to have laboured towards the complainant is alleged to have been coupled with something of insane feeling in other particulars, especially on the subject \*of religion; although here, as in Greenwood's Case, the general capacity is, in substance, unimpeached. But she must understand that no course of harsh treatment—no sudden bursts of violence—no display of unkind, or even unnatural feeling, merely, can avail in proof of her allegation—she can only prove it by making out a case of antipathy clearly resolvable into mental perversion, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity" (*h*). After the evidence had been gone through on both sides, the same learned judge delivered his judgment: that the will being proved to be the direct unqualified offspring (*i*) of a morbid delusion, as to the character and conduct of the daughter, being the very creature of that morbid delusion put into act and energy, the deceased must be considered insane at the time of making the will, and consequently that the will itself was null and void in law (*k*). In the course of his judgment the learned judge made the following remarks, on the subject of partial insanity: "It was said that 'partial insanity' was unknown to the law. The observation could only have arisen from mistaking the sense in which the court used

What is meant  
by partial in-  
sanity.

the morbid delusion that his brother had attempted to poison him; under the influence of which (so said) he disinherited him. On a trial in the Court of King's Bench upon an issue *devisavit vel non*, the jury found against the will: but a contrary verdict was had in the Court of Common Pleas: and the suit ended in a compromise." See also Sir John Nicholl's statement of Greenwood's Case, 3 Add. 96, 97, and Lord Eldon's in *White v. Wilson*, 13 Ves. 89, and the summing up of Lord Kenyon in 3 Curt. Appendix, pp. I—XXXI.

(*h*) 1 Add. 284. See also *Fulleck v. Allinson*, 3 Hagg. 527.

(*i*) It must, however, be observed that

the rule of law is that, in civil suits, it is not necessary to trace or connect the morbid imagination with the act itself. If the mind is unsound, the act is void. The law avoids every act of the lunatic during the period of the lunacy, although the act to be avoided cannot be connected with the influence of the insanity, and may be proper in itself: *Groom v. Thomas*, 2 Hagg. 436.

(*k*) 3 Add. 208. This judgment was afterwards confirmed by the Court of Delegates. A commission of review was then applied for before the Lord Chancellor, but refused. See 5 Russ. Chan. Cas. 163.

that term. It was not meant that a person could be partially insane and sane at the same moment of time : to be sane, the mind must be perfectly sound ; otherwise it is unsound. All that was meant was, that the delusion may exist only on one or more particular subjects.<sup>18</sup> In that sense, the very same term is used by no less an authority than Lord Hale, who says, ‘There is a partial insanity of mind and a total insanity. The former is \*either in respect to things *quod hoc vel illud insanire*. Some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications. Or else it is partial in respect of degrees ; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason ; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital ; for doubtless most persons that are felons of themselves, and others, are under a degree of partial insanity, when they commit these offences. It is very difficult to define the invisible line that divides perfect and partial insanity ; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of

18. It is probably better to speak of one as being a monomaniac than as being partially insane, for, strictly speaking, there can be no such thing as partial insanity. One’s mind must be either sound or unsound, either healthy or diseased. If a mind is unsound on one subject, and always unsound on that subject, although not manifesting that unsoundness constantly, but always exhibiting this peculiarity when attention is called to that subject, it can never be correct to consider that mind as a sound mind. Such a mind can be sound on other subjects only in appearance, for if while occupied with other matters the subject of delusion were presented to the mind, the unsoundness would forthwith manifest itself.

From this it must follow that the question of the validity of the will of

one partially insane is not at all different from the question of the power of an insane person to make a will during a lucid interval, of which we have already spoken (p. 26 and notes), and that where the will of a monomaniac is offered for probate the inquiry must be whether at the time of the making of the will the testator was free from his delusion, or, in a word, whether the will was made during a lucid interval. A monomaniac may make a will. *Will of Forman*, Tuck 221 ; *Re Thompson*, 2 Bradf. 449 ; *Potter v. McAlpine*, 3 Dem. 108, 122 ; *Lathrop v. Am. Board of Foreign Missions*, 67 Barb. 590, 595 ; *Children’s Aid Society v. Loveridge*, 70 N. Y. 387 ; *Riggs v. Am. Tract Soc.*, 95 Id. 503 ; *Fraser v. Jennison*, 42 Mich. 206, 238. Unless the mania affect the testamentary act. *Id.*

inhumanity towards the defects of human nature; or, on the other side, too great an indulgence given to great crimes'”(l).

\*These doctrines, and the subject of “Partial Insanity” (or, as it has been more usually called of late, “Monomania,”) generally, were fully commented on and explained with great ability by Lord Brougham, in delivering the opinion of the Privy Council in *Waring v. Waring* (m). His lordship, after demonstrating that no confidence can be placed in the acts, or any act, of a diseased mind, however

(l) Dr. Haggard's Report from the judge's notes, pp. 11, 12. The Lord Chancellor (Lyndhurst), on refusing a commission of review, thus commented upon the judgment of Sir John Nicholl:—

“In this case I do not find any error in law: I do not find any doubtful or important question of law, which requires to be decided in any solemn form. The only point of law which has been agitated has arisen out of an expression made use of by the learned judge in the court below. He speaks of *partial insanity*; and it was contended at the bar, that a case of partial insanity would not be a sufficient ground to lead a court to set aside, or to justify a court in setting aside a will: and that the doctrine of partial insanity is not known to the law of England. I think I am stating correctly the argument of counsel with respect to this point, according to the apprehension which I entertain of it, at the time when the term *partial insanity* was reiterated, over and over again, as expressing the ground of Sir John Nicholl's judgment. But I think the argument, founded upon that phrase, proceeds upon a misapprehension of what was meant by the learned judge who occasionally used it. I have read his judgment with great attention, and I collect from it that his meaning is this: that there must be unsoundness of mind in order to invalidate a will, but that the unsoundness may be evidenced in reference to one or more subjects. ‘It seldom happens,’ he says, ‘that a person

who is insane displays that insanity with reference to every question and every subject; it shows itself with reference to particular subjects, and sometimes with reference to only one individual subject; it sometimes displays itself with reference to one subject very decidedly, and very generally, perhaps, with reference to other subjects.’ All that the learned judge meant to convey was, that it was no objection to the imputation of unsoundness, that it manifested itself only, or principally, with reference to one particular question or one particular person: and he illustrates his position by a variety of cases, some of them of public notoriety and known to us all. This construction does not rest on any general reasoning, because, for the purpose of avoiding misapprehension, and as if his attention had been directed to the very point, he himself, in the course of his judgment, explains in distinct terms what he meant by the term *partial insanity*. [His Lordship here read the passage above cited in the text, and then continued:] I think, therefore, the learned judge has sufficiently explained what he meant by the occasional use of the term *partial insanity*; and with the explanation he has thus in terms given, and with the whole of his argument, and the illustrations he has used, and the cases to which he has referred in support of that argument, I confess I entirely agree.”—5 Russ. Chanc. Cas. 166–167.  
(m) 6 Moo. P. C. 341.

apparently rational that act may appear to be, or may in reality be, proceeded to observe, that "we are wrong in speaking of partial unsoundness; we should say that the unsoundness always exists, but it requires a reference to a peculiar topic, else it lurks and appears not. But the malady is there; and as the mind is one and the same it is really diseased, while apparently sound, and really its acts whatever appearances they may put on, are only the acts of a morbid or unsound mind." Accordingly, it was an established principle of law, that to show unsoundness of mind it was not required that it should be general; it was sufficient if proved to exist on one or more points, though in all other respects the man might conduct \*himself with the utmost propriety(*n*). The recent case, however, of *Banks v. Goodfellow* (*o*) seems to establish that partial unsoundness not affecting the general faculties and not operating on the mind of a testator in regard to testamentary disposition will not be sufficient to deprive a person of the power of disposing of his property. But just as partial insanity does not necessarily negative testamentary capacity so a man may be capable of transacting business of a complicated and important kind, involving the exercise of considerable powers of intellect, and yet may be the subject of delusions so as to be unfit to make a will. The result would seem to be that a person subject to delusions may make a valid will if the delusions under which he labours be such that they could not reasonably be supposed to have affected the dispositions made by the will(*p*).

The following observations of Sir John Nicholl, made in the course of his judgment in *Dew v. Clark*, relating to the proper test of the absence or presence of insanity, are so important and valuable, that it may be expedient to present them in the very words in which they have been reported(*pp*). "The first point for consideration, and which should be distinctly ascertained, as far as it can be fixed, is, what is the test and criterion of unsound mind, and where eccentricity or caprice ends, and derangement commences.<sup>19</sup>

Criterion of  
insanity.

(*n*) *Fowles v. Davidson*, 6 Notes of Cas. 473, 474, by Sir H. Jenner Fust; *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

(*o*) L. R. 5 Q. B. 549, followed in *Boughton v. Knight*, L. R. 3 P. & D. 64.

(*p*) *Smee v. Smee*, 5 P. D. 84.

(*pp*) Dr. Haggard's Report, from the judge's notes, pp. 5-10.

19. No belief as to future rewards and punishments, or the principles of justice upon which they are to be administered, or other religious creed, can be regarded as evidence of insanity, since courts have no test by which the truth of such beliefs can be determined, and it is, therefore, impossible to decide whether they are



Derangement assumes a thousand different shapes as various as the shades of human character. It shows itself in forms very dissimilar both in character and in degree. It exists in all imaginable varieties, from the frantic maniac chained down to the floor, to the person apparently rational on all subjects and in all transactions save one; and whose disorder, though latently perverting the mind, yet will not be called forth except under particular circumstances, and will \*show itself only occasionally. We have heard of persons at large in Bedlam, acting as servants in the institution, showing other maniacs and describing their cases, yet being themselves essentially mad. We have heard of the person who fancied himself Duke of Hexham, yet acted as agent and steward to his own committee. It is further observable, that persons under disorder of mind have yet the power of restriction from respect and awe. Both towards their keepers and towards others in different relations they will control themselves. There have been instances of extraordinary cunning in this respect, so much as even to deceive the medical and other attendants, by persons who, on effecting their purpose, have immediately shown that their disorder existed undiminished.

“It has probably happened to most persons who have made a considerable advance in life, to have had personal opportunities of seeing some of these varieties, and these intermediate cases between eccentricity and absolute frenzy,—maniacs who though they could talk rationally, and conduct themselves correctly, and reason rightly, nay, with force and ability, on ordinary subjects, yet on others were in a complete state of delusion,—which delusion no arguments or proofs could remove. In common parlance, it is true, some say a person is mad when he does any strange or absurd act, others do not conceive the term ‘madness’ to be properly applied unless the person is frantic.

“As far as my own observations and experience can direct me, aided by opinions and statements I have heard expressed in society, guided also by what has occurred in these and in other courts of justice, or has been laid down by medical

Absence or presence of delusion the true test of insanity(q).

delusions or not. *Gass v. Gass*, 3 Humph. 278. But the belief in ghosts and supernatural appearances was held to have some tendency to show unsoundness of mind, or such weakness of mind as would easily be imposed upon by the exertion

of undue influence. *Woodbury v. Obear*, 7 Gray 467. But a believer in witchcraft may make a will. *Will of Forman*, Tuck. 221; *Re Thompson*, 2 Bradf. 449.

(q) See *Wheeler v. Alderson*, 3 Hagg. 598. Acc. But see also the observa-

and legal writers, the true criterion is—where there is delusion of mind there is insanity; that is, when persons believe things to exist which exist only, or at least in that degree exist only, in their own imagination, and of the non-existence \*of which neither argument nor proof can convince them, they are of unsound mind: or, as one of the counsel accurately expressed it, ‘It is only the belief of facts which no rational person would have believed, that is insane delusion’ (r). This delusion may sometimes exist on one or two particular subjects, though generally there are other concomitant circumstances—such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion and to establish its insane character.<sup>20</sup>

“Medical writers have laid down the same criterion by which insanity may be known. Dr. Battie, in his celebrated Treatise on Madness(s),

tions of Sir H. Jenner Fust in *Chambers v. The Queen’s Proctor*, 2 Curt. 448, 449.

(r) This passage was cited with approbation by Sir H. Jenner Fust in *Frere v. Peacocke*, 1 Robert. 444. But Lord Brougham remarked, in *Waring v. Waring*, 6 Moo. P. C. 353, that, perhaps, in a strictly logical view, the definition is liable to one exception, or at least, exposed to one criticism, viz., that it gives a consequence for a definition, and that it might be more strictly accurate to term “delusion” the belief of things as realities, which exist only in the imagination of the patient. “The frame, or state of mind,” said his lordship, “which indicates his incapacity to struggle against such an erroneous belief constitutes an ‘unsound frame of mind.’” See further as to the different kinds of insane delusion, the judgment of Dr. Lushington, in *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232, 247; S. C., *Dea. and Sw. 22*.

20. The classification of insanity, as given by Esquirol, is: “1. *MELANCHOLIA*.—Perversion of the understanding in regard to one object or a small number of objects with the predominance of sadness or depression of mind. 2.

*MONOMANIA*.—Perversion of understanding limited to a single object or small number of objects with predominance of mental excitement. 3. *MANIA*.—A condition in which the perversion of the understanding embraces all kinds of objects and is accompanied with mental excitement. 4. *DEMENTIA*.—A condition in which those affected are incapable of reasoning, from the fact that the organs of thought have lost their energy and the force necessary for performing their functions. 5. *IMBECILITY OR IDIOCY*.—A condition in which the organs have never been sufficiently well conformed to permit those affected to reason correctly.” Insanity in its Medico-Legal Relations 10.

“The only legal test of insanity is delusion. Insane delusion consists in a belief of facts which no rational person would believe.” *Forman’s Will*, 54 Barb. 274, 289; *Colhoun v. Jones*, 2 Redf. 34. See also, *Stanton v. Wetherwax*, 16 Barb. 259; *Seamen’s Friends Soc. v. Hopper*, 33 N. Y. 619; *Duffield v. Morris*, 2 Harr. (Del.) 375; 2 Greenl. Ev. § 371a; 1 Best Ev. §§ 147, 150; *Shaw’s Will*, 2 Redf. 107, 126.

(s) London, 1758.

thus expresses it. After stating what is not properly madness, though often accompanying it, namely, either too lively or too languid a perception of things, he proceeds:—

“‘But *qui species alias veris capiet commotus habebitur*; and this by all mankind, as well as the physician; no one ever doubting whether the perception of objects not really existing, or not really corresponding to the senses, be a certain sign of madness: therefore “deluded imagination,” is not only an indisputable, but an essential character of madness’ (t).<sup>21</sup>

“Deluded imagination, then, is insanity.

(t) S. 1, p. 5.

21. “Delusion is a belief in something impossible in the nature of things or the circumstances of the case.” Ray’s Med. Jur. (5th ed.), § 169. Insane delusion is the belief in the existence of that which has only an existence in the imagination of the person. It is the result of disease. Colhoun v. Jones, 2 Redf. 34, 40. An error in fact, or a prejudice or suspicion, will not amount to an insane delusion. Clapp v. Fullerton, 34 N. Y. 190; Stackhouse v. Horton, 2 McCart. 202; Hall v. Hall, 38 Ala. 131; Seamen’s Friends Soc. v. Hopper, 33 N. Y. 619; Trumbull v. Gibbons, 2 Zab. 117; Boardman v. Woodhouse, 47 N. H. 120, 138; Taylor v. Kelly, 31 Ala. 59; Jenckes v. Smithfield, 2 R. I. 255; Florey v. Florey, 24 Ala. 241; Townshend v. Townshend, 7 Gill 10; Kelly v. Miller, 39 Miss. 17. But the line between insane delusions and suspicion is sometimes very indistinct. Will of Cole, 49 Wis. 179. An insane delusion is one which is not only founded in error, but is without evidence of its truth. Its essence is that it has no basis in reason, and cannot be dispelled thereby. Merrill v. Rolston, 5 Redf. 220; Florey v. Florey, 24 Ala. 241; Potter v. McAlpine, 3 Dem. 108, 122; Stanton v. Wetherwax, 16 Barb. 259; Philadelphia Trust Co. v. Drinkhouse, 17 Phila. 23.

But where a testator, from slight and inadequate evidence, acting upon a jealous

and suspicious mind, entertained the mistaken idea that one of his daughters was illegitimate, it was held not to be an insane delusion, and, therefore, not sufficient to justify the rejection of the will Clapp v. Fullerton, 34 N. Y. 190; while, on the other hand, where a testator, addicted to drink, was intensely jealous of his wife, who was of chaste character, accused her of infidelity, denied the paternity of two of his children, beat and abused his wife, and finally shot her and committed suicide himself, it was held to be an insane delusion, and the will was rejected. Burkhart v. Gladish, 123 Ind. 337; so too, Chaney v. Bryan, 16 Lea 63.

Intermittent mental delusions, resulting from disease, do not affect testamentary capacity, if the testator shows no signs of delusion at the time of the *factum*, and at such time knew and recalled his property and the persons who had claims upon his bounty. Lee v. Scudder, 4 Stew. (N. J.) 633. As no one has a claim upon the bounty of a testator that can be asserted as conclusive in a contest over a will, the cutting off of a son-in-law cannot be regarded as evidence of insane delusion. Brace v. Black, 125 Ill. 33.

Absurd prejudice, groundless antipathies, silly and chimerical hatreds, originating in acknowledged insanity, are evidences of delusion. Boyd v. Eby, 8 Watts 71. Insane delusion may exhibit itself by hating, without cause, persons formerly

"Mr. Locke, who practiced for a short time as a physician, \*though more distinguished as a philosopher, thus expresses himself in his highly esteemed work on the Human Understanding: 'Madmen having joined together some ideas very wrongly, mistake them for truths.—By the violence of their imaginations, having taken their fancies for realities, they make right deductions from them.' Hence it comes to pass, that a man who is of a right understanding in all other things, may, in one particular, be as frantic as any in Bedlam.—'Madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them' (u).

loved. *Bitner v. Bitner*, 65 Pa. St. 347. Sudden irritability, moroseness and unprovoked profanity, indicating a complete and radical change of disposition, may be shown as tending to prove insane delusion. *Conely v. McDonald*, 40 Mich. 150. But where probate is opposed on the ground of an insane delusion, and the court finds itself able to understand how a person situated in all respects as the decedent was, might have believed all which the evidence shows that he believed, and yet have been in full possession of his senses, contestant's case will be held to be unproved, *Phillips v. Chater*, 1 Dem. 533; unless it be shown that the disposition was the immediate offspring of the delusion. *Fraser v. Jennison*, 42 Mich. 206.

Insane delusions on the part of a testator as to any one of his relatives are sufficient to avoid his will. *Shaw's Will*, 2 Redf. 107; *Merrill v. Rolston*, 5 Id. 220. Evidence of existence of insane delusions is not countervailed by evidence of business capacity as to ordinary transactions. *Shaw's Will*, *ubi supra*; *Morse v. Scott*, 4 Dem. 507. And where the probate is opposed on the ground of insane delusion, it is admissible to show the good character of the heir at law when needed to prove that the testator was under a delusion on that point. *Mill's Appeal*, 44 Conn. 484. Delusions as to greenbacks, or that testator was courted by his wife, or that since

marriage she had maltreated him, do not *per se* prove a man incompetent to make a will. *Rice v. Rice*, 50 Mich. 448.

A person who persistently believes supposed facts, which have no real existence, against all evidence and probability, and conducts himself upon the assumption of their existence, is, so far as such facts are concerned, under an insane delusion. *Seamen's Friends Society v. Hopper*, 33 N. Y. 619; *Waters v. Cullen*, 2 Bradf. 354; *Lathrop v. American Board of Foreign Missions*, 67 Barb. 590; *Lathrop v. Borden*, 5 Hun 560; *Brick v. Brick*, 66 N. Y. 144; *Coit v. Patchen*, 77 Id. 533; *Denson v. Beazley*, 34 Texas 191; *Matter of White*, 31 N. Y. St. Rep. 528.

Upon proof of delusion naturally affecting the testamentary act, the *onus* of showing that the delusion did not exist at the time of the *factum* is upon the proponent. *Morse v. Scott*, 4 Dem. 507. Testimony by the attending physician of the testator that he had judiciously managed his property prior to his last sickness, tends to show that he was subject to no delusion. *Coryell v. Stone*, 62 Ind. 307. But where the mental condition of the testator is thoroughly established *abunde*, medical speculations relating thereto are entitled to little weight. *Rankin v. Rankin*, 61 Mo. 295.

(u) Locke on the Human Understanding, Book 2, c. 11, s. 13

“Here again, the putting wrong ideas together, mistaking them for truths, and mistaking fancies for realities, is Mr. Locke’s definition of madness; and he states, that insane persons will reason rightly at times, and yet still are essentially mad: and that they may be mad on one particular subject only” (x).

Although in the case of a person who is sometimes sane, and sometimes insane, if there is no direct proof of his state when he wrote his will, and there be in it a mixture of wisdom and folly, it is to be presumed that the same was made during the testator’s phrenzy, even if there be but one word “sounding to folly”(y); yet the Court of Probate will not at once reject an allegation propounding a will, which even strongly “sounds to folly” when facts are pleaded, showing that the deceased up to his death conducted himself in the ordinary concerns of life as a sane man (z).

In a case where a woman made a will, under a power authorising her to dispose of certain property by a will attested by two witnesses, the will was pronounced for, \*though both the witnesses deposed to the deceased’s incapacity (a).

The presumption of law is, that a verdict of a jury under a commission of lunacy, that the party, the subject of the commission, is of unsound mind, is well founded, and if the commission remained unsuperseded, that the party continued a lunatic to his death.<sup>22</sup> Such presumption, however, may be rebutted and displaced by positive proof of entire recovery or possession of a lucid interval when a testamentary instrument was executed (b).

Case of a will  
“sounding to  
folly”

A will may be  
pronounced for  
though both  
the attesting  
witnesses  
depose to the  
testator’s in-  
capacity,  
because the  
court disbelieved  
them on other  
evidence.

Effect of com-  
mission of  
lunacy.

(x) See the judgment of Sir H. Jenner Fust in *Mudway v. Croft*, 3 Curt. 671, as to the criteria by which to test and ascertain whether natural or innate eccentricity has exceeded the bounds of legal testamentary capacity. See also *Austen v. Graham*, 8 Moo. P. C. 493; *Boughton v. Knight*, L. R. 3 P. & D. 64.

(y) *Swinb. Pt. 2*, s. 3, pl. 15. See in *The Goods of Watts*, 1 Curt. 594.

(z) *Arbery v. Ashe*, 1 Hagg. 214.

(a) *Le Breton v. Fletcher*, 2 Hagg. 558. S. P. in *K. B.*, *Lowe v. Jolliffe*, 1 W. Bl. 365. See *Starnes v. Marten*, 1 Curt. 294; *post*, § 11.

22. When insanity is once shown to have existed, it is presumed to continue until the contrary is shown. *Sheets v. Bray*, 125 Ind. 33. It is not error in a will contest, on the ground of unsoundness of mind, to charge the jury that an inquest finding the testator of unsound mind and placing him under guardianship, which is in force at *factum*, is *prima facie* evidence of insanity and incapacity on the part of the testator to execute the will in question. *Stevens v. Stevens*, 127 Ind. 560.

(b) *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232, 239, 244, 245.

By the Roman law testaments might be set aside as being *inofficiosa*, deficient in natural duty, if they totally passed by (without assigning a true and sufficient reason) any of the children of the testator: though if the child had any legacy, however small, it was proof the testator had not lost his memory or his reason, which otherwise the law presumed. But the law of England makes no such constrained suppositions of forgetfulness or insanity; <sup>23</sup> and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosa* to set aside such testament(c). The modern doctrine requires only that there should be satisfactory proof of some kind of the testator's knowledge and approval of the contents of the will(d).

Besides the two classes of persons *non compotes mentis* already mentioned, viz., idiots and lunatics, Lord Coke mentions two more classes, viz., those who were of good and sound memory, and by the visitation of God have lost it; and those who have become *non compotes* by their own act, as drunkards(e). In the former of these two latter classes must be reckoned those who, from sickness, grief, \*accident, or old age, have lost their reason, who are not like those classed by Lord Coke, as "*lunatici*," sometimes having their understanding and sometimes not: but whose understandings are defunct; who have survived the period that Providence has assigned to the stability of their minds(f).

But old age alone does not deprive a man of the capacity of making a testament(g); for a man may freely make his testament how old soever

23. The doctrine of *testamentum inofficiosum* has no place in the law of New York. Phillips v. Chater, 1 Dem. 533, 535; Seguire v. Seguire, 3 Keyes 665; Clapp v. Fullerton, 34 N. Y. 196.

(c) 2 Black. Comm. 503. Wrench v. Murray, 3 Curt. 623.

(d) See *post*, Pt. I. Bk. IV. Ch. II. § 5.

(e) 4 Co. 124, b.

(f) Ex parte Cranmer, 12 Ves. 452, by Lord Erskine. Sherwood v. Sander-son, 19 Ves. 283. See also Ridgway v. Darwin, 8 Ves. 66.

(g) Swinb. Pt. 2, s. 5, pl. 1. Godolph. Pt. 1, c. 8, s. 4. Bird v. Bird, 2 Hagg. 142. Lewis v. Pead, 1 Ves. Jun. 19.

Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the court: Kindleside v. Harrison, 2 Phillim. 461, 462. And in cases where no insanity has either existed or been supposed to exist, the inquiry as to capacity simply is, whether the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done. But when lunacy or unsoundness of mind has previously existed, the investigation is of a totally different character: per Dr. Lushington, in Prinsep v. Dyce Sombre, 10 Moo. P. C. 278. Banks v. Goodfellow, L. R. 5 Q. B. 549.

he be ; since it is not the integrity of the body, but of the mind, that is requisite in testaments.<sup>24</sup> Yet if a man in his old age becomes a very

24. The questions to be determined in these cases are, as in other cases involving mental capacity, whether the testator had sufficient memory to recall his property and the persons upon whom, in the natural course of events, he would bestow it, sufficient mental capacity to construct a will, and a due appreciation of the business in hand and of the manner in which he wished to distribute his property. *Harrison v. Rowan*, 3 Wash. C. C. 580 ; *Clark v. Fisher*, 1 Paige 171 ; *Daniel v. Daniel*, 39 Pa. St. 191 ; *Yoe v. McCord*, 74 Ill. 33 ; *Carpenter v. Calvert*, 83 Id. 62 ; *Higgins v. Carlton*, 23 Md. 115 ; *Cornwell v. Riker*, 2 Dem. 354, 368 ; *Hathorn v. King*, 8 Mass. 371 ; *Bleecker v. Lynch*, 1 Bradf. 458 ; *Kinne v. Kinne*, 9 Conn. 102 ; *Horn v. Pullman*, 72 N. Y. 276 ; *Converse v. Converse*, 21 Vt. 168 ; *Matter of Forman*, 54 Barb. 274 ; *Lowder v. Lowder*, 58 Ind. 538. The mere fact that the testator is very aged cannot be made use of, of itself, to overthrow his will. *Thompson v. Kyner*, 65 Pa. St. 368 ; *Turner v. Cheeseman*, 2 McCart. 243 ; *Whitenack v. Stryker*, 1 Gr. Ch. 8 ; *McCulloch v. Campbell*, 49 Ark. 367 ; *Chrisman v. Chrisman*, 16 Oreg. 127 ; *Whitney v. Twombly*, 136 Mass. 145. Nor that being very aged he has recently married a wife under twenty years of age. *Thomas v. Stump*, 62 Mo. 275.

In *Collins v. Townley*, 6 C. E. Gr. 353, the will of a person ninety-eight years old was sustained, while in *Harrel v. Harrel*, 1 Duv. 203, that of a testator but seventy years of age was rejected. In *Minor v. Thomas*, 12 B. Mon. 106, the testator was ninety, and the witnesses testified that, in their opinion, he was *scarcely competent* ; the will was rejected. So, too, in *Shropshire v. Reno*, 5 J. J. Marsh. 91, the will was rejected, the testator being but

little over seventy, and it being shown that he was not entirely superannuated nor absolutely *stultus* or *fatuus* ; while in *Cornwell v. Riker*, 2 Dem. 354, the will of a woman of eighty-seven was sustained, notwithstanding strong testimony against her capacity ; and in *Potter v. McAlpine*, 3 Id. 108, the will of a feeble, crabbed, irritable, morose and petulant man of eighty-six was sustained, except as to one provision that was against good morals, and another which undertook to abrogate a statute. So, too, in *Stebbins v. Hart*, 4 Id. 501, where the testator was eighty years old and much addicted to drink, his will was sustained ; and in *Marshall's Estate*, 16 Phila. 393, the will was sustained, although the testatrix was ninety-six years of age, blind and deaf, and could not move or eat without assistance, nor speak nor recognize those about her ; and in *Collins v. Osborn*, 7 Stew. (N. J.) 511, where the testator was eighty-five and had been blind for fifteen years, these things were not considered conclusive evidence of incapacity ; nor where the testator was ninety-four years old. *Humphrey's Will*, 11 C. E. Gr. 513. And in *Naffle's Estate*, 134 Pa. St. 492, the will was sustained, the testator being eighty-four and having married a second time at the age of seventy-five ; and in *Wilson v. Mitchell*, 101 Id. 495, the testator being over one hundred years old, also blind and partially deaf, and with a treacherous memory, this was held not to be sufficient evidence of mental incapacity, and the will was sustained. Again, in *Horn v. Pullman*, 72 N. Y. 269, the will was sustained, the testator being eighty-three, suffering from infirmities of age and the effects of a recent severe illness, sight poor and memory somewhat shattered. And in one case, where the testator was ninety-two years of age, his

child again in his understandings, or rather in the want thereof, or by reason of extreme old age, or other infirmity, he is become so forgetful

will was sustained against a strong effort to overthrow it. on the ground of *senile dementia*. Matter of Soule, 1 Connoly 18.

Perverse opinion, violence of manner, ill-temper, moroseness, severity and even brutality are to be distinguished from alienation of mind. Riggs v. American Tract Society, 95 N. Y. 503, 513; In re Lewis, 6 Stew. (N. J.) 219; Frowert's Estate, 11 Phila. 136.

No expression is more common in connection with this subject than "sound memory." It may be well, then, to consider what is a "sound" memory, especially in this connection. In Den v. Johnson, 2 South. 454, this definition is given: "Sound signifies whole, unbroken, unimpaired, unshattered by disease or otherwise." However, it is certain that every discomposure of the mind by melancholy, grief, sorrow, misfortune, sickness or disease will not render one incapable of making a will. The discomposure must be such a derangement as deprives one of the rational faculties common to man. Den v. Van Cleve, 2 South. 589, 660. The term "unsound mind" is held to be synonymous with *non compos mentis*. Mairs v. Freeman, 3 Redf. 181, 208; Blanchard v. Nestle, 3 Den. 37; Stewart's Executors v. Lisenard, 26 Wend. 255. Weakness is not necessarily unsoundness, but there may be a weakness short of idiocy, either congenital or superinduced by disease or old age, that amounts to unsoundness. It is within the observation of nearly every one, that in extreme old age the mental powers nearly fade out. Under such circumstances it is clearly a case of unsoundness of mind as distinguished from lunacy or idiocy. As to the measure of that weakness which amounts to unsoundness, it may be said that it is not easy to distinguish between that which does and that

which does not, because the one often shades off into the other; and the mental weakness of old age does not always open the door to delusions. Smith v. Hickenbottom, 57 Iowa 533, 540. Yet a person may be so diseased mentally as not to be of sound mind and still have capacity to make a will, having a disposing mind. Freeman v. Easly, 117 Ill. 317. *Absolute* soundness of mind is not requisite, but only such amount and kind of mental ability as will enable the testator to know what he is doing. Delaney v. City of Salina, 34 Kans. 532. The unsoundness of mind sufficient to defeat a will need not be such as that the testator does not realize that he is making a will; although he knows that he is making a will, if he does not comprehend the nature of the act and extent of his property, he is incapable. Young v. Ridenbaugh, 67 Mo. 574; Garrison v. Blauton, 48 Tex. 299. The strength of mind must be equal to the business in hand. Garrison v. Blauton, *ubi supra*.

Merely weakness of mind is not sufficient to invalidate a will, if the testator had sufficient mind to comprehend the nature and effect of the business in hand. "When it is considered that a very large proportion of wills are made in old age or upon the sick-bed, after the mind has lost a portion of its former vigor, and has become somewhat enfeebled by age or the effect of disease, the wisdom of the above rule becomes apparent." Parker, S., in Legg v. Myer, 5 Redf. 628, 635. "By a sound mind, within the meaning of the law, is not meant a mind which is perfectly balanced and free from all prejudice and passion; else the circle of competent will-makers would be, indeed, a narrow one." Rollins, S., in Phillips v. Chater, 1 Dem. 533, 547. See Nicholas v. Kershner, 20 W. Va. 251.



that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or lunatic person (*h*).

But where a testator is in a dying condition, if his mind, upon his being aroused from his condition of stupor, acts clearly and with discriminating judgment in respect of the act to be done and the objects of his bounty, he has sufficient testamentary capacity. *Campbell v. Campbell*, 130 Ill. 466.

A will is not to be set aside merely because its maker was weak, or sometimes foolish, or lacked the average mental capacity of his neighbors, or did not dispose of his property as others, who know nothing of his reasons, might think he ought to have done. *Rice v. Rice*, 50 Mich. 448; *Hoban v. Piquette*, 52 Id. 346; *Storer's Will*, 28 Minn. 9. Failure of memory, being a natural attendant upon age, will not incapacitate an aged person from making a will, *Reynolds v. Root*, 62 Barb. 250; *Pilling v. Pilling*, 45 Id. 86, 95; *Matter of Wintermute*, 12 C. E. Gr. 447; *Wilson v. Mitchell*, 101 Pa. St. 495; *Matter of Eddy*, 5 Stew. (N. J.) 701; nor does morbid avarice, or senility or physical weakness, *Potter v. McAlpine*, 3 Dem. 108, 118; *Re Lewis*, 6 Stew. (N. J.) 219. Testamentary incapacity cannot be inferred from an enfeebled condition of mind or body. *Horn v. Pullman*, 72 N. Y. 269; *Children's Aid Society v. Loveridge*, 70 Id. 387, 410; *Stebbins v. Hart*, 4 Dem. 501; *Wintermute v. Wilson*, 1 Stew. (N. J.) 437; *Chrisman v. Chrisman*, 16 Oreg. 127; *Rutherford v. Morris*, 77 Ill. 397. And it is error to instruct a jury that the will is void if the testator was so feeble in mind or body that he was not able to see attesting witnesses sign. *Spoonemore v. Cables*, 66 Mo. 579. Nor is mere physical weakness *per se* incapacity. *Burley v. McGough*, 115 Ill. 11. Nor is temporary mental delusion at times when

suffering from paroxysms of pain sufficient to show that the testator was not capable. *Blake v. Rourke*, 74 Iowa 519.

The fact of senility raises no presumption of dementia, *Cornwell v. Riker*, 2 Dem. 354, 366; *Moore v. Moore*, 2 Bradf. 261; *Maverick v. Reynolds*, Id. 360; *Leaycraft v. Simmons*, 3 Id. 35; *Carroll v. Norton*, Id. 291; *Horn v. Pullman*, 72 N. Y. 276; *Crolins v. Stark*, 64 Barb. 112; *Clark v. Fisher*, 1 Paige 171; *Van Alst v. Hunter*, 5 Johns. Ch. 158; *Andreas v. Weller*, 2 Green Ch. 604; *Collins v. Townley*, 6 C. E. Gr. 353; *Humphrey's Will*, 11 Id. 513; *Comstock v. Hadbyrne*, 8 Conn. 254; *Stebbins v. Hart*, 4 Dem. 501; *McCulloch v. Campbell*, 49 Ark. 367; *Kerr v. Lunsford*, 31 W. Va., 659; *Whitney v. Twombly*, 136 Mass. 145; unless undue influence is practiced. *Rutherford v. Morris*, 77 Ill. 397.

The question as to the capacity of the testator is a question of fact. *Chrisman v. Chrisman*, 16 Oreg. 127; *Philadelphia Trust Co. v. Drinkhouse*, 17 Phila. 23; *Brown v. Ward*, 53 Md. 376. So, too, as to knowledge of the contents, in regard to which the jury must be satisfied that testator was acquainted with it, but this may be proved by circumstantial evidence, direct evidence not being necessary. *Montague v. Allen*, 78 Va. 592.

But if the testator be very aged, and at the same time his sight and hearing are both impaired, the case presents such an opportunity for fraud or influence that great care should be taken to make sure that the will is the actual will of the decedent and was not obtained by undue influence. *Weir v. Fitzgerald*, 2 Bradf. 42. Failure of memory is not sufficient to create the incapacity unless it be quite total or extends to the testator's imme-

(*h*) *Swinb. ubi supra*. *Godolph. ubi supra*.

"It is not necessary," observed Lord Chief Baron Eyre, in *Mountain v. Bennett* (i), "to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question, whether he was of a sound and disposing mind, memory and understanding. A man perhaps may not be insane, and yet not equal to the important act of disposing of his property by will."

So it was agreed by the judges in *Combe's Case* (k), that sane memory for the making a will is not at all times when \*the party can speak "yea or no," or had life in him, nor when he can answer to anything with sense: but he ought to have judgment to discern, and to be of perfect memory. And it is said by Lord Coke, in the *Marquis of Winchester's Case* (l), that it is not sufficient that the testator be of memory when he makes his will to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his property with understanding and reason; and that is such a memory which the law calls sane and perfect memory (m). So it is laid down by Erskine, J., in delivering the opinion of the Judicial Committee of the Privy Council, in *Harwood v. Baker* (n), that in order to

diate family or property, *Van Alst v. Hunter*, 5 Johns. Ch. 148; especially if such failure be merely such as incident to old age. *Montague v. Allen*, 78 Va. 592; *Wilson v. Mitchell*, 101 Pa. St. 495. So where, on a question of mental incapacity, the claim is only of incapacity such as arises by gradual decay of faculties from great age, it is proper to show, in order to prove sufficient capacity, that after the trial in question, and without regard to how long after, the person had sufficient capacity. *Pinney's Will*, 27 Minn. 280. But inability to transact ordinary business, arising from physical weakness, does not of itself incapacitate one from making a will, and, as a general proposition, if a testator is able to attend to the ordinary affairs of life, this will have great weight for the will on an attempt to defeat the will for lack of mental capacity. *Brown v. Riggan*, 94 Ill. 560; *Meeker v. Meeker*, 75 Id. 260; *Brinkman v.*

*Rueggessick*, 71 Mo. 553; *Carpenter v. Calvert*, 83 Ill. 62.

(i) 1 Cox, 356.

(k) Moor 759. Vin. Abr. tit. Devise, A. 224. Burn, E. L. 49.

(l) 6 Co. 23, a. 4 Burn, E. L. 49.

(m) See further, *Herbert v. Lowms*, 1 Chanc. Rep. 24. *Dyer*, 27, a, in marg. *Ball v. Mannin*, 3 Bligh, N. S. 1. See also the judgment of Sir John Nicholl, in *Marsh v. Tyrrell*, 2 Hagg. 122, as to the rules by which the competency of the mind must be judged; and see further the judgment of the same learned judge in *Ingram v. Wyatt*, 1 Hagg. 401, where some valuable remarks on the subject of imbecility of mind will be found. For an instance, where weakness of mind and forgetfulness will not constitute incapacity, see *Constable v. Tuffnell*, 4 Hagg. 465: affirmed on appeal, 3 Knapp, 122.

(n) 3 Moo. P. C. C. 282, 290.

constitute a sound disposing mind the testator must not only be able to understand that he is by his will giving the whole of his property to the objects of his regard, but must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his will, he is excluding from participation in that property (o).<sup>25</sup>

On the other hand it must be observed, that mere *weakness* of understanding is no objection to a man's disposing of his estate by will; for courts cannot measure the size of people's understandings and capacities; nor examine into the wisdom or prudence of men in disposing of their estates (p).<sup>26</sup> "If a man," says Swinburn (q), "be of a mean understanding \*(neither of the wise sort or the foolish), but indifferent as it were, betwixt a wise man and a fool, yea, though he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed *grossum caput*, a dull pate, or a dunce, such a one is not prohibited from making his testament" <sup>27</sup>(r).

(o) See also *Sefton v. Hopwood*, 1 Fost. & F. 578. *Swinfen v. Swinfen*, 1 Fost. & F. 584.

25. The burden of proof that the mind of the testator was imbecile is on the party impeaching the will. 2 Greenl. Ev., § 689. The attesting witnesses to a will are placed there by statute to be satisfied not only that the act done was performed by the testator, but that he was in a mental condition that qualified him to dispose of his property by will. For this reason such witnesses are not only allowed, but expected, to give their opinions as to the mental condition of the testator at the time the will in question was executed. Other witnesses are to state facts that tend to show the state of mind of the testator, but they will not be permitted to give their opinions, merely, of the mental capacity of the testator. 2 Greenl. Ev., § 69. The subscribing witnesses to a will are those called by the testator for the express purpose of attesting after the death of the testator to the circumstances attending the execution of the will; their posi-

tion is, therefore, one of advantage before the court, which pays particular regard to the facts they state as having occurred, and even in their opinions as to the capacity of the testator. *Clifton v. Clifton*, 2 Dick. 237, 239; *Cockrill v. Cox*, 65 Tex. 669; *Kerr v. Lunsford*, 31 W. Va. 659.

(p) *Osmond v. Fitzroy*, 3 P. Wms. 129.

26. The amount of mental capacity must be equal only to the subject with which it has to deal. *Clifton v. Clifton*, 2 Dick. 227, 241; *Wade v. Holbrook*, 2 Redf. 378, 387. And where the capacity is fluctuating and at times sinking into the imbecility of second childhood, yet where the weight of evidence is in favor of capacity when in ordinary health and free from excitement, the will may be sustained. *Boylan v. Meeker*, 2 McCart. 310. Mere forgetfulness alone will not disqualify one from making a will. *Mairs v. Freeman*, 3 Redf. 181, 208. See note 1, *ante* p. 11.

(q) Pt. 2, s. 4, pl. 3.

27. In cases of this kind an important circumstance is, that the will is reason-

(r) See also *Harrod v. Harrod*, 1 Kay & J. 4.

As to the last of the classes of *non compotes* mentioned by Lord Coke ;

“He that is overcome by drink,” says Swinburn (s),

**Persons drunk :** “during the time of his drunkenness is compared to a madman (t), and, therefore, if he make his testament at that time, it is void in law ; which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding ; otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his testament, being in that case” (u). In a case where it appeared that the testator was a person not properly insane or de-

habitu-  
al drunkenness. ranged, but habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted in most respects like a madman, it was held that as the testator was not under the excitement of liquor, he was not to be considered as insane at the time of making his will ; and the will itself was accordingly established (x), and the court pointed out the difference between the present case and one of actual insanity ; inasmuch as insanity may often be *latent*, whereas there can scarcely be such a thing as latent ebriety ; and consequently, in a case like the one under consideration, all which requires to be shown is, the absence of the excitement at the time of the act done ;<sup>28</sup> or at least the absence of excitement in any such degree as would vitiate the act done (y).

able and natural, showing strongly that the testator had sufficient capacity to understand thoroughly the business about which he was engaged. *Pancoast v. Graham*, 2 McCart. 274 ; *Clifton v. Clifton*, 2 Dick. 227, 240.

(s) Pt. 2, s. 6.

(t) See *Gore v. Gibson*, 13 M. & W. 623.

(u) See also *Godolph. Pt. 1, c. 8, s. 5*.

(x) *Ayrey v. Hill*, 2 Add. 206. See also *Billinghurst v. Vickers*, 1 Phillim. 191. *Handley v. Stacey*, 1 Fost. & F. 574.

28. Intoxication is temporary insanity, ceasing with the cause. All rules as to

burden of proof are, therefore, changed in this class of cases. A person is not incapacitated from making a will because of habits of intoxication, not even though he may have suffered from *mania a potu*. No amount of evidence to establish such facts will shift the burden of proof. The proponent of the will has but to prove the will ; if the contestant allege that the testator was incompetent, on the ground of drunkenness, the necessity is on him to *prove* that, at the time of the *factum*, the testator was suffering from delirium occasioned by drink. The reason of the rule is evident, and must commend itself at once. The duration

(y) 2 Add. 210. See also *Wheeler v. Alderson*, 3 Hagg. 602, 608. In the case of *Rex v. Wright*, 2 Burr. 1099, a rule was obtained to show cause why a criminal information could not be exhibited

against certain persons, for a misdemeanor in using artifices, in order to obtain a will from a woman addicted to, and almost destroyed by, liquor.

\*If a will be executed by a testator of sound mind at the time of execution, and be afterwards wholly or partially defaced by him, while of unsound mind, such will is to be pronounced for as it existed in its integral state, that being

A will defaced  
by the testator  
while non  
compos.

of delirium from this cause is but temporary, and when the force of the intoxicant has expended itself, reason returns and the patient is immediately competent to transact his ordinary business. Hence, the rule is, both at law and in equity, that the acts of such a party will not be invalidated, unless it be proved that he was so far deprived of his faculties as to be unable understandingly to perform the act, or to give a free consent, or to be unduly under the influence of others.

But in one case it was held, contrary to the general rule, that, where the testator was, for some time prior to the execution of his will and until death, in general in a state of derangement produced by drink, but enjoying some intervals in which he was of disposing mind, in order to establish the will it ought to appear, by undoubted proof, that the will was made in one of those intervals. *Cochran's Will*, 1 Mon. 263.

Habitual drunkenness will not, *per se*, constitute incapacity to make a valid will. *Thompson v. Kyner*, 65 Pa. St. 368; *McLaughlin's Will*, 2 Redf. 504; *Kahl v. Schober*, 8 Stew. (N. J.) 461; *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Pierce v. Pierce*, 38 Mich. 412; *Estate of Johnson*, 57 Cal. 529; *Estate of Lang*, 65 Id. 19. The testator may have habits of intemperance, and yet, in the eye of the law, possess that sound mind necessary to a disposition of his estate. *Turner v. Cheeseman*, 2 McCart. 243.

But, where one is lunatic from the excessive use of ardent spirits, the question is, whether he had recovered that quantum of disposing mind which ought to give the writing effect. *Pancoast v. Graham*, Id. 294, 300.

And, where a testator was addicted periodically to excessive drinking but was not habitually intoxicated, it was held that this did not constitute incapacity. *Harmony Lodge's Appeal*, 127 Pa. St. 269. But proof that he was intoxicated at the time of the *factum* is competent, on an issue of undue influence, to show such influence. *Estate of Cunningham*, 52 Cal. 465.

In *Waters v. Cullen*, 2 Bradf. 354, the will was set aside, on the ground of insanity, where the testatrix died of *delirium tremens*, to which she had been more or less subject for some time; while, in *Stebbins v. Hart*, 4 Dem. 501, the will was sustained, the testator being over eighty years of age and much addicted to intemperance, and there being some question as to whether the last illness, during which the will was made, was not the result of excessive drink; and, in *Kahl v. Schober*, *ubi supra*, the will was sustained, although the last illness of testator was the result of habits of drunkenness; and when a testator recovered from a severe attack of *mania a potu* and made his will, and the next day committed suicide, it was held that this was not sufficient ground to hold that he was incapacitated at the time of the *factum*, and the will was sustained. *McElwee v. Ferguson*, 43 Md. 479.

Where the will was drafted by the testator himself, and its terms are reasonable, this will be strong evidence of a sound and disposing mind, although there be much evidence to prove that the testator was, and had long been, a man of very intemperate habits. *McLaughlin's Will*, 2 Redf. 504, 516. And, even though the testator be a habitual drunkard, subject

ascertainable (z). Accordingly, where a testatrix having duly executed her will, subsequently became insane, and shortly before her death, it was discovered that the will had been mutilated by her; but it was proved to have been in her custody for a short time subsequent as well as prior to her insanity: it was held by Sir C. Cresswell that the *onus* of showing her to have been of sound mind when she mutilated it was on the party alleging the revocation (a).

*Onus of showing sanity at the time of mutilation.*

Before the Wills act when signature was not essential to the execution of a will questions used to arise as to mental incapacity supervening between instructions for a will and its execution, and it was held that part of a will might be established and part held not entitled to probate if actual incapacity were shown at the time of the execution of the latter part (b).

*Insanity supervening between the instructions for a will and its execution.*

*Effect of, before the Wills Act.*

It was decided by the House of Lords in the great case of Doe dem. Tatham v. Wright (c), that letters written to the testator, and not acted upon, or indorsed, or answered by him, are not evidence of his sanity.

*Letters written to testator not evidence of his sanity.*

## SECTION II.

### PERSONS INCAPABLE FROM WANT OF LIBERTY OR FREE-WILL.

Such persons as are intestable for want of liberty or freedom of will are, by the civil law, of various kinds, as \*prisoners, captives, and the like (d). But the law of England does not make such persons absolutely intestable, but only leaves it to the discretion of the court to judge upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animi testandi* (e).

If it can be demonstrated that actual force was used to compel the

to the control of a commission, he will not necessarily be incapacitated from making a valid will. *Lewis v. Jones*, 50 Barb. 645.

(z) *Scruby v. Fordham*, 1 Add. 74. In the *Goods of Brand*, 3 Hagg. 754.

(a) *Harris v. Berrall*, 1 Sw. & Tr. 153.

(b) *Billinghurst v. Vickers*, 1 Phil. 187; *Wood v. Wood*, Ib. 357.

(c) 4 Bing. N. C. 489. See *Rosc. Evid.* 14th edition, 973.

(d) *Swinb. Pt. 2*, s. 8; *Godolph. Pt. 1*, c. 9.

(e) 2 Black. Comm. 497.

testator to make the will, there can be no doubt, that although all formalities have been complied with, and the party perfectly in his senses, yet such a will can never stand (*f*). Will obtained by force:

So, if there were, at the time of bequeathing, a fear upon the testator, it could not be, as it ought, *libera voluntas* (*g*). Yet it must be understood, that “it is not every fear, or a vain fear that will have the effect of annulling the Will; but a just fear, that is, such as that indeed without it the testator had not made his testament at all, at least not in that manner (*h*). A vain fear is not enough to make a testament void; but it must be such a fear as the law intends when it expresses it by a fear that may *cadere in constantem virum* (*i*): as the fear of death, or of bodily hurt, or of imprisonment, or of loss of all or most part of one’s goods, or the like (*k*)<sup>29</sup>: whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened; in the person threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity and the like” (*l*). by fear:

Fraud is no less detestable in law than open force. Wherefore, when the testator is circumvented by fraud, the testament is of no more force than if he were constrained by fear (*m*). by fraud: With regard to what deceit shall annul a testament on the ground of fraud, as in the case of a will made under fear, it is left to the discretion of the judge, comparing the deceit to the capacity or understanding of the person deceived to discern whether it be such as

(*f*) *Mountain v. Bennett*, 1 Cox, 355, by Eyre, C. B.

(*g*) *Godolph. Pt. 3, c. 25, s. 8. Swinb. Pt. 7, s. 2, pl. 1.*

(*h*) *Godolph. Pt. 3, c. 25, s. 8.*

(*i*) *Godolph. Pt. 3, c. 25, s. 8. Swinb. Pt. 7, s. 2, pl. 7.*

(*k*) *Swinb. Pt. 7, s. 2, pl. 7.*

29. Or fears arising from practicing on the religious beliefs of the testator by one having “a spiritual ascendancy” over him, *Norton v. Rely*, 2 Eden 286; or where a priest persuades testator to make peace with the religion at which he had scoffed during a score of years. Will of Langton, Tuck. 301, 329. On a question

of undue influence on part of the pastor of the testatrix, it is discretionary with the court as to whether a book on hell, which she had in her library and was wont to read, shall be admitted. *Melanefy v. Morrison*, 152 Mass. 473.

(*l*) *Swinb. Pt. 7, s. 2, pl. 7. See Nelson v. Oldfield*, 2 Vern. 76.

(*m*) *Swinb. Pt. 7, s. 3, pl. 1.* Fraud and imposition upon weakness is a sufficient ground to set aside a will of real, much more of personal estate, though such weakness is not sufficient to ground a commission of lunacy: By Lord Hardwicke, in *Lord Donegal’s Case*, 2 Ves. Sen. 408

may overthrow the testament or not<sup>(n)</sup>.<sup>30</sup> If a part of a will has been obtained by fraud, probate, it should seem, ought to be refused as to that part, and granted as to the rest<sup>(o)</sup>.<sup>31</sup>

It was settled by the case of *Allen v. McPherson*<sup>(p)</sup> that a will, whether of personal or real property, could not be set aside *in equity* on the ground that the will was obtained by fraud and imposition; because a will of personal estate might be annulled for fraud in the

(n) Swinb. Pt. 7, s. 3, pl. 3. See also the cases cited by Lord Lyndhurst, in *Allen v. McPherson*, 1 H. of L. 207, 208, of wills obtained by false representations.

30. "The modes of fraud are infinite; and it has been said that courts of equity have very wisely never laid down as a general proposition what shall constitute fraud or any general rule beyond which they will not go upon the ground of fraud, lest other means of avoiding the equity of the courts may be found. It is usually and accurately divided however into two large classes, actual fraud and constructive fraud." Flood on Wills 396. It is only on allegations of fraud that courts will inquire into reasons for changes and inequalities in testamentary dispositions, and then they will consider them in connection with, and as corroborative of, proofs which tend to show that they were not the voluntary act of the person who made them. *Dumont v. Dumont*, 1 Dick. 223. Inequalities in distribution are not evidences of fraud. *Kitchell v. Beach*, 8 Stew. (N. J.) 446. Whether the will was obtained by means of fraud is a question of fact, not of law. *Griffith v. Diffenderffer*, 50 Md. 466. But it is not essential to make direct or positive proof of fraud; it may be established by circumstances. *Swenarton v. Hancock*, 22 Hun 38; *Shailer v. Bumstead*, 99 Mass. 112.

Fraudulent misrepresentations are fraud, and a will obtained by such means will not be sustained. *Id.* But misapprehension alone will not defeat the will; the representations must have been fraudulent. *Estate of Sittle*, My-

rick Prob. 12. Deception will amount to fraud. *Matter of Farnsworth*, 62 Wis. 474. In order to set aside a will on account of fraud, it must amount to constraint. *Will of Shaw*, 11 Phila. 51. So, too, in *Will of Bouse*, 18 Ill. App. 433. In a contest against a devisee, in which fraud is alleged, it is competent to show the procurement of a deed by the devisee from the testator, for the purpose of ascertaining the feelings of the testator toward the devisee. *Canada's Appeal*, 47 Conn. 456. An executor is not estopped from setting aside a will procured by his own fraud. *Brookie v. Partwood*, 84 Ky. 259.

(o) *Allen v. McPherson*, 1 H. of L. 191. *Trimbletown v. D'Alton*, 1 Dow, N. S., stated *post*, p. \*41.

31. This was so held in *Baker's Will*, 2 Redf. 179. So, too, if one legacy be obtained by undue influence, this will not invalidate the remainder of the will. *Harrison's Appeal*, 48 Conn. 202. This depends on how the alleged undue influence is used. *In re Welsh*, 1 Redf. 238; *Florey v. Florey*, 24 Ala. 241; *McIntire v. Worthington*, 68 Md. 203. So, one part of a codicil may be rejected for undue influence and the remainder be sustained. *Ogden v. Greenleaf*, 143 Mass. 349.

(p) 1 H. L. 191. In some earlier cases we find the Court of Chancery distinctly asserting its jurisdiction to relieve against fraud in obtaining wills, as in *Maundy v. Maundy*, 1 Ch. Rep. 123; in other cases, disclaiming such jurisdiction, though the fraud was gross and palpable, as in *Rob-*



Court of Probate, and a will of real estate might be set aside at law; for in such cases, as the *animus testandi* is wanting, it cannot be considered as a will (q).

If a man (said Rolle, C. J., at a trial at bar) makes a will in his sickness, by the over-importunity of his wife, to the  
 \*end he may be quiet, this shall be said to be a will <sup>by importunity:</sup>  
 made by constraint, and shall not be a good will (r).<sup>32</sup>

Importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; <sup>33</sup> it must be such impor-

erts v. Wynn, 1 Ch. Rep. 236; and in other cases, steering a middle course, by declaring the party who practised the fraud a trustee for the party prejudiced by it: Herbert v. Lowms, 1 Chanc. Rep. 22.

(q) As to how far the jurisdiction of the Probate Division is exclusive in respect of the grant or revocation of probate, see *post* Pt. I. Bk. IV. Ch. I. § I. The Chancery Division has since the Judicature act complete jurisdiction to establish or set aside a will of real property.

(r) Hacker v. Newborn, Styles, 427. See also Money Penny v. Brown, 8 Vin. Abr. 167, tit. Devise (Z 2), pl. 7. Lamkin v. Babb, 1 Cas. temp. Lee, 1.

32. But all wills made at the importunity of the wife will not be set aside. Potts v. House, 6 Ga. 324; Small v. Small, 4 Greenl. 220; Jackman's Will, 26 Wis. 104; Pierce v. Pierce, 38 Mich. 412; Will of Storey, 20 Ill. App. 183; Hughes v. Murtha, 5 Stew. (N. J.) 288. Nor is the request of a wife to be appointed one of the executors evidence of fraud or undue influence. Black v. Foljambe, 12 Stew. (N. J.) 234. Nor will a will which describes the residuary legatee as "my beloved wife, I. P. McG," she being the person with whom testator was living as his wife, although his lawful wife was at the time living, be set aside on the allegation of influence. Will of McGuire, Tuck. 196. Nor will the fact that the sister of the wife procured the attendance of the lawyer to draw the will.

Black v. Foljambe, *ubi supra*. In a case in Iowa where the evidence showed that the wife married her husband, who was sick at the time, for the purpose of obtaining his property, and made merry with her friends on the day of his death, the will, which was in her favor, was not sustained. Primmer v. Primmer, 75 Iowa 415.

33. A will could not be set aside on the ground of undue influence unless such influence amount to a degree of constraint, such as the testator is too weak to resist; such as would deprive him of his free agency and would prevent him from doing as he pleased with his property. Chandler v. Ferris, 1 Harr. (Del.) 454; Booth v. Kitchen, 3 Redf. 52, 67; Stebbins v. Hart, 4 Dem. 501; McCulloch v. Campbell, 49 Ark. 367; Trost v. Dingler, 118 Pa. St. 259; Layman v. Conrey, 60 Md. 286; Ahmon v. Pigg, 82 Ill. 149; Latham v. Schaal, 25 Neb. 535. But such influence or importunity sufficient to invalidate the will may be exercised without the existence of fraud. Stewart v. Elliott, 2 Mackey 307. Suggestions by the scrivener will not necessarily constitute undue influence. Blake v. Rourke, 74 Ia. 519. But when a testator, at the suggestion of the scrivener, inserted legacies to heirs, not children, on the suggestion that they must be named, this was considered undue influence. Whitman v. Morey, 63 N. H. 448.

tunity as he is too weak to resist; such as will render the act no longer the act of the deceased; not the free act of a capable testator; in order to invalidate the instrument (s).

A will made by interrogatories is valid: but undoubtedly when a will is so made, the court must be more on its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition than it would be in an ordinary case (t).

With respect to a will obtained by influence, it is not unlawful for a man, by honest intercession and persuasion, to procure a will in favour of himself or another person (u): Neither is it to induce the testator, by fair and flattering speeches (x)<sup>34</sup>: for though persuasion may be employed to influence the dispositions in a

(s) By Sir John Nicholl, in *Kindleside v. Harrison*, 2 Phillim. 551, 552.

(t) *Green v. Skipworth*, 1 Phillim. 58.

(u) Swinb. Pt. 2, s. 4, pl. 1. It is no part of the testamentary law of this country, that the making a will *must originate* with a testator; nor is it required that proof should be given at the commencement of such a transaction, provided it be proved that the deceased completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition: By Sir J. Nicholl, in *Constable v. Tufnell*, 4 Hagg. 477; affirmed on appeal, 3 Knapp, 122.

(x) Swinb. Pt. 7, s. 4, pl. 1.

34. The procuring a will to be made, unless by foul means, is nothing against its validity. One may, by fair argument and persuasion, or even by flattery, induce another to make a will, and even to make it in his favor. *Miller v. Miller*, 3 Serg. & R. 267; *Blanchard v. Nestle*, 3 Denio 37; *Burk's Will*, 2 Redf. 239, 243; *McCulloch v. Campbell*, 49 Ark. 367; *Wise v. Foote*, 81 Ky. 10; *Lucas v. Carnnon*, 13 Bush 650; *Maynard v. Vinton*, 59 Mich. 139.

In a well considered case in New York, the provisions of a will in favor of the husband of the testatrix, who had persuaded

her that he had the right to marry her, he having another wife living, from whom he had obtained a fraudulent and illegal divorce, were set aside on the ground of undue influence. *Baker's Will*, 2 Redf. 179. But in one case flattery is said to indicate undue influence. *Schofield v. Walker*, 58 Mich. 96.

Undue influence often arises from the relations existing between a testator and his spiritual adviser. Courts look with great scrutiny at the transaction where the circumstances are such as to raise the question whether the will was procured through the undue influence of the spiritual adviser. But a spiritual adviser may present, and present earnestly, to a testator proper arguments and enforce motives to persuade the intellect and quicken the conscience, and the result of such importunity will be upheld where the testamentary disposition arising therefrom is praiseworthy and does not violate natural obligation. *Merrill v. Rolston*, 5 Redf. 220, 235. But it will not be sustained where one who had scoffed at the church makes a disposition of his estate, on the eve of his death, to that church, in the presence of a priest and his counsel, and without the knowledge of his family. *Will of Langton*, Tuck. 301, 329. Where the testator

will, this does not amount to influence in the legal sense;<sup>35</sup> and whether or not a capricious partiality has been shown, the court will not inquire. But where persuasion is used to a testator on his death-bed, when even a word distracts him, it may amount to force and inspiring fear (y).<sup>36</sup>

gave a large part of his estate to a church, of which the draftsman was a vestryman, to the exclusion of his relatives, who were kept away until the testator was *in extremis* and after the execution of the will, it was adjudged to be so suspicious as to give to the jury the right to consider whether the will was not produced by undue influence and required explanation on the part of persons propounding the will. *Drake v. Appeal*, 45 Conn. 9.

So also as to similar case of a hospital, see *Muller v. St. Louis Hospital Assn.*, 73 Mo. 242. But the solitary circumstance of the existence of the relation of confidant and spiritual adviser between the testator and the chief beneficiary under the will is insufficient to establish the presumption of fraud or undue influence. *Figueira v. Taafe*, 6 Dem. 166. But the mere fact that the legatee had an influence growing out of confidential relations is no objection unless such influence was used. *Brinkman v. Rueggessick*, 71 Mo. 553.

35. *Creely v. Ostrander*, 3 Bradf. 107; *Chandler v. Ferris*, 1 Harr. (Del.) 454. Neither advice, nor argument, nor persuasion would vitiate a will made freely and from conviction, although the will might never have been made except for such advice or persuasion. The fact that the provisions of a will were changed by a testator in compliance with the request of, and in order to gratify, his wife will not *per se* prove undue influence. *Rankin v. Rankin*, 61 Mo. 295. Nor where changed in favor of a niece who had long cared for the testatrix. *Clifton v. Clifton*, 2 Dick. 227. Nor where

changed in favor of the person in whose handwriting the codicil changing the will is. *Booth v. Kitchen*, 3 Redf. 52. Nor a change in favor of a daughter, who lived with testatrix, to the exclusion *pro tanto* of the son, who was absent. *Neiheisel v. Toerge*, 4 Id. 328, 336. Nor will the fact that the legatee had for a long time made his home with the testator prove undue influence. *Foster's Estate*, 142 Pa. St. 62. Nor that the testator's wife urged upon him the propriety of leaving his property to her. *Hughes v. Murtha*, 5 Stew. (N. J.) 288.

And the motive to favor those toward whom a testator's feelings are the most friendly, which was to be inferred from the circumstances, will rebut any presumption of undue influence to be drawn from the fact of intimate and confidential relations between a testator and a daughter thus favored, or from the fact that such child contributed to increase and keep alive family differences. *Coit v. Patchen*, 77 N. Y. 533. And in one case where the testator gave to his wife's relatives to the exclusion of his own, the circumstances were such that the court held that it was more natural so, and therefore it was no evidence of undue influence. *Burge v. Hamilton*, 72 Ga. 568.

(y) By Sir Wm. Wynne, in *Dickinson v. Moss*, Prerog. T. 1790. MS. 4 Burn, 58 Tyrwhitt's Edit.

36. Any influence brought to bear on the mind of a testator, which leads him to surrender his free agency and adopt the will of another, is undue, and vitiates the will. *Van Kleeck v. Phipps*, 4 Redf. 99; *Merrill v. Rolston*, 5 Id. 221; *Car-*

\*The sort of influence which will invalidate a will is thus described by Eyre, C. B., in *Mountain v. Bennett*(z): "There is another ground, which though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the will; that is, if a dominion was required by any person over a mind of sufficient sanity *to general purposes*, and of sufficient soundness and discretion to regulate his affairs *in general*; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind." 37

But the influence to vitiate an act must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; 38 it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it

roll v. Hause, 3 Dick. 269; *Primmer v. Primmer*, 75 Iowa 415; *Lucas v. Cannon*, 13 Bush 650.

(z) 1 Cox, 355.

37. Unless it is an *interested influence* it cannot be considered that it is an undue influence. *Harrison's Will*, 1 B. Mon. 351. But, *contra*, *Carroll v. Hause*, 3 Dick. 269, 273. But it is immaterial by whom such influence is exercised, if the free agency of the testator be destroyed or coerced. *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *Davis v. Calvert*, 5 Gill & J. 269; *Estate of Cahill*, 74 Cal. 52. And, where a testator undertook to devise property not owned by him, this may be shown, in connection with testator's character for intelligence, to establish undue influence from *some source*. *Bellows v. Sowles*, 59 Vt. 63.

38. Kindness and attention do not of themselves constitute undue influence so as to invalidate a will. *Gleespin's Will*, 11 C. E. Gr. 523; *Den d. Trumbull v. Gibbons*, 2 Zab. 117; *Roe v. Taylor*, 45 Ill. 485; *Rogers v. Diamond*, 13 Ark. 474; *Rutherford v. Morris*, 77 Ill. 397;

*Allmon v. Pigg*, 82 Id. 149; *Higgins v. Carlton*, 28 Md. 115; *Children's Aid Society v. Loveridge*, 70 N. Y. 387; *Kerr v. Lunsford*, 31 W. Va. 659; *McCulloch v. Campbell*, 49 Ark. 367. Influence arising from gratitude, affection or esteem will not be held to be undue. *Jackman's Will*, 26 Wis. 104; *Glover v. Hayden*, 4 Cush. 580; *Gardiner v. Gardiner*, 34 N. Y. 155; *Tyler v. Gardiner*, 35 Id. 559; *Clifton v. Clifton*, 2 Dick. 227; *McCoy v. McCoy*, 4 Redf. 54; *Proctor v. Clarke*, 3 Id. 445; *Coit v. Patchen*, 77 N. Y. 533; *Mooney v. Olsen*, 22 Kans. 69; *Matter of Mondorf*, 110 N. Y. 450; *Layman v. Conrey*, 60 Md. 286. But such influence may be carried so far as to invalidate the will. *Davis v. Calvert*, 5 Gill & J. 269; *Van Kleeck v. Phipps*, 4 Redf. 99. So, an appeal to gratitude for past services will not constitute undue influence. *Jones v. Roberts*, 37 Mo. App. 163; *Matter of Eddy*, 5 Stew. (N. J.) 701. So, too, if the appeal be on account of the needy circumstances of the beneficiary. *Jones v. Roberts*, *ubi supra*.

was done merely for the sake of peace ;<sup>39</sup> so that the motive was tantamount to force and fear (*a*).

In two important cases, in the Prerogative Court, wills made by persons of sufficient capacity, but of weak minds, have been set aside on the ground of improper influence. The will, in one of these cases, was made in favour of the attorney and agent of the testator (*b*), in the other, by a wife \*in favour of her husband (*c*).<sup>40</sup> And in another case in the House of Lords (*d*), on an appeal from the Irish Chancery, it was held, that where undue influence is exercised over the mind of the testator in

39. But both fraud and undue influence may be inferred from circumstances. *Colhoun v. Jones*, 2 Redf. 34; *Fagan v. Dugan*, Id. 341, 347; *Lake v. Ranney*, 33 Barb. 49; *Van Kleeck v. Phipps*, 4 Redf. 99. But not from opportunity; the *circumstances* must be proved. *Seguine v. Seguine*, 3 Keyes 663; *Van Hanswyck v. Wiese*, 44 Barb. 494; *Wade v. Holbrook*, 2 Redf. 378; *McCoy v. McCoy*, 4 Id. 54. However, it is not necessary to prove that the duress was visible or physically exercised at the time of the execution of the will; it may have been exercised before the *factum* and have continued its domination until that time. *Fagan v. Dugan*, *ubi supra*; *Van Kleeck v. Phipps*, *ubi supra*; *Potter's Appeal*, 53 Mich. 106.

(*a*) *Williams v. Goude*, 1 Hagg. 581. *Constable v. Tufnell*, 4 Hagg. 485. *Sefton v. Hopwood*, 1 Fost. & F. 578. *Lovett v. Lovett*, Ibid. 581. *Hall v. Hall*, L. R. 1 P. & D. 481. As to undue influence, dependent on religious feelings, see *Norton v. Rely*, 2 Eden. 286. *Huguenin v. Basely*, 14 Ves. 273. *Parfitt v. Lawless*, L. R. 2 P. & D. 462.

(*b*) *Ingram v. Wyatt*, 1 Hagg. 94. The judgment of Sir J. Nicholl in this celebrated case was reversed by the delegates; 3 Hagg. 466: not, however, on any point of law, but on a view of the evidence of the cause. The correctness of Sir J. Nicholl's judgment, so far as

regards his exposition of the law on the subject of improper influence, was recognised by the Judicial Committee of the Privy Council in the case of *Cockraft v. Rawles*, 4 Notes of Cas. 237.

(*c*) *Marsh v. Tyrrel*, 2 Hagg. 84. In this case there was an appeal to the delegates; but the case was afterwards compromised; 3 Hagg. 471.

40. By the civil law, a will written by a person in favor of himself was void. Dig. 48, tit. 10, § 15 and 34, § 8.

Though this rule of the civil law has not been adopted by our courts, yet, in such cases, it is essential to convince the court, by very satisfactory proof, that the party executing the will perfectly understood its provisions and freely intended to make that disposition of his property which the instrument purports to make. *Crispell v. Dubois*, 4 Barb. 398; *Delafield v. Parish*, 25 N. Y. 9; *Van Kleeck v. Phipps*, 4 Redf. 99; *Cheatham v. Hatcher*, 30 Gratt. 56; *Will of Eddy*, 16 Phila. 380; *Beall v. Mann*, 5 Ga. 456; *Simpler v. Lord*, 28 Id. 52; *Lee v. Dill*, 11 Abb. Pr. R. 218; *Langton's Will*, Tuck. 301. But it is not influence by a beneficiary, but undue influence amounting to moral coercion, that will vitiate. *Ewen v. Perrine*, 5 Redf. 640.

The maxim *qui se scripsit haeredem* has imposed, by law, an additional burden on those claiming to establish a will under circumstances which call for the

(*d*) *Trimbletown v. D'Alton*, 1 Dow (New Series), 85.

making his will, the provisions in the will, in favour of the person exercising that influence, are void ; but the will may be good, as far as

application of that rule. *Delafield v. Parish*, *ubi supra*.

But, while the fact that the will is in the handwriting of a favored legatee is not enough to invalidate the will, it is sufficient to raise suspicion. *Rusling v. Rusling*, 9 Stew. (N. J.) 603. Also where, not being the sole beneficiary, he is a large beneficiary, such circumstance is suspicious, and the *onus* is on him. *Hambleton v. Mendenhall*, 17 Phila. 73; *Cheat-ham v. Hatcher*, *ubi supra*. And, in one case, it is said that the law requires such beneficiary to prove that interest and opportunity have not, in his own behalf, led him into improper and pernicious activity. *Matter of Bartholick*, 1 Connolly 373. But, where the will was written by an attorney procured by the husband, and at the dictation of the husband, and the testatrix devised her entire estate to the husband, it was held no proof of undue influence. *Armstrong v. Armstrong*, 63 Wis. 162.

In a case where one who was indebted to the testator in a sum of money, which debt had been due for a long time, selected the lawyer who drew the will, gave him the necessary instructions, selected the witnesses, and was present at its execution ; and, upon the reading of the will, this person is found to be a legatee to the amount of this indebtedness, a presumption of undue influence is raised against him. *Burke v. Nolan*, 1 Dem. 436, 438.

But the mere fact that a subsequent will or codicil reversing some of the provisions of a former will is in the handwriting of one advantaged by the later testamentary act does not establish the fact of undue influence. *Booth v. Kitchen*, 3 Redf. 52. There is no rule of law prohibiting the draftsman of a will from taking a legacy thereunder.

*Whelpley v. Loder*, 1 Dem. 368, 380. But, where the draftsman is the sole beneficiary under the will, the burden of proof is on him to overcome the charge not only of undue influence, but of fraud. *Matter of Western*, 60 Hun 298; *Post v. Mason*, 91 N. Y. 539. But the force of the circumstance of the change of testamentary intention, as bearing upon the allegation of undue influence in procuring a will, depends mainly upon its connection with associated facts. *Neiheisel v. Toerge*, 4 Redf. 328, 337; *Horn v. Pullman*, 72 N. Y. 269, 276. In such cases undue influence is presumed, and the absence of it must be shown by the party sustaining the devise. *Harvey v. Sullens*, 46 Mo. 147; *Beall v. Mann*, 5 Ga. 456; *Denny v. Pinney*, 60 Vt. 524. But this presumption is one of fact and not of law, and may be rebutted. *Harvey v. Sullens*, *ubi supra*.

A great change of disposition and a total departure from former testamentary intentions, render it essential to examine with particularity into the cause of the change, especially where the person in whose favor the change is made originated and conducted the whole transaction. *Tyler v. Gardiner*, 35 N. Y. 559; *Demmert v. Schnell*, 4 Redf. 409; *Mowry v. Silber*, 2 Bradf. 133; *Matter of Welsh*, 1 Id. 238; *Kinne v. Johnson*, 60 Barb. 69; *Carroll v. Hause*, 3 Dick. 269. But, where a testatrix changed her will and devised her entire estate to a niece, who conducted the whole transaction, it was held that there was no undue influence, and the will was sustained. *Clifton v. Clifton*, 2 Dick. 227. This rule also applies where the will was written by the executor named in the instrument, and the entire property was given to persons not of kin to the testator. *Cramer v. Crumbaugh*, 3 Md. 491. But the testa-

respects other parties ;<sup>41</sup> so that a will may be valid as to some parts, and invalid as to others ; may be good as to one party, and bad as to another (e).

The subject of undue influence received full consideration in a case in the House of Lords (f), on which occasion Lord Cranworth made the following observations : “ In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable ; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who has thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property : \*Provided only, that in making such a will, the young man was really carrying into effect his own intention, formed without either coercion or fraud. I must further remark, that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife.<sup>42</sup> The relation constituted by marriage is

tor's knowledge of the contents of the will may be proved by circumstantial evidence, *direct* evidence not being essential. *Day v. Day*, 2 Gr. Ch. 549.

41. *Baker's Will*, 2 Redf. 179 ; *Harri-son's Appeal*, 48 Conn. 202 ; *McIntire v. Worthington*, 68 Md. 203 ; *In re Welsh*, 1 Redf. 238 ; *Florey v. Florey*, 24 Ala. 241.

(e) See further, on the subject of influence, *Mynn v. Robinson*, 2 Hagg. 179 ; in which case Sir John Nicholl held that when the will of a married woman, obtained while she was in an extremely weak state, nine days before death, by the active agency of the husband, the sole executor and universal legatee, wholly departed from a former will, de-

liberately made a few months before, the presumption was strong against the act ; and the evidence not being satisfactory, the will was pronounced against, and the husband condemned in the costs.

(f) *Boyse v. Rossborough*, 6 H. of L. 6.

42. When the question is reversed and the point to be decided is whether one living in meretricious relations with the husband has exercised an undue influence in her own favor as against the wife, the law looks suspiciously for coercion and will protect jealously the wife from such an influence. However, the law will allow a man to leave all his personal property to his mistress and to cut off his lawful wife, if he do so with free, sound and disposing mind and with

of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish."

"In order therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used, or even threatened.<sup>43</sup> The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute

due legal formalities. Will of McGuire, Tuck. 196, 204; Blakely v. Blakely, 33 Ala. 611; McClure v. McClure, 86 Tenn. 173; Matter of Mendorf, 110 N. Y. 450. And an influence exerted by one who believes herself to be a lawful wife, where there is no constraint, will not be considered undue. Will of McGuire, *ubi supra*; Sutton v. Sutton, 5 Harr. (Del.) 459; Matter of Tunison, 4 Bradf. 138; McClure v. McClure, *ubi supra*. Unlawful cohabitation after a false accusation of seduction will not amount to undue influence. Wainwright's Appeal, 89 Pa. St. 220.

A wife has the right to exercise her wifely influence; therefore, a will in her favor is not necessarily procured by undue influence. Pierce v. Pierce, 38 Mich. 412; Will of Storey, 20 Ill. App. 183; Small v. Small, 4 Greenl. 220; Thompson v. Ish, 99 Mo. 160. Even though she urge the propriety of having the will made in her favor. Hughes v. Murtha, 5 Stew. (N. J.) 288; or that some special provision be made for her. Pingree v. Jones, 81 Ill. 177.

Ancient scandals as to relations between testator and his wife are not admissible. Pierce v. Pierce, *ubi supra*. Nor evidence as to her reputation for chastity. Thomas

v. Stump, 62 Mo. 275. And there is a great distinction to be drawn between the exercise by a wife of such influence as she may exert by her virtues and affections and the influence of the charms and meretricious arts of a mistress; on the former courts look with favor, while they regard the latter with great suspicion. Dean v. Negley, 41 Pa. St. 312; Kessinger v. Kessinger, 37 Ind. 341; McClure v. McClure, *ubi supra*.

In the case of husband and wife, the charge of undue influence, as between themselves, must be supported by facts which are wholly inconsistent with any other hypothesis. Potter's Appeal, 53 Mich. 106. See too Armstrong v. Armstrong, 63 Wis. 162. It is not admissible to show that before marriage and eleven years prior to the *factum* the testator was under the influence of the woman whom he married; it is too remote. Ketchum v. Stearns, 76 Mo. 396.

43. Hazard v. Hefford, 2 Hun 445; Proctor v. Clarke, 3 Redf. 445. The coercion meant in speaking of undue influence is denominated "moral coercion" in Children's Aid Society v. Loveridge, 70 N. Y. 387, 394, and it is said that it must be such as to restrain inde-



as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency; a will thus made may possibly be described as obtained by coercion. So as to fraud, if a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed; <sup>44</sup> such contrivance may, perhaps, be equiva-

pendent action or destroy free agency, and which the testator was unable to refuse or too weak to resist. So too in *Van Kleeck v. Phipps*, 4 Redf. 99, 125; *Gugel v. Vollmer*, 1 Dem. 484; *Marx v. McGlynn*, 88 N. Y. 357. Whether mental or physical, whether slight or powerful, it must be such as to render the act the result of the determination of the mind of another rather than the expression of the mind of the actor. *Earl v. Norfolk and New Brunswick Hosiery Co.*, 9 Stew. (N. J.) 158, 192. There must be the control of another will over that of the testator. *Burk's Will*, 2 Redf. 239. The importunity or influence must be such as to deprive him of the free exercise of his will. *Booth v. Kitchen*, 3 Redf. 52, 67. It must be such as to dominate the will of the testator and substitute the will of another in its stead. *Leeper v. Taylor*, 47 Ala. 221; *Tyson v. Tyson*, 37 Md. 567; *Rutherford v. Morris*, 77 Ill. 397; *Gardiner v. Gardiner*, 34 N. Y. 155; *Van Kleeck v. Phipps*, 4 Redf. 99, 126; *Merrill v. Rolston*, 5 Id. 220; *Carroll v. Hause*, 3 Dick. 269; *Stebbins v. Hart*, 4 Dem. 501; *Coit v. Patchen*, 77 N. Y. 533; *McCulloch v. Campbell*, 49 Ark. 367; *Primmer v. Primmer*, 75 Iowa 415; *Thompson v. Devitte*, 59 Ga. 472; *Grove v. Spiker*, 72 Md. 300; *Maynard v. Vinton*, 59 Mich. 139; *Latham v. Schall*, 25 Neb. 535.

But no matter how little the influence, if the free agency is destroyed it vitiates the act which is the re-

sult of it. *Turner v. Cheeseman*, 2 McCart. 265; *Van Kleeck v. Phipps*, 4 Redf. 99, 125; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Carroll v. Hause*, 3 Dick. 269; *Wise v. Foote*, 81 Ky. 10. So too if the result of the influence is but to mislead the testator. *Allmon v. Pigg*, 82 Ill. 149. It is also said that the importunity or coercion must be such as that the motive be tantamount to force or fraud. *Mooney v. Olsen*, 22 Kans. 69, 71; *Bundy v. McKnight*, 48 Ind. 502; *Townly v. Long*, 79 Pa. St. 106; *Leeper v. Taylor*, 47 Ala. 221; *Tyson v. Tyson*, 37 Md. 567; *Roe v. Taylor*, 45 Ill. 485; *Kevil v. Kevil*, 2 Bush 614; *Mitchell v. Mitchell*, 43 Minn. 73; *Layman v. Conrey*, 60 Md. 286.

44. So where a sister of a testator (who was a semi-imbecile, and had once been in an asylum) constantly assured him that another sister was intending to send him to an asylum in order to obtain control of his property, a will made in favor of the former sister and to the entire exclusion of the latter was set aside as procured by undue influence. *Alexander's Will*, 12 C. E. Gr. 463. And in a case where a son of the testator was seeking a divorce from his wife, the testator was encouraging and assisting him in the action, the wife meanwhile contesting the divorce, and the son wrote letters to the testator falsely accusing one of his sisters of aiding the wife in the divorce suit and such sister was disinherited, it was held that the letters amounted to

lent to positive fraud, and may render invalid any will executed under false impressions thus kept alive (*g*). It is, however, extremely \*difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud.”

After observing, that where it has been proved that a will has been duly executed by a person of competent understanding and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it,<sup>45</sup> his lordship thus proceeded: “In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence: It must be shown that they are inconsistent with a contrary

undue influence over the testator. Will of Budlong, 126 N. Y. 423.

(*g*) See Acc. Allen v. McPherson, 1 H. of L. 207, per Lord Lyndhurst. White v. White, 2 Sw. & Tr. 505; in which last case Sir C. Cresswell held that a fraud of this kind could not be set up under a plea of undue influence.

45. Tyler v. Gardiner, 35 N. Y. 559; Small v. Small, 4 Greenl. 220; Glover v. Hayden, 4 Cush. 580; Baldwin v. Parker, 99 Mass. 79; Taylor v. Wilburn, 20 Mo. 306; Davis v. Davis, 123 Mass. 590; Higgins v. Carlton, 28 Md. 115. If no evidence be offered to show influence exerted upon the testator at or about the time of the execution of the will, it is error to submit to the jury the question of undue influence. Eckert v. Flowry, 43 Pa. St. 46. But declarations of the testator are not competent evidence to sustain the charge of undue influence. Such declarations should be sustained by some proof of the acts. Neihsel v. Toerge, 4 Redf. 328, 332. Such declarations may, however, be admitted to show the state of the testator's mind. Marx v. McGlynn, 4 Redf. 455. If made soon after. Davis v. Davis, *ubi supra*. But, if made after the

*factum*, they are not admissible if made so remotely as not to be a part of the *res gestæ*, but they are admissible if made sufficiently soon to show that the testamentary act was influenced. Griffith v. Diffenderffer, 50 Md. 466. And evidence of expressions of testamentary purpose by a testator is admissible and is of great weight in determining whether a will is the result of undue influence. Ewen v. Perrine, 5 Redf. 640. So in a case where the testator and the principal beneficiary were dwelling together, the declarations of the testator were admitted. Herster v. Herster, 116 Pa. St. 612. But if the testator be of unsound mind declarations by him are no proof. Estate of Lang, 65 Cal. 19.

The rule as to the burden of proof in the matter of undue influence is the same as in cases of alleged incapacity, *i. e.*, the burden is upon the party alleging it. In re Hardy's Will, 12 Phila. 22; Denny v. Pinney, 60 Vt. 524; Dumont v. Dumont, 1 Dick. 223; Jones v. Roberts, 37 Mo. App. 163; Griffith v. Diffenderffer, 50 Md. 466; Potter's Appeal, 53 Mich. 106; Ogden v. Greenleaf, 143 Mass. 349; Flood v. Pragoff, 79 Ky. 607; Waddington v. Buzby, 16 Stew. (N. J.) 154; Wheeler v.

hypothesis.<sup>46</sup> The undue influence must be an influence exercised in a relation to the will itself, not an influence in relation to other matters or transactions. But the principle must not be carried too far. Where a jury sees that, at and near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised."<sup>47</sup> To be undue influence in the eye of the law there must be coercion. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence (*gg*).<sup>48</sup>

Whipple, 17 Id. 141; *Parsons v. Parsons*, 66 Iowa 754. But in a case where the testatrix was mentally enfeebled by disease and a son was in a position to exercise improper influence, and he received nearly all her property, the burden was held to be on him. *Dale v. Dale*, 9 Stew. (N. J.) 269; S. C., 11 Id. 274. So too in a case in Pennsylvania it was held to be upon the later beneficiary. *Wilson's Appeal*, 99 Pa. St. 545.

46. The existence of the motive and opportunity for undue influence will not, in the absence of affirmative evidence of its exercise, warrant the presumption of such undue influence, where the testator's mind is unimpaired, and he had the opportunity to and did understand the provisions of his will. *McCoy v. McCoy*, 4 Redf. 54; *Cudney v. Cudney*, 68 N. Y. 148; *La Bau v. Vanderbilt*, 3 Redf. 384, 424; *Merrill v. Rolston*, 5 Id. 220; *Marx v. McGlynn*, 88 N. Y. 357; *Wood v. Bishop*, 1 Dem. 512; *Will of McGuire*, Tuck. 196; *Harrison's Appeal*, 100 Pa. St. 458; *Mullen v. Helderman*, 87 N. C. 483; *Bancroft v. Otis*, 91 Ala. 279; *Eckert v. Flowry*, 43 Pa. St. 46, 52; *Sunderland v. Hood*, 84 Mo. 293; *Monroe v. Barclay*, 17 Ohio St. 302.

In order that the will be rejected on ac-

count of undue influence the contestant must show facts inconsistent with the hypothesis of the execution having been procured by any other means. *Whelpley v. Loder*, 1 Dem. 368. Undue influence must be *proved*, like any other material fact; it cannot be guessed at. *Stebbins v. Hart*, 4 Dem. 501, 505; *Maynard v. Vinton*, 59 Mich. 139; *Latham v. Schall*, 25 Neb. 535. And such proof must be that the influence was exerted at the time of the *factum*. *Mooney v. Olsen*, 22 Kans. 69, 71; *Thompson v. Devitte*, 59 Ga. 472; *Potter's Appeal*, 53 Mich. 106; *Latham v. Schall*, *ubi supra*; *Brown v. Mitchell*, 75 Tex. 9. But such influence is generally proved by a number of facts, each one of which, standing alone, may be of little weight, but taken collectively may satisfy a rational mind of its existence. *Moore v. McDonald*, 68 Md. 321; *Potter's Appeal*, *ubi supra*.

47. An influence worthily exerted for the benefit of others ought not to condemn the will. *Harrison's Will*, 1 B. Mon. 351.

(*gg*) *Wingrove v. Wingrove*, 11 P. D. 81.

48. As to the testimony necessary to establish undue influence in testamentary matters, it may be remarked that undue

In the case of gifts or other transactions *inter vivos*, it \*is considered by courts of equity that the natural influence which relations such as

influence is not a presumption, but a conclusion, and that whether it exist or not must be determined from the facts. In *re Humphrey's Will*, 11 C. E. Gr. 513; *Muller v. St. Louis Hospital Assn.*, 73 Mo. 242; *Ogden v. Greenleaf*, 143 Mass. 349; *Reynolds v. Adams*, 90 Ill. 134; *Mooney v. Olsen*, 22 Kans. 69. But direct evidence is not necessary, it may be inferred from circumstances. *Reynolds v. Root*, 62 Barb. 253; *Milton v. Hunter*, 13 Bush 163; *Dale v. Dale*, 9 Stew. (N. J.) 269; S. C., 11 Id. 274. In fact, direct proof can rarely, if ever, be given. *Forman v. Smith*, 7 Lans. 443; *Rollwagen v. Rollwagen*, 63 N. Y. 519. In some cases it will be inferred from the nature of the transaction alone. *Sears v. Schafer*, 6 N. Y. 268. There must be some proof; the fact of such influence cannot be left to presumption, but the proof requisite may be either by direct affirmative evidence, or by an array of circumstances making an inference of its exercise absolutely irresistible. *Cudney v. Cudney*, 68 N. Y. 148; *Marx v. McGlynn*, 88 Id. 357; *Merrill v. Rolston*, 5 Redf. 220; *Wood v. Bishop*, 1 Dem. 512; *Humphrey's Will*, 11 C. E. Gr. 513; *Porschett v. Porschett*, 82 Ky. 93; *Saunders's Appeal*, 54 Conn. 108. The question is not a question for experts, it must be submitted to the jury. *Matter of Nelson*, 39 Minn. 204. And the form of the will and nature of the dispositions are in themselves important evidence on a question of undue influence. *Mitchell v. Mitchell*, 43 Minn. 73. The court will look to the will alone for the final expression of the intentions of the testator. *Matter of Forbes*, 60 Hun 171.

An instruction to the jury that "by undue influence is meant the substitution of the intention of another for that of the testator," is too general, and, therefore,

erroneous. *Jones v. Roberts*, 37 Mo. App. 163. So too it is error in instructing a jury to speak of the testator as "prompted or swayed by designing relatives or pretended friends," as such an expression tends to mislead the jury. *Milton v. Hunter*, 13 Bush 163. But it is proper to instruct a jury that evidence that the testator was weak and imbecile from age and disease, and incapable of performing ordinary business; was induced to abandon former attorneys and had his will written by the attorney of the principal devisee; that will was witnessed by that attorney and the wife and relatives of the chief beneficiary, while other disinterested parties were at hand and within reach, may be considered by them on the question of influence. *Jenkins v. Tobin*, 31 Ark. 306. But it is error to instruct a jury that if an agent exercise a controlling influence over her conduct, intentions and will, prior to and at the date of said will, and that said will excluded the plaintiffs from participation in her estate, when they might otherwise have been subjects of her bounty, then you may find that such will is not her will, but void on account of undue influence. *Todd v. Fenton*, 66 Ind. 25.

But mere inequality in the distribution of his estate is not conclusive evidence of undue influence. *Salisbury v. Aldrich*, 118 Ill. 199; *Coffman v. Hedrick*, 32 W. Va. 119; *Hartman v. Strickler*, 82 Va. 225; *Carter v. Dixon*, 69 Ga. 82. Nor that the division is such that the court or jury deem it unreasonable. *Muir v. Miller*, 72 Iowa 585.

It is not indispensable that the precise mode of exercising the influence should be proved; if the circumstances raise a legitimate presumption it is proper to so find in the absence of sufficient explanation. *McLaughlin v. McDevitt*, 63 N. Y.

those of solicitor and client,<sup>49</sup> guardian and ward,<sup>50</sup> physician and patient,<sup>51</sup> tutor and pupil, involve, exerted by those who possess it to

213, 220; *Children's Aid Society v. Loveridge*, 70 Id. 387, 395; *Brick v. Brick*, 66 Id. 144, 149; *Coit v. Patchen*, 77 Id. 533, 540; *Demmert v. Schnell*, 4 Redf. 409.

Where it is sought to set aside a will on the ground of undue influence, it is competent to show the relations of the testator with his family. *Staser v. Hogan*, 120 Ind. 207. But this should not be allowed except as such evidence may bear upon testator's condition of mind at the time of the *factum*. *Estate of Lang*, 65 Cal. 19. It is also admissible to prove a declaration by a legatee that they had got the will as they wanted it. *Saunders's Appeal*, 54 Conn. 108.

49. The presumption in regard to a will by a client in favor of his attorney is that it was procured by undue influence—but this is a presumption of *fact*—and, like other presumptions of fact, may be rebutted by any evidence which satisfies the jury that it is untrue. *St. Leger's Appeal*, 34 Conn. 434; *Wright v. Howe*, 7 Jones Eq. (N. C.) 412; *Wilson v. Moran*, 3 Bradf. 172; *Richmond's Appeal*, 59 Conn. 226; *Post v. Mason*, 26 Hun 187; *Rundell v. Downing*, 5 N. Y. St. Rep. 253. But the rule is otherwise where the legal adviser is named as executor and takes no interest as legatee. *Linton's Appeal*, 104 Pa. St. 228. And although the will may contain legacies to his relatives, no presumption of undue influence will be raised. *Carter v. Dixon*, 69 Ga. 82. But as to a will giving bequests to the infant children of the person preparing the will, *McMechen v. McMechen*, 17 W. Va. 683.

And in such cases the burden is on the proponents to show absence of influence. *Richmond's Appeal*, 59 Conn. 226. While a principal may bestow a donation

or a reward upon his agent, it will be essential, in order to sustain it, for the beneficiary to establish its fairness. *Decker v. Waterman*, 67 Barb. 460. So too where the testator is old, eccentric, inclined to drink and hysterics, and the principal devisee is the salaried and trusted agent of the testator, a relative and a favorite. *Moore v. Spier*, 80 Ala. 129.

The rule that undue influence must be sufficient to overcome free agency supposes that the testator and the influential adviser stand upon an equal footing; where the adviser stands in a confidential relation, the burden shifts. *Banta v. Willetts*, 6 Dem 84. But the fact that there is a bequest in favor of the attorney will not invalidate the will. *Riddell v. Johnson*, 26 Gratt. 152; *Will of Smith*, 95 N. Y. 516. And this rule extends to the case of agent, physician, priest, or other confidential adviser. *Montague v. Allen*, 78 Va. 592. But a legacy to the draftsman does not *per se* defeat the will, although it may raise suspicion. *Cheatnam v. Hatcher*, 30 Gratt. 56.

50. If the will be by the ward in favor of the guardian, it is incumbent on those who would maintain the will to establish it beyond reasonable doubt as made while the testator had such freedom of will as is necessary to render a will valid in law. *Breed v. Pratt*, 18 Pick. 115; *Fish v. Miller*, 1 Hoff. Ch. 273; *Taylor v. Taylor*, 8 How. 183; *Wells v. Middleton*, 1 Cox 125; *Gaither v. Gaither*, 20 Ga. 721; *Garvin's Admr. v. Williams*, 44 Mo. 465; *Meek v. Perry*, 36 Miss. 190.

The general rule is that the burden of proof as to undue influence in the case of parties standing in a relation of trust and confidence is upon the beneficiary.

51. While there is no rule of law which prevents a person from bequeathing his

property to his medical attendant, it is a very suspicious circumstance if a will be

obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment (*h*). The law regarding wills is very different from this, and the mere proof of the existence of such a relation is no evidence of undue influence, and the party relying thereon must give some evidence of coercion or dominion exercised over the testator against his will or of coercion so strong that it could not be resisted (*i*).<sup>52</sup>

Baker's Will, 2 Redf. 179; Moore v. Spier, 80 Ala. 129; Waddell v. Lanier, 62 Id. 347; Shipman v. Furniss, 69 Id. 564; Decker v. Waterman, 67 Barb. 460; Bridwell v. Swank, 84 Mo. 455. But *contra*, Bancroft v. Otis, 91 Ala. 279. But where the will is drawn by the guardian of the testator, executed in the guardian's family, bequeaths all to the guardian and guardian's wife, excluding the testator's sisters, if the evidence shows that the will is in accord with the affections of the testator, the will will be sustained. Daniel v. Hill, 52 Ala. 430. On the other hand, where the will is in favor of the committee of an adjudged lunatic, who is the testator, made while the testator is residing in the house of the committee, undue influence will be presumed as conclusively shown and the will will be set aside. Mundy's Appeal, 123 Pa. St. 464.

(*h*) Archer v. Hudson, 7 Beav. 557.

made by one suffering from a severe illness, in a secret and clandestine manner, and it confers a large benefit upon the then medical attendant of the testator. Ashwell v. Lomi, 2 L. R., P. & D. 477; Colhoun v. Jones, 2 Redf. 34, 43; Dean v. Negley, 41 Pa. St. 312; Gilneath v. Gilneath, 4 Jones Eq. 142. The *onus* will then be upon the party benefited to maintain the will beyond question. Ashwell v. Lomi, *ubi supra*. So too in case of a will made by a patient in favor of his

(*i*) Parfitt v. Lawless, L. R. 2 P. & D. 462; see also Ashwell v. Lomi, reported in the note thereto.

52. But, in all cases of this kind, where there is a great change of disposition and an entire departure from former testamentary intentions long adhered to, it is quite material to examine the probability of the change, particularly so if, at the time of making the later disposition, the capacity is doubtful; still more, if the person in whose favor the change is made, possessing great influence and authority over the testator, originates and conducts the whole transaction. Marsh v. Tyrrell, 2 Hagg. 84; Tyler v. Gardiner, 35 N. Y. 559; Beall v. Mann, 5 Ga. 456; Forman v. Smith, 7 Lans. 443; Davis v. Calvert, 5 Gill & J. 269; Lewis v. Mason, 109 Mass. 169; Van Kleeck v. Phipps, 4 Redf. 99. So too if the will were written by the executor

physician, under any circumstances, a strong presumption arises against its validity. Colhoun v. Jones, 2 Redf. 34, 40. In the case of a physician being made the chief or a large beneficiary "fraud and undue influence will readily be inferred unless all jealous suspicion is put to rest." Peck v. Belden, 6 Dem. 299; Post v. Mason, 91 N. Y. 539; Trumbull v. Gibbons, 2 Zab. 117; Boyd v. Boyd, 66 Pa. St. 233; Thompson v. Ish, 99 Mo. 160.

Persons in the sea service are frequently under the pressure of urgent wants, and to procure an immediate supply of those wants (such as an outfit, or the like) they will, without thought, comply with almost any condition proposed to them. These temporary necessities have been considered to operate on them as a sort of duress, on the part of those who are to furnish the supply: and it is partly on this consideration, that the policy of the law has been extended to guard the testamentary acts of this class of persons (*j*).

By statute 9 & 10, Wm. III. c. 41, s. 6 (now repealed, but re-enacted) (*k*), it is provided, “that no Will of any seaman \*contained, printed or written *in the same instrument, paper, or parchment, with a warrant or letter of attorney,* shall be good or available in law to any intent or purpose whatsoever.”

Wills of seamen:

made on the same instrument with a warrant of attorney invalid.

named therein, and the kin of the testator were wholly omitted from the provisions of the will. *Cramer v. Crumbaugh*, 3 Md. 491. But where the instructions for the will are given by the chief beneficiary, the testator is very aged and resides with the chief beneficiary at the time, this will not, *per se*, invalidate the will on the ground of influence. *Stein v. Wilzinski*, 4 Redf. 441. But where the testatrix attended herself to all the details of the will, this will be strong evidence against alleged undue influence. *Matter of Pemberton*, 13 Stew. (N. J.) 520.

As a general rule, in all cases where one sustaining any fiducial relation to another is concerned in framing the latter's will to his own advantage, there is a presumption against its validity, which is strong or weak according to the particular circumstances. *Bristed v. Weeks*, 5 Redf. 529. But the fact of the existence of such influence is nothing unless it be used. *Brinkman v. Rueggessick*, 71 Mo. 553; *Sunderland v. Hood*, 84 Id. 293; *Monroe v. Barclay*, 17 Ohio St. 302. “A change of intention is of no importance if there be a sound mind, unconstrained.” *Titlow v. Titlow*, 54 Pa. St. 216; *Potter v. McAlpine*, 3 Dem.

108, 120. “A testator has a right to change, radically and arbitrarily the manner of disposing of his property, and, in the absence of fraud, courts will sustain his action in this respect.” *McLaughlin v. McDevitt*, 63 N. Y. 213; *Potter v. McAlpine*, *ubi supra*. Where one who writes the will is a stranger, and the will is in his favor, the burden is on him to show capacity; but it is otherwise if said writer and beneficiary is a relative who would have received a benefit from the estate in case there had been no will. *Caldwell v. Anderson*, 104 Pa. St. 199.

(*j*) *Zacharias v. Collis*, 3 Phillim. 177.

(*k*) The stat. 9 & 10 W. 3, c. 41, s. 6, was repealed and re-enacted by the stat. 55 G. 3, c. 60, s. 4. The latter statute was itself repealed by the Stat. 11 G. 4 and 1 W. 4, c. 20, which last act provides that no will of any petty officer, seaman, non-commissioned officer of marines, or marine, shall be deemed good or valid in law, to any intent or purpose, which shall be contained, printed, or written in the same instrument, paper, or parchment, with a power of attorney. A similar enactment is contained in stat. 28 & 29 Vict. c. 72, s. 4, which supersedes 11 G. 4 and 1 W. 4, c. 20, now repealed.

Soon after the passing of this statute, the case of *Craig v. Lester* was decided upon its construction. There Sir Charles Hedges held, and his sentence was confirmed by the delegates, that the will was invalid, though executed *on a different instrument* from the power of attorney (*l*). This decision, although it may not have gone beyond the spirit of the act, must, it should seem, be considered as a bold stretch of the words of it.

The case of *Craig v. Lester* has been followed by numerous others in the Prerogative Court, fully establishing, that wills made by mariners as securities for debts are void. But *Wills of seamen made as security for debt, invalid:* neither the statute nor these decisions must be understood as making the relation of agent and seaman, or the circumstance of the seaman being indebted to his agent, an absolute defeasance to the will, so that it could, in no case, be valid. The proper result to be deduced is, that when the relation of agent and seaman exists, there must be clear proof, not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect: that wherever it is executed *merely* as a security for a debt, it shall not operate as a testamentary disposition of the whole property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by will, the instrument shall be valid (*m*).

The equity of these statutes cannot be extended beyond the wills of mariners, so as to invalidate the wills of other persons given to secure debts (*n*). *Secus, as to wills of other persons.*

\*Before the passing of the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, the capacity of a married woman to dispose of her real and personal estate by will was limited.<sup>53</sup> This statute does not apply to any will made before 1 Jan., 1883. It is therefore necessary to consider the law as applicable to wills on which the statute cannot operate. A married woman was not only utterly incapable of devising

(*l*) Delegates, 11th June, 1714, cited by Sir John Nicholl, in *Zacharias v. Collis*, 3 Phillim. 189.

(*m*) *Zacharias v. Collis*, 3 Phillim. 202, 203, 204. See also *Deardsley v. Fleming*, 2 Cas. temp. Lee, 98.

(*n*) *Florance v. Florance*, 2 Cas. temp.

Lee, 87.

53. In *Washington* a married woman may dispose of her property by will in the same manner and to the same extent that her husband can of his property. *Hill's Stats. & Codes of Wash.*, § 1398.



*lands* (o) (being excepted out of the Statute of Wills, 34 & 35 Hen. VIII. c. 5) (p), but also she was incapable of making a testament of *chattels*, without the license of her husband; and such a will, being considered a mere nullity, was not admitted to probate in the Court of Probate (q): For all her personal chattels were absolutely his; and he might dispose of her chattels real, or have them to himself, if he survived her: It would therefore have been extremely inconsistent to have given her a power of defeating that provision of the law, by bequeathing those chattels to another (r). The stat. 1 Vict. c. 26, made no alteration in the law with respect to the testamentary capacity of a *feme covert*; for by sect. 8, it was provided and enacted, that "no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act." 54 But this section does not exclude the wills of married women

(o) This incapacity to devise real estate does not arise from the husband's interest in her property, and consequently cannot be cured by his renunciation of interest: *Dye v. Dye*, 13 Q. B. D. 147.

(p) Impliedly repealed by M. W. P. A. 1882, in so far as it disabled married women from devising lands.

(q) *Steadman v. Powell*, 1 Add. 58. *Bransby v. Haines*, 1 Cas. temp. Lee, 120. *Tucker v. Inman*, 4 M. & Gr. 1076.

(r) *Andrew Ognell's Case*, 4 Co. 51 b. 2 Black. Comm. 498.

54. By the civil law a married woman had the same power of disposal by will as that allowed to a *feme sole*. "The mental and moral capacity of the wife were never questioned, for she was allowed to perform many acts requiring ability, discretion and judgment, during her coverture. She could execute a power disposing of property of unlimited value according to her own discretion, or act as agent and attorney for another in all matters of business requiring skill and judgment, as well where it was in the business of another as where it was in her own business, as in dealing with property settled to her separate use. She could

perform a condition without the concurrence of her husband, as to convey an estate to J. S., which was devised to her on condition of so conveying, and she could make a will of her personalty with her husband's consent. She could also make a will as executrix against his consent; and she had absolute power to act as a *feme sole* during the exile or transportation of her husband. Before her marriage she could fill a great variety of offices. The legal fiction was, that her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognized than is the *cestui que trust* or the mortgagor, the legal estate, which is the only estate the law recognizes, being in others." Per Lord Brougham, C., in *Murray v. Barlee*, 3 M. & K. 220.

At common law, however, the will of a *feme covert* disposing of real estate to any one was void. She was regarded as under civil disqualification arising from want of free agency, and as so utterly subject to the power of her husband that she could in no case make what could properly be called a will. *Wakefield v. Phelps*, 37 N. H. 275, 299.

from the operation of the 24th section (s), as to a will speaking, as to the real and personal estate comprised in it, as if executed immediately \*before the testator's death (t),—or of the 27th section, as to a general gift being an execution of a power (u).

Since the husband had no beneficial interest in the personal estate which the wife took in the character of executrix; and except of property to which she was entitled in autre droit, as executrix. as the law permitted her to take upon herself that office, it enabled her, even before the Married Women's Property Act, 1882, in exception to the general rule that a married woman could not dispose of property, to make a will in this instance, without the consent of her husband; restricted, however, to those articles to which she was entitled as executrix (x). The effect of such an instrument is merely to pass, by a pure right of representation, to the testator or prior owner, such of his personal assets as remained outstanding, and no beneficial interest which the wife might have in any part of them: and with respect to the assets which might have been received by the feme executrix during the marriage, and not disposed of, they immediately became the husband's property, and were not affected by the will (y).

But as the husband could always waive the interest which the law bestowed on him, he might empower the wife to make a will to dispose of her personal estate.<sup>55</sup> Thus a husband might assent to his wife's will, and such assent entitled

Husband may assent to his wife's will:

(s) *Noble v. Phelps*, L. R. 2 P. & D. 276. See *post*, Pt. I. Bk. II. Ch. IV. § II. Pt. III. Bk. III. Ch. IV. § VIII.

(t) *Thomas v. Jones*, 1 De G. J. & Sm. 63. But the 24th sect. does not speak from the death of a married woman so as retroactively to give effect to her will made during coverture as to property acquired after the death of her husband: *Willock v. Noble*, L. R. 7 H. L. 580, affirming S. C. L. R. 8 Ch. 778, and this case was held by Pearson J., to be untouched by the Married Women's Property Act, 1882, sect. 1 (sub-s. 1), on the ground that such sub-section applies only to a disposition by a married woman *during coverture* of property which she *then* has; and that consequently, notwithstanding sect. 24 of the Wills Act, her will

made during coverture is not, unless it is re-executed after she has become discov-  
ert, effectually to dispose of property which she acquires after the coverture has come to an end: *Re Price*, 28 C. D. 709.

(u) *Thomas v. Jones*, 1 De G. J. & S. 63; *Noble v. Phelps*, L. R. 2 P. & D. 276.

(x) *Scammell v. Wilkinson*, 2 East, 552.

(y) *Hodsden v. Lloyd*, 2 Bro. C. C. 534, 543.

55. The assent of the husband does not expressly operate to give testamentary capacity, but operates simply as a renunciation by him of his legal right to the administration of his wife's personalty. 2 Black. Comm. 498. But where the assent of the husband has been given to his

the wife's executor to claim such articles of her personal \*estate, which would have been her husband's as her administrator (z).<sup>56</sup>

wife's will, it has been held that he may revoke that assent at any time before the will is probated. *Van Winkle v. Schoomaker*, 2 McCart. 384. If the will have been admitted to probate he cannot revoke his assent. *Cutter v. Butler*, 5 Fost. 343; *George v. Bussing*, 15 B. Mon. 563; *Fisher v. Kimball*, 17 Vt. 323. As to the effect of wills of *femes covert* executed under the Massachusetts statute of 1842, ch. 74, see *Heath v. Withington*, 6 Cush. 497; and as to wills executed before the statute of 1850, ch. 200, *Burroughs v. Nutting*, 105 Mass. 228.

The rule that the husband may by consent give validity to his wife's testament of personalty extends equally to her will of realty where he is her sole heir. Hence, where a husband had joined his wife in articles of separation and she afterward made a will under the power, to which the husband consented, it was held that the will was operative to pass realty from the husband. *Wagner v. Ellis*, 7 Pa. St. 411.

Where the wife devised the bulk of her estate to her husband and at the time of the execution of the will he indorsed his consent on the will, it was held that his consent was irrevocable, as obtained upon a valuable consideration, and probate of her will after the husband's death, by his co-executor, was valid. *Camden Safe Deposit and Trust Co. v. Ing-ham*, 13 Stew. (N. J.) 3.

Also see *Newlin v. Freeman*, 1 Ired. L. 514; *Burton v. Holly*, 18 Ala. 408; 4 Kent 505, 506; 1 Redf. on Wills 22, *et seq.*; 2 Story Eq. Jur., §§ 1388, *et seq.*; *Walkem on Wills*, 25, *et seq.*; *Flood on Wills* 367, *et seq.*

(z) *Tucker v. Inman*, 4 M. & Gr. 1076. As to what such articles are, see *post*, Pt. II. Bk. III. Ch. I. § III.

56. But, in New Jersey, the right of

the husband to a life estate in the lands of his wife, at her death, cannot be devised by her will, made by consent of her husband, in writing. *Middleton v. Steward*, 2 Dick. 293.

And in Pennsylvania, where a tract of land was conveyed to a married woman to hold "unto herself, her heirs and assigns, exclusively of her said husband," and by her will she devised the rents and profits of the land, during the life of her husband, and the proceeds of sale, at his death, to her son and daughter, it was held that, at the death of the wife, the land passed subject to the curtesy of the husband. *Rank v. Rank*, 120 Pa. St. 191. However, in Illinois, where a testator devised lands to a married daughter "to be free from the debts of the husband," it was held that by necessary implication the husband of the devisee was excluded from any estate by curtesy. *Monroe v. Van Meter*, 100 Ill. 347.

However, in Indiana, the consent of the husband that his wife may devise her real estate to her child by a former marriage, does not estop him from asserting title, after her death, to one-third of the premises, as given to him by § 2485, R. S. 1881. *Roach v. White*, 94 Ind. 510. And in West Virginia, although a husband fail to renounce the provisions of a will made in his favor by his wife, who had no children at the date of the will, he will not be deprived of his curtesy by an after-born child that survived the wife. *Beirne v. Beirne*, 33 W. Va. 663. And a husband who releases his curtesy in his wife's estate, accepting in lieu thereof an income given him by her will, will be regarded as a purchaser of such income and not the mere recipient of his wife's bounty, and the income will be subject to the claims of his creditors notwithstanding that the provisions of

But in order thus to establish the will, a general assent that the wife might make a will was not sufficient; it should be shown **he must assent to the particular will:** that he had consented to the particular will that she had made (a), and his consent should have been given when it was proved (b). He might, therefore, revoke his consent at any time during his wife's life, or after her death before probate (c). But this consent might be implied from circumstances;<sup>57</sup> and if **what was sufficient assent:** after her death he acted upon the will, or once agreed to it, he was not, it seems, at liberty to retract his assent, and oppose the probate (d). And when the will was made in pursuance of an express agreement or consent, it was said that a little proof would be sufficient to make out the continuance of the consent after her death (e).

This assent on the part of the husband was no more than a waiver

the will exempt it from such claims. *Bank of Commerce v. Chambers*, 96 Mo. 459. See also, *McCulloch v. Valentine*, 24 Neb. 215.

And, in Maryland, a *feme covert* is competent to dispose by will, made without her husband's consent, of property which she was entitled to receive and hold to her sole and separate use, whether before or since the Code. And also, she has power of devising, as *feme sole*, all property, real and personal, which belonged to her at the time of the marriage, if that took place since the adoption of the Code, and all property which she may have acquired or received since that period by purchase, gift, grant, devise, bequest or in course of distribution. *Schull v. Murray*, 32 Md. 9; *Buchanan v. Turner*, 26 Md. 1. Chapter 293, § 6, acts of 1842 refers only to the general property of the wife and does not apply where property is held to her separate and sole use. *Buchanan v. Turner*, *ubi supra*.

(a) *Rex v. Bettesworth*, 2 Stra. 891. *Willock v. Noble*, L. R. 7 H. L. 580.

(b) *Henley v. Philips*, 2 Atk. 47.

(c) *Swinb.* Pt. 2, s. 9, pl. 10. 4 Burn, Ecc. L. 52. *Brook v. Turner*, 2 Mod. 170.

57. In South Carolina, the circumstance that the will was in the handwriting of the husband was held to establish assent by implication. *Grimke v. Grimke*, 1 Desaus. 366.

(d) *Brook v. Turner*, *ubi supra*. Accordingly in *Maas v. Sheffield*, *Prerog. M. T.*, 1845, 4 Notes of Cas. 350, S. C., 1 Robert. 364, it was held by Sir H. Jenner Fust, that if, after the death of the wife, the husband does assent to a particular will, he is bound by that assent. Where a wife made a will, disposing of a fund over which she had a power, and also of a fund over which she had no power, and made her husband her executor, and he proved her will generally, Sir L. Shadwell, V.-C., held that, as to the latter fund, the will was valid, as being made *ex assensu viri: ex parte Fane*, 16 Sim. 406. And in the case of a will made by a married woman who appointed her husband an executor and he assented to the making of the will, and after her death expressed his intention to take probate, but died before so doing without withdrawing his consent, it was held that he had assented to the will: In the Goods of Cooper, 6 P. D. 34.

(e) *Brook v. Turner*, 2 Mod. 173.

of his rights as his wife's administrator (*f*).<sup>58</sup> It therefore could only give validity to the instrument, in the \*event of his being the survivor. Hence it follows, that if he died before his wife, her will was void against her next of kin, so far as it derived its effect from his consent; and it, therefore, did not pass the right of property bequeathed to her during the coverture (*g*).

husband's assent only available if he survived.

If the circumstances took place before the 1st of January, 1838 (and consequently the case did not fall within the operation of the stat. 1 Vict. c. 26), a widow after the death of her husband might, without any formal republication, recognize her will made during her coverture;<sup>59</sup> and the instrument by such a recognition, operated as a new will (*h*). So, a woman by recognition, without any formalities, might republish, during her widowhood, a will that she had made when a *feme sole*, and such will was then equally valid, as to personalty, as if made in her widowhood (*i*). But by reason of the stat. 1 Vict. c. 26, no such recognition made on or after the 1st January, 1838, can be effectual, notwithstanding the will itself were made before that date (*k*).

A widow might, prior to 1838, by recognition set up her will made during coverture, or one made when a *feme sole*.

Hitherto the subject has only been considered with respect to cases of wills, which were merely valid by the husband's consent to waive his rights as administrator. But it often occurred that the will of a married woman was made in pursuance of an agreement before marriage, or of an agreement made after marriage, for consideration.<sup>60</sup> Wills of married women made under such circumstances, fall under the same rules as those made by a *feme covert*, by virtue of a power (*l*);

Will of *feme covert* made in pursuance of agreement before marriage, or by virtue of a power:

(*f*) In the Goods of Smith, 1 Sw. & Tr. 127, per Sir C. Cresswell.

58. But in New Jersey, the husband who has allowed the will of his wife to be probated is held by such act to have waived any rights of survivorship in her personalty. *Webb v. Jones*, 9 Stew. (N. J.) 163.

(*g*) *Stevens v. Bagwell*, 15 Ves. 156. *Price v. Parker*, 16 Sim. 198. *Noble v. Phelps*, L. R. 2 P. & D. 276-283. *Willock v. Noble*, L. R. 7 H. L. 580. As to the assent of the husband, see generally

*Roper on Husband and Wife*, 2 ed. p. 170-189.

59. In Kentucky, where a married woman executed her will while her husband was living, and after his death she recognized and adopted it as her will, it held that it was a valid will. *Porter v. Ford*, 82 Ky. 191.

(*h*) *Miller v. Brown*, 2 Hagg. 209.

(*i*) *Long v. Aldred*, 3 Add. 48.

(*k*) See *post*, Pt. I. Bk. II. Ch. IV.

60. By statute in Delaware, the husband and wife may, by ante-nuptial con-

(*l*) *Tucker v. Inman*, 4 M. & Gr. 1077.

concerning which it is thought more advisable to refer the reader to the several able Treatises on that subject, than to enlarge this work by a farther discussion of it (*m*). \*It must still be remarked, not available without probate: that although a different rule formerly prevailed, a testamentary appointment of such a nature by a wife cannot now be made available, either at law or equity, without probate (*n*), but a will of a married woman made during coverture under a power and disposing of *real property only*, is not entitled to probate though there is an ap-

tract, executed in the presence of two witnesses, determine what rights each shall have in the other's property, both during marriage and after death, and may bar each other of all rights not so secured. Laws Del., vol. 14, ch. 550, § 4. And in Kentucky, a married woman cannot dispose, by will, of estate secured to her by parol ante-nuptial contract. *Hickman v. Brown*, 88 Ky. 377. But in South Carolina, where, by marriage settlement, the husband has surrendered to her full and free disposal of her property, she has power during coverture to dispose of it absolutely by will. *Porcher v. Daniel*, 12 Rich. Eq. 349. A power of testamentary disposition reserved in a marriage settlement may be exercised by a *feme covert* after her marriage. *Michael v. Baker*, 12 Md. 158; *Buchanan v. Turner*, 26 Id. 1; *Mullins v. Lyles*, 1 Swan 337; *Mitchell v. Holder*, 8 Bush 362; *Harris v. Harbeson*, 9 Id. 397; *Albrecht v. Pell*, 11 Hun 127; *Newlin v. Freeman*, 4 Ired. Eq. 312.

When a husband has covenanted in a marriage settlement that his wife may make a will, but withholds his consent from the particular will she makes, this is still her will, as to personal property, sufficient to repel his right to administration and to authorize the granting of administration to her appointee with will annexed. *Newlin v. Freeman*, 1 Ired. L. 514. Where property is conveyed to or settled upon a *feme covert* to her separate use, and a specific mode of alienation or

appointment is provided in the instrument creating the estate, that mode *must* be pursued. In such case, however, if there be no specific mode of disposition prescribed, or no restriction thereon, the *feme covert* may act in reference to the disposition of the estate as a *feme sole*. *Armstrong v. Kerns*, 61 Md. 364, 367; *Cooke v. Husbands*, 11 Id. 492; *Buchanan v. Turner*, 26 Id. 1, 5.

But where a *feme sole*, in prospect of marriage, conveyed real estate in turn to her separate use, so that the husband might not have any right to the rents, issues and profits, and then proceeded, "nor shall the said premises, nor the rents, issues or profits be liable for any debts which he may now owe, or which he may hereafter contract, but be subject to her *order alone*;" the deed contained no power to dispose of the estate by an appointment in the nature of a will. *Lyne's Executor v. Crouse*, 1 Pa. St. 111. In such a case, a married woman has no power except such as is expressly given. *Lancaster v. Dolan*, 1 Rawle 231; *Barnett's Appeal*, 46 Pa. St. 392, 399; *Thomas v. Folwell*, 2 Whart. 11.

(*m*) Sugden on Powers, chap. 3. As to the husband's right to administration, *ceterorum*, see *post*, Pt. I. Bk. IV. Ch. II. § VII.; Bk. V. Ch. II. § I.

(*n*) *Ross v. Ewer*, 3 Atk. 160. *Stone v. Forsyth*, Dougl. 708. Sugden on Powers, 332, 4th edit. *Tucker v. Inman*, 4 M. & Gr. 1049.

pointment of executors (o).<sup>61</sup> Where, however, a married woman having a power of appointment over real property executed the power in favour of herself, and afterwards made a will directing that a portion of the property should be sold to pay legacies and erect a memorial window, it was held that as she possessed the property as separate estate, and had appointed an executor and directed him to pay the legacies, &c., and as the arrears of rent were part of her personal estate, the will was entitled to probate (p). And the Court of Probate would allow such appointment to be proved without the husband's consent (the probate being limited to the property comprised in the power (q),) although its former practice was to require the husband's concurrence before it would admit the instrument to probate.<sup>62</sup> Formerly the Court of Probate did not take upon itself to enter with any great minuteness into the construction of the powers, under which wills of this kind were executed, or as to the due compliance with their conditions. But according to the more modern practice, until the decision of the case of *Barnes v. Vincent* (hereafter mentioned), the Court of Probate considered itself bound to decide in the first instance, not only whether there was a power authorizing the testamentary act, but also whether the power had been duly executed, before it gave the instrument the sanction of its seal (r). Yet

probate may be obtained of such a will without husband's consent:

(o) In the Goods of Tomlinson, 6 P. D. 109.

61. But in Kentucky if the will of a married woman which devises estate which is not disposable by a married woman's will be presented for probate, probate will be refused. *Hickman v. Brown*, 88 Ky. 377.

And under section 2168 of the Code of Tennessee, a *feme covert* cannot make a valid devise of her property or estate except when it is secured to her separate use, or in execution of a power vested in her. Nor do the provisions of chapter 36, section 2481 of the Code create in a wife such separate estate (in her land) as will enable her to dispose of it by will. *Johnson v. Sharp*, 4 Coldw. 45.

(p) *Brownrigg v. Pike*, 7 P. D. 61. And see In the Goods of Hornbuckle, 15 P. D. 149.

(q) See *post*, Pt. I. Bk. IV. Ch. III. § VII.

62. In Kentucky a *feme covert* may, by will, dispose of any estate secured to her separate use by deed or devise, or in execution of a written power to make a will. Gen. Stats. Ky. 1873, ch. 113, § 4. And it would appear that although she may dispose of her personal estate by consent of her husband, she has no power to dispose of any real estate, except in execution of a power. *George v. Bussing*, 15 B. Mon. 563. But by a will devising real estate of a wife to her husband the title to such real estate will pass. *Parrott v. Kelly*, 79 Ky. 490.

In New York, if a wife execute a will under a power it is not essential that reference should be made to the power in the will. *Heyer v. Burger*, 1 Hoff. Ch. 1.

(r) *Allen v. Bradshaw*, 1 Curt. 110, 121.

if the court felt any real \*doubt on the point, it was always deemed the safer course to admit the paper to probate: inasmuch as the production of such a probate will not alone be sufficient to induce a Court of Equity to act upon it; for, with respect to other special circumstances which may be required to give the instrument effect as a valid appointment, *viz.*, attestation, sealing, &c., the Temporal Courts were never contented with the judgment of the Spiritual Court(s): whilst on the other hand, if the Court of Probate should reject the paper, its decision would be final; as the Court of Construction will not proceed to the consideration of the effect of any testamentary paper, till it has

without any decision as to whether it is authorized by the power and its execution.

been proved in the Probate Court (t).<sup>63</sup> But at last, in the case of *Barnes v. Vincent* (u), it was held by the Judicial Committee of the Privy Council (reversing the decision of the Prerogative Court of Canterbury) that the proper course for the Ecclesiastical Court is to grant probate whereso-

(s) *Rich v. Cockell*, 9 Ves. 376. *Price v. Parker*, 16 Sim. 198. However, if the instrument has been admitted to probate, a Court of Equity is precluded from questioning it as a will; and the only office of that Court is to see that it has been duly executed and attested according to the power: *Douglas v. Cooper*, 3 M. & K. 378. *Whicker v. Hume*, 7 H. of L. 124, 144. But see *Morgan v. Annis*, 3 De G. & Sm. 461.

(t) *Allen v. Bradshaw*, 1 Curt. 121, 122. In the *Goods of Biggar*, 2 Curt. 336. See *post*, Pt. I. Bk. IV. Ch. III. § IX. But see also *Goldsworthy v. Crossley*, 4 Hare, 140, 145.

63. The will of a *feme covert* must be established in the court of probate before it can be made available as a will in a court of equity. But after probate it is for the court of equity to see that the instrument is of the kind by which a married woman can dispose of her property. The course in the court of probate is, where a married woman assumes the right to make a will, and the right is questioned, to pronounce for the will on proof of the *factum*, and leave it to the court of equity to determine whether she had

such an interest or authority as she could dispose of or execute by will. *Whitfield v. Hurst*, 3 Ired. Eq. 242; *Osgood v. Bliss*, 141 Mass. 474; *Ela v. Edwards*, 16 Gray 91; *Heath v. Withington*, 6 Cush. 497; *Parker v. Parker*, 11 Id. 519; *Cutter v. Butler*, 25 N. H. 343.

And such will must be admitted to probate in the same manner as that of any other person capable of making a will. *Schull v. Murray*, 32 Md. 9.

And in case of an appointment, authorizing a married woman to make a will of personal property, such appointment must be proved as a will in the proper court, and is then regarded as a will in all courts. *Newlin v. Freeman*, 1 Ired. L. 514. So too, as to the will of a *feme covert*, under a power reserved in a settlement, in Massachusetts. *Picquet v. Swan*, 4 Mason 443.

And a decree of a court of probate, approving and allowing the will of a married woman unappealed from and unrevoked, is final and conclusive upon the heirs at law of the testatrix. *Parker v. Parker*, 11 Cush. 519.

(u) 4 Notes of Cas. Suppl. XXI. S. C., 5 Moo. P. C. 201.



ever the paper professes to be made and executed under a power, and is made by one whose capacity and testamentary intention are clear, and no other objection occurs save those connected with the power (for example, no objection on the provisions of the Wills Act), and to leave the court which has to deal with the rights under that instrument, to decide whether or not it is authorized by that power and by its execution. Their Lordships appear further to have been of opinion, that, on a power being alleged, the Ecclesiastical Court should grant probate, without going into any question as to the existence of the power. The decision in this case \*was declared by their Lordships to be a restoration of "the ancient and laudable practice" of the Ecclesiastical Court (x). The question as to the jurisdiction of the Probate Division and the limit in practice of its exercise (which is wholly different from the question of the jurisdiction and practice of the Ecclesiastical Courts and the Probate Court), has been recently before the courts in the case of *In the Goods of Tharp* (y) in which *Barnes v. Vincent* was commented on in the Court of Appeal, and it was pointed out that such case was decided at a time when the then Court of Probate, being an Ecclesiastical Court, was a court of very limited jurisdiction, and could not decide the question of the sufficiency of the execution of the power and also that since the passing of the Judicature Act everyone of the Divisions of the High Court of Justice, and every judge, has now jurisdiction to do that which might be done by any other Division or any other judge. Thus in the present day it would seem that, in a case of a will of a married woman made under a power, it would not only be competent to, but also incumbent upon, the Probate Division, if the court had all persons interested before it, to decide the question not only whether there was a power, but whether it was well executed.

In cases where a will is made by a married woman under a power, her executors do not take *jure representationis*, but merely under the power which she was authorised to exercise by making a will as to particular property. And, consequently, the title of her executors did not extend beyond the property the subject of the power (z).

Executors of the will of a married woman made under a power take nothing *jure representationis*.

(x) Where the will of a married woman recited a power to bequeath certain property in case of her dying without issue, the Court refused to grant administration with the will annexed to one of her children, but granted a general administration

founded on an affidavit that the testatrix left no will operative at law. In the *Goods of Graham*, L. R. 2 P. & D. 385. *Noble v. Phelps*, L. R. 2 P. & D. 276.

(y) 3 P. D. 76.

(z) *Tugman v. Hopkins*, 4 M. & Gr.

\*According to the old practice, in granting probate of a married woman's will made by virtue of a power, or administration with such will annexed, the power under which the will purported to have been made must have been specified in the grant (a).

Grant of probate under old practice to specify the power.

It need hardly be observed, that if a will of a married woman, made under a power, be obtained by the husband by undue influence and marital authority, contrary to her real wishes and intentions, such will will not be admitted to probate (b). So if a wife have power to dispose of property by her will, makes her will, and afterwards destroys it by the compulsion of her husband, it may be established, upon satisfactory proof of its having been so destroyed, and also of its contents and execution (c).

Will unduly obtained or unduly destroyed by marital authority.

Besides the case of a will, made by a married woman by virtue of a power, there were, even before the Married Women's Property Act, other circumstances under which a will made by her was valid without the assent of her husband, viz., where personal property was actually given or settled, or was agreed to be given or settled, to the separate use of the wife. In such a case it has been established, since the case of *Fettyplace v. Gorges* (d), that she may dispose of it as a *feme sole*, to the full extent of her interest, although no particular form to do so is prescribed in the instrument by which the settlement or agreement was made. The principle upon which that decision was founded is this; that when once the \*wife is permitted to take personal property to her separate use as a *feme sole*, she must so take to it with all its privileges and incidents,

Will of *feme covert* of personalty settled, or agreed to be settled, to her separate use:

389. *O'Dwyer v. Geare*, 1 Sw. & Tr. 465. And, consequently, there would have been an intestacy as to property not disposed of by the power.

(a) Rule 15, 1862, P. R. (Non-Contentious Business). This rule was repealed in April, 1887, and by the rule (18) substituted for it it is enacted that in the grant of probate of the will of a married woman it shall not be necessary to recite in the grant, or in the oath to lead the same, the separate personal estate of the

testatrix or the power or authority under which the will has been, or purports to have been, made. The probate shall take the form of ordinary grants of probate without any exception or limitation and issue to the executor.

(b) *Marsh v. Tyrrell*, 2 Hagg. 84. *Mynn v. Robinson*, 2 Hagg. 179.

(c) *Williams v. Baker*, Prerog. Trin. Term. 1839.

(d) 1 Ves. Jun. 46. S. C., 3 Bro. C. C. 8.

one of which is the *jus disponendi* (e). And it may be stated as a general rule, that personal property which has been acquired by a married woman under such circumstances, that it became her separate estate, may be dealt with by her as if she were a *feme sole* (f).<sup>64</sup> And this rule prevailed without regard to the circumstance, whether the property were in possession or reversion (g), and whether it were vested or contingent (h). And when she has such a power over the principal, it extends also to its produce and accretions, *e. g.*, the savings of her pin-money (i). Nor did it make any difference whether the property were given to trustees for the wife's separate use, or without the intervention of trustees, to the wife herself, for her own separate use and benefit (k);<sup>65</sup> for in the latter case a Court of Equity would decree the husband to stand as a trustee to the separate use of the wife (kk).

good, of property in reversion as well as possession :

extends to accretions.

(e) *Rich v. Cockell*, 9 Ves. 369. But in the case of such property the title to which accrued to a married woman before the commencement of the Married Women's Property Act, 1882, if she dies intestate, the property will belong to her husband *jure mariti*: *Molony v. Kennedy*, 10 Sim. 254.

(f) As to what before the Married Women's Property Act, 1882, was considered as such separate estate, see *Haddon v. Fladgate*, 1 Sw. & Tr. 48. In the Goods of *Smith*, *ibid.* 125. In the Goods of *Crofts*, L. R. 2 P. & D. 18. The old cases have, however, lost their importance since the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). See *post*, Pt. II. Bk. II. Ch. II. § III., where the general subject of the separate property of a widow as against her husband's executors is considered.

64. Where both husband and wife have always treated as the wife's separate property, and as under her entire control, moneys and notes taken for the loan of money belonging to her before, or accruing to her during, coverture, her right to hold and dispose of the same as she may choose will be recognized and

protected by courts of law as well as of equity. She may, therefore, dispose of the notes, as *donatio causa mortis*, to her husband for a third person, or the husband himself may be the donee *causa mortis* in his own right. *Caldwell v. Renfrew*, 33 Vt. 213.

(g) *Sturgis v. Corp.*, 13 Ves. 190.

(h) *Lechmere v. Brotheridge*, 32 Beav. 353.

(i) *Herbert v. Herbert*, Prec. Ch. 44. 1 Eq. Ca. Abr. 66, 68. Accordingly, she could dispose by will, as against her husband, of the savings out of her alimony: *Moore v. Barber*, 34 L. J., N. S., Ch. 667: *coram* Stuart, V. C.

(k) See the judgment of Sir John Nicholl, in *Braham v. Burchell*, 3 Add. 263.

65. Where a deed of trust was executed and delivered for the use of a married woman, who, by her will, made her husband residuary devisee; upon a conveyance to the husband by the trustee, it was held that the husband took no estate by the deed, but that he took all by the devise. *Bradstreet v. Kinsella*, 76 Mo. 63.

(kk) *Tappenden v. Walsh*, 1 Phillim. 352, and the authorities there cited.

Even before the Married Women's Property Act, 1882, the Legislature had by statute given married women testamentary powers under special circumstances, for the Divorce Act (1857), (20 & 21 Vict. c. 85), sect. 21, enacts that a wife who has obtained a protection order by reason of her husband having deserted her shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in like position in all respects, with regard to property, as she would be if she had obtained a decree of judicial separation. And by sect. 25, referring to property acquired by the wife from the date of the sentence of judicial separation, it is provided that "such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead." Under these enactments a woman having been deserted by her husband obtained a protection order by reason of his desertion. On her death, in the life of her husband, intestate, the court decreed letters of administration, limited to such personal property as she had acquired, or became possessed of, since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin (l).

Statutory testamentary powers of married women prior to Married Women's Property Act, 1882.

Will of *feme covert* of property acquired after a protection order :

after a judicial separation.

The law as to the testamentary powers of married women, and as to their rights of property generally, has been completely altered by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which repealed the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93).<sup>66</sup> The earlier

Testamentary powers of married women under the Married Women's Property Act.

(l) In the Goods of Worman, 1 Sw. & Tr. 513. The requirement in the statute as to the entry of the protection order with the registrar is directory only: In the Goods of Faraday, 2 Sw. & Tr. 369. As to the property to which the wife becomes entitled as executrix or administratrix since the sentence of separation or commencement of desertion, see stat. 21 & 22 Vict. c. 108, s. 7; *Bathe v. Bank of England*, 4 K. & J. 564. *Post*, Pt. II. Bk. IV. Ch. II.

66. The common law status of married women as to disposing of property by will has been changed by statute in the

United States. It is better to subjoin an epitome of the statutes of the various states, which is given, as follows:

In *Alabama* the Wills act of 1806 (Toulm. Dig. 883, § 2) gives the power of devise to "every person" with no exception of married women, and this section is copied in the code (1852, § 1589; 1867 and 1876, § 2274), but by § 1989 of the code of 1852 (1876, § 2713) it is provided that a married woman may make a will of her separate estate. In *Arkansas* in the territorial law of 1815 (Comp. T. L. 556, § 1), married women are expressly excluded unless they act

statute only affected testamentary powers of married women in so far as it brought within separate property the wife's personal earnings, and

under a marriage settlement or a special authority executed by the husband in writing. By the Revised Statutes of 1847 (c. 170, § 3) this special authority must have been executed prior to the marriage. By the Revised Statutes of 1873 (§ 5762) she may devise her separate property as a *feme sole*. In *California* the code of 1850 (c. 72, § 2) requires for the validity of such devise, either the annexed written consent of the husband duly attested, or that it be made under a marriage settlement or by virtue of an ante-nuptial written authority of the husband. These requirements are dispensed with by act of 1866 (P. L. 317; Code 1872, ed. 1876, § 6273). In *Colorado* a married woman may make a will subject to the restriction that she cannot give more than half of her property away from her husband without his consent (1861, P. L. 153, § 4; 1867, R. S., c. 60, § 4; 1877, G. S. 614, § 1750). In the *District of Columbia* she was excepted in the statute of wills (Code 1816, 77, § 75; Rev. Code 1857, c. 52, § 1); but can devise her separate property or execute a power of appointment (R. C., § 8). In *Connecticut* a married woman may make a will without restriction, by act of 1809 (P. L. 15, since then frequently re-enacted, 1875, G. S., p. 368, § 1). In *Delaware* married women were excepted as late as the act of 1829 (P. L. 221, § 2) and the code of 1852 (R. C. 272, § 2), but enabled by act of 1873, c. 550, with the consent of her husband, and subject to his right of curtesy. In *Florida* married women were excepted in the act of 1822 (P. L. 52, § 1), but this exception is omitted in the subsequent acts of 1823 (P. L. 101, § 1) and 1828 (P. L. 141, § 51). The act of 1822 (§ 7) contains a proviso saving the wife's right to her separate estate. In *Georgia*, by the code

of 1858 (§ 2375; 1873, § 2410), a married woman may make a will under a power in the instrument creating the estate, or under a power of appointment, or regarding her separate estate, or in case of abandonment by her husband, or divorce, and in no other case. In *Idaho* a married woman may devise in the same manner as if she were sole (1887, Rev. Stats., § 5726). In *Illinois*, prior to 1861, a married woman might dispose by will only of her separate real and personal estate, (1829, R. C. 191, § 1; 1833, P. L. 611; 1845, R. S. 536, § 1), but in 1861 (P. L. 143) an act was passed making all property of a married woman separate estate, to be enjoyed as if she were sole. See, too, 1872, R. S., c. 148, § 1. In *Indiana* a married woman may now make a will as if sole (1847, P. L. 108; 1859, P. L. 245; 1876, R. S. 570, § 1). In *Iowa* the statute of wills extends to "every person," without exception of married women (1839, P. L. 471, § 1; 1843, P. L. 666, §§ 1-4; 1873, Code 411, § 2322). In *Kansas* there is no exception of married women in the statute (1855, T. L., c. 164, § 1; 1859, P. L., c. 63, § 1) enabling every person of proper age and sound mind to make a will, but it is provided in the General Statutes of 1868 (c. 117, § 35) that a married man or woman cannot bequeath away from wife or husband more than half of his or her estate without a written consent duly executed and attested. In *Kentucky* married women are excepted in all the earlier statutes of wills, (1785 and 1797, 1 Litt. 611, § 1; 1851, R. S. 227, c. 106, § 2; 1852, R. S. 693), but by act now in force (1873, G. S., c. 113, § 4) a married woman may make a will to dispose of her separate estate or in execution of a power. The statutes of *Maine* authorize every one of proper age and sane mind, to dispose of

generally gave her a right of acquiring property independently of her husband. The Act of 1882 expressly gives married women testamentary powers. The material sections of this act are the following :—

property by will (1821, P. L. 137, § 1; 1871, R. S. 563, § 1). In *Maryland*, the earlier statutes of wills enable only such persons to make a will as are "capable of executing a valid deed or contract" (1798, c. 10, § 3; Code 1860, art. 93, § 300; Rev. Code 1878, art. 49, p. 419, § 3), but by act of 1842 (P. L., c. 393, § 6; Code 1860, *supra*, § 308; Rev. Code 1878, *supra*, § 12), a married woman may make a will to her husband or other person, executed sixty days before her death, on a private examination first had by witnesses out of her husband's presence, whether she was induced by fear, threats or ill-usage. This requirement by the code and revised code does not apply to separate property acquired after the code of 1860 went into effect. In *Massachusetts* the earliest acts of 1641 and 1671 (Laws of New Plymouth Colony, p. 281) apply to all persons of competent age and sound mind, married women being neither excepted nor enabled by express words. So, too, the act of 1784 (1 Laws 109, § 1) and the Revised Statutes of 1836. By the act of 1842 (P. L. 527) she was authorized to dispose by will of her separate property by consent of her husband, not, however, in such manner as to affect his rights. The act of 1850 (P. L. 403) further enabled her to devise or bequeath property to her husband. By the act of 1855 (P. L. 710) her right to devise her real estate was made subject to the husband's right of curtesy, and her power to bequeath her personal property away from her husband was limited to one-half. So Laws 1857, p. 599; 1859, G. S. 538, c. 108. In *Michigan* a married woman's power to dispose of her property by will was extended by act of 1848 to a policy of insurance on the life of her husband for her sole use (1 Comp. L.

1818, p. 1479), but the husband's consent, executed in the presence of witnesses, and annexed to the wife's will, was, until 1873, necessary to its validity (1857, Comp. L., c. 92, § 1; 1 Comp. L. 1871, c. 154, § 4322). This requirement seems to have been done away by the act of 1873 (P. L. 13), giving power to all persons of full age and sound mind to dispose of their property by will. The same requirement formed part of the laws of *Minnesota* (1851, R. S. 53, § 1; 1866, G. S., c. 47, § 1), until struck out by act of 1869 (P. L. 75), and a married woman of full age may, without her husband, execute a power of appointment by will (1878, R. S. 558, § 38). In *Mississippi* by the code of 1821 (ed. 1848, p. 647, § 14), and the revised code of 1871 (§ 2388), every person of proper age and sound mind (with no exception of married women) may make a will; and a married woman may dispose of her property by will as if unmarried (Rev. Code, § 1785). In *Missouri* married women were at first excepted from the Wills act unless authorized by marriage settlement or special written authority of husband (1 T. L. 1807, p. 140, § 18; 1 T. L. 1814, p. 405, § 25; 1 T. L. 1821, p. 786, § 1; 1825, R. L. 790, § 1; 1835, R. S. 617, §§ 1, 3; 1845, R. S. 1078, §§ 1, 3; 1855, R. S., c. 167, §§ 1, 3). The exception was first omitted in 1865 (G. S., c. 131, § 1), and in 1877 (P. L. 262) an act was passed authorizing married women to dispose of their real and personal property by will, subject only to the right of curtesy, and this is now the law in *Missouri* (1879, R. S., c. 71, § 3961). In *Montana* her powers are limited only by a provision that she cannot deprive her husband of more than one-third of her estate without his consent (1887, Com. Stats., § 435). The statutes

\*Sect. 1 (sub-s. 1). "A married woman shall in accordance with the provisions of this Act be capable of acquiring, holding, and *disposing by will* or otherwise of any real or personal property as her separate

of *Nebraska*, on the other hand, have since 1860 required the husband's written consent to his wife's will to be duly attested and annexed thereto (1860, P. L., c. 5, § 1; 1866, R. S., c. 14, § 123; 1873, R. S., c. 17, § 123). With the same proviso in *Nevada* a married woman might dispose by will of her separate property and her interest in common property (1862, Comp. L., c. 61, § 2). This proviso was struck out in 1873 (P. L. 102). In *New Hampshire*, prior to 1845, the statute of wills gave power to every person of proper age and sound mind, with no express exception of married women (1822, P. L., p. 10, § 1; 1853, C. S. 165; 1867, G. S. 174; 1878, G. L., §§ 1, 6). Married women were first expressly authorized by act of 1845 (P. L. 236) to dispose of real property by will, subject, however, to all rights of their husbands, and by act of 1854 (P. L. 1418) such devise could not be to the husband. This was changed in 1860 (P. L. 2248), and in 1858 the wife of an insane person was enabled to dispose of her separate property by will, presumably clear of her husband's rights (1858, P. L. 1980). In *New Jersey* married women were first authorized by statute to make a will in 1864 (P. L. 698), subject, however, to the husband's rights. This proviso practically subjected the will to the husband's consent. It was changed in 1874 so as to save only the husband's right of curtesy in her real property (Rev. 1874, p. 638, § 9). The statute of 1795 (Pat. Rev. 189, § 3) included coverture among testamentary disabilities in wills of real estate and estates *pur autre vie*, and by inadvertence this provision still remains upon the statute book (Rev. 1874, p. 1244, § 3). In *New York* by the act of 1787 (1 Greenl. 386, § 5) a married woman was declared

incapable of making a will. This incapacity was not removed until 1867 (P. L., 1927), although enabled to transfer her separate personal property by act of 1860 (P. L. 157, § 2). She could before that execute a power of appointment without the concurrence of her husband (1827, 1 R. S. 732, § 80; 735, § 110; 6th ed., vol. II., p. 1114, § 101; p. 1116, § 131). In *North Carolina* the power of a married woman to make a will is still limited to the execution of a power of appointment or a power of disposal contained in the instrument creating the estate (1845, P. L. 125, § 8; 1873, Batt. Rev., c. 119, § 3). In *Ohio* every person without exception as to coverture, is authorized to make a will (1808, 6 L. 64, § 1; 1810, 8 L. 146, § 1; 1816, 14 L. 141, § 1; 1824, 22 L. 119, § 1; 1840, 38 L. 120, § 1; 1852, 50 L. 297, § 1; 1878, 75 L. 838, § 2; 1880, Rev., § 5914). In *Oregon* married women can only make wills by virtue of their marriage settlement or a written authority of the husband executed before marriage (1850, G. S. 274, § 3), and her devise of real property is subject to his right of curtesy (1855, Comp. L. 784, § 3). In *Pennsylvania* married women were authorized by the act of 1833 (P. L. 249, § 1; Purd. Dig. 1872, p. 1474) to devise real property under a power of appointment, and to bequeath personal property by consent of husband. This power was afterwards made general as to property of every kind (1848, P. L. 537; Purd. Dig. 1872, p. 1474, § 2), subject, however, to the husband's curtesy, except where made in the exercise of a power of appointment over a trust for her separate use (1855, P. L. 430; Dig., *supra.*, § 21). In *Rhode Island* a married woman may make a will subject to her husband's curtesy (1856, P. L. 1269; 1857, R. S. 356, § 3; 1872, G. S.

property in the same manner as if she were a *feme sole*, without the intervention of any trustee" (II).

374, §§ 1, 6). In *South Carolina* married women were excepted from the statutes of wills of 1733 (2 Stats. at Large 341, § 5) and 1789 (5 Stats. at Large 106, § 2). This exception was done away as to wills in execution of a power in 1866 (13 Stats., p. 438), and altogether in 1873 (R. S. 442, §§ 1, 17). In *Tennessee* she may make a will of her separate estate (1852, P. L. 260, § 4; 1858, Code, § 2168), or in execution of a special power (Id.). In *Texas* the statute gives power to make a will to every person, irrespective of coverture (1840, P. L. 167, § 1), and this is extended by the Revised Statutes of 1879 (§ 4857) to all persons, irrespective of age, "who may be or may have been lawfully married." It is believed that this and that of Iowa are the only statutes in the United States with this provision. In *Vermont* no exception of married women is made in the earlier statutes (1797, Dig. L. 119, § 1; 1821, Comp. L. 334, § 16; 1851, Comp. Stats. 327, §§ 1, 4; 1862, G. S., c. 49, §§ 1, 4), but they were not expressly authorized to make a will until 1847 (P. L. 26; 1851, Comp. Stats. 403; 1862, G. S., c. 71, § 17). They were excepted in the *Virginia* statutes of 1785 (12 Stats. at Large 140, c. 61, § 1) and 1792 (13 Id. 88, § 1), and still remain so (1835, P. L. 43; 1873, Code 909, §§ 2, 3), except as to separate estate and execution of powers (Code, *supra*, § 3). In *West Virginia* there is no such exception in the Wills act (1868, Code, c. 77, § 1). In *Wisconsin* in 1849 (R. S. 324, § 38) a

married woman was authorized to make a will in execution of a power, but in general only by annexed written consent of husband duly attested (1849, R. S. 353, c. 66, § 1). This power was made general and independent of consent as to her separate property in 1870 (P. L. 10), and as to all property in 1878 (R. S., § 2277). In *Wyoming* her powers are the same as if sole (C. L. 1876, c. 82, § 4).

In New Jersey, even where the wife is living separate from her husband, she cannot dispose of any interest of his in her property. *Vreeland v. Ryno*, 11 C. E. Gr. 160. But the act of 1855, in Pennsylvania, neither expressly nor impliedly repealed section 9 of the act of 1848. *Dickinson v. Dickinson*, 61 Pa. St. 401. As to the Kansas statute, see *Bennett v. Hufthinson*, 11 Kan. 398; *Allen v. Hammer*, 15 Id. 625; *Barry v. Barry*, Id. 587. In Georgia a *feme covert* may make a valid will without her husband's consent as to any property acquired since 1866. *Urquhart v. Oliver*, 56 Ga. 344. But in Texas the power of a married woman to make a will does not confer upon her the right to devise any community property free from community debts. *Brown v. Prigden*, 56 Tex. 124. But subject to its liability for community debts, such property will pass to and vest in her legatee under a valid will as effectually as any other property owned by her. Id.

In Missouri a wife cannot, by will, deprive her husband of his curtesy in her

(II) It is only in accordance with the provisions of the act that this sub-section gives power to a married woman to dispose of her property by will as her separate property, that is to say, in the case of a woman married after the commencement of the act, in accordance with sec-

tion 2, of the property in that section mentioned, in the case of a woman married before the commencement of the act in accordance with section 5 of the property in that section mentioned. *Re Cuno*, 43 C. D. 12.



Sect. 2. "Every woman who marries *after the commencement of this Act*" (1 Jan., 1883) "shall be entitled to have and to hold as her separate property, *and to dispose of in manner aforesaid*" (i. e., by will or otherwise as if she were a *feme sole*), "all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Sect. 4. "The execution of a general power by will of a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

Sect. 5. "Every woman married *before the commencement of this Act*" (1 Jan., 1883) "shall be entitled to have and to hold *and to dispose of in manner aforesaid*" (i. e., by will or otherwise as if she were a *feme sole*) "all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act (*m*), including any

lands, *Soltan v. Soltan*, 93 Mo. 307; while in the District of Columbia a married woman is to be regarded as a *feme sole* in respect to her separate property, and she may dispose of it as she pleases, *Smith v. Thompson*, 2 M'Arth. 291; and may make her will without consent of husband, *Emmons v. Garnett*, 7 Mackey 52; but the fact that the husband does not object to the probate does not estop him from afterwards raising the question as to what property passed by the will. *Id.*

But the provision in the Pennsylvania statute of 1887 (P. L. 332, § 5), that a married woman "may dispose of her property by will, signed by her, in the same manner as if she were unmarried," does not permit her to deprive her hus-

band of his curtesy. *Teacle's Estate*, 132 Pa. St. 533. And in Massachusetts the husband's curtesy cannot be barred without his written consent, *Silby v. Bullock*, 10 Allen 94; *Cushing v. Aylwin*, 12 Metc. 169; *Burroughs v. Nutting*, 105 Mass. 228; and under the statute of 1887, a wife, who dies after the statute, cannot, by a will made before the statute, deprive her husband of the interest secured to him by that statute, without his consent. *Johnson v. Williams*, 152 Mass. 414. See also *Sears v. Sears*, 121 Mass. 267; *Burke v. Colbert*, 144 Id. 160.

Like the similar provisions of the statute in regard to a widow, the statute is a modification of the statute of descents. *Sears v. Sears*, *ubi supra*.

(*m*) Property, the title to which, whether vested, or contingent in reversion, or remainder, is acquired before the commencement of the act, does not come

within this section though it falls into possession after the act. *Reid v. Reid*, 31 C. D. 402.

\*wages, earnings, money and property so gained or acquired by her as aforesaid" (*i. e.*, in sect. 2).

Sect. 23. "For the purposes of this act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

The general effect of this act on the testamentary capacity of women married on or after the 1st January, 1883 (*mm*), would seem to be that a married woman can, during coverture, dispose by will of all property which she then (during coverture) (*n*) has, whether real or personal, as if she were a *feme sole*, and the property limited to her separate use; while with regard to women married before that date their testamentary capacity is limited to property to which their title accrues after that date, including any wages, earnings, money or property gained or acquired by her as aforesaid in the act (*nn*).<sup>67</sup>

One consequence of the change in the capacity of married women to acquire property and hold it as separate property and dispose of it by will has been that the old rule as to specifying in the grant of probate, or administration with the will annexed, the power under which the will purported to have been made, has been repealed (except in so far as concerns anything done or proceeding taken in accordance with it) by Rules 15 and 18, April, 1887, P. R. (Non-Contentious Business), which enact that it shall not be necessary to recite in the grant the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate, or letters of administration with will annexed, shall take the form of ordinary grants of probate or letters of administration with will annexed, without any exception or limitation (*o*).

\*It has been pointed out (*p*) that since the Judicature Act the jurisdiction of the Probate Division is not limited by the rule established by the case of *Barnes v. Vincent* (*q*) by the Judicial Committee of the

And in Kansas the rights of the husband and wife in the property of each other are substantially the same. *Martindale v. Smith*, 31 Kans. 273; *Vining v. Willis*, 40 Id. 609, 616; *Green v. Green*, 34 Id. 740.

(*mm*) See section 2 above.

(*n*) *Re Price*, 28 C. D. 709.

(*nn*) Sect. 5. "As aforesaid" would

seem to be her personal earnings after marriage as defined in sect. 2 of the act.

67. However, in Tennessee, a married woman who is under twenty-one years of age cannot dispose of real estate by will. *Campbell v. Browder*, 7 Lea 240.

(*o*) *Re Price*, 12 P. D. 137.

(*p*) *Ante*, p. \*52.

(*q*) 5 Moo. P. C. 201.

Privy Council in respect of the Ecclesiastical Courts, and in 1878 it was decided that when the will of a married woman is tendered for probate on the ground that she had separate property and the probate is contested, if the Court is satisfied that there is separate property it has power to grant probate of all such property as the testatrix has power to dispose of, without deciding what that property is, but it is in general the duty of the Court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists (*r*).

The will of a married woman dealing only with realty, but appointing executors, is entitled to probate where a portion of the estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882 (*s*).

If a wife acquired any property after her husband's death, it could not pass by a will made during her coverture, though by the consent of her husband: for at the time of making the will she was intestable as to that property (*t*). And the law in this respect remained, it should seem, unaltered, notwithstanding that, by the 24th section of the Wills Act (1 Vict. c. 26), every will is to be construed to speak and take effect as if it had been executed immediately before the death of the testatrix, unless a contrary intention shall appear by the will: for the effect of that is not to make a will valid which was invalid in its inception, but to give a rule for the construction of a valid testamentary instrument (*u*). Neither, it would seem, is it altered in this respect by the Married Women's Property Act, 1882 (*x*).

\*If a *feme sole* makes her will, and afterwards marries, such subsequent marriage is a revocation, and entirely vacates the will:<sup>68</sup> and although she should survive the husband, a will made before marriage will not revive upon his death, without a republication (*y*).<sup>69</sup>

Property acquired by the wife after husband's death.

Will made by a wife before marriage.

(*r*) In the Goods of Tharp, 3 P. D. 76.

(*s*) In the Goods of Cubbon, 11 P. D.

169. And see In the Goods of Hornbuckle, 15 P. D. 149.

(*t*) Scammell v. Wilkinson, 2 East, 556. Swinb. Pt. 2, s. 9, pl. 5.

(*u*) Price v. Parker, 16 Sim. 198, 202.

Willock v. Noble, L. R. 7 H. of L. 580. See *ante*, p. \*47, n. (*t*).

(*x*) *Re Price*, 28 C. D. 709.

68. So held in *New York*, Estate of Davis, Tuck. 107, in accordance with the provision of the statute. So too by statute as to an unmarried woman in Ala-

(*y*) *Post*, Pt. I. Bk. II. Ch. III. § v.  
69. In North Carolina this doctrine is

not sustained, but in such an event the will is good and effectual without repub-

The will of a *feme covert*, made during coverture, in virtue of powers vested in her under her marriage settlement, is not revoked by her surviving her husband (z).

Will made by wife during marriage not revoked by her surviving her husband.

A woman whose husband is banished, or convict.

A woman whose husband is banished by Act of Parliament may make a will, and act in every respect as a *feme sole* (a). So where a married woman, whose husband was a convict, made a will, probate thereof was

granted, on proof given that the property bequeathed was acquired by her subsequently to her husband's conviction, though he had received a conditional pardon from the governor of the colony whither he had been transported for life (b). And the Queen consort is

The Queen consort.

an exception to the general rule; for she may dispose of

her chattels by will without the consent of her lord (c).

Where a married woman was a native of Spain, and domiciled there,<sup>70</sup> and it appeared, upon affidavit, that, by the law of Spain, she had full power and authority to bequeath,

Will of married woman, native

bama, Arkansas, California, Indiana, Missouri, Nevada, Oregon and Pennsylvania, and as to any testator, therefore a woman, in Connecticut, Georgia, Illinois, Kentucky, North Carolina, Rhode Island, Virginia and West Virginia.

The reason for the rule that the marriage of a woman subsequently to her having made a will, revoked it, rested on the fact that the woman becoming *covert* became thereby, on account of the marital rights of her husband, disabled to dispose of the property devised or bequeathed by the will, and so her will ceased to be ambulatory, thus losing one of the necessary characteristics of a will. *Morton v. Onion*, 45 Vt. 145. C. made her will, being, at the time, unmarried; she afterwards married; at the time of her marriage, her husband agreed that the will should not be affected by the marriage. It was held that, as there was no antenuptial agreement to keep the property of C. separate, nor to cut down her hus-

band's right thereto, her will was revoked by the marriage, as to all personalty, whether choses in possession or action. *In re Polly Carey's Estate*, 49 Vt. 236. See *post*, p. —, note —, and cases there cited.

(z) *Morwan v. Thompson*, 3 Hagg. 239. *Trimmell v. Fell*, 16 Beav. 537, 541. *Bishop v. Wall*, 3 C. D. 194.

(a) *Portland v. Prodggers*, 2 Vern. 104. *Compton v. Collinson*, 2 Bro. C. C. 385.

(b) *In the Goods of Martin*, 2 Robert. 405. *In the Goods of Coward*, 11 Jur. (N.S.) 569. S. C., 34 L. J. (N.S.) P. M. & A. 120.

(c) 2 Black. Comm. 498.

70. But in New York it is held that the domicile of the wife is determined by that of the husband, and that where living apart from her husband she cannot have a separate domicile for testamentary purposes. *Will of Paulding*, Tuck. 47.

Where a man married in France a native of that country and subsequently

lication. *Wood v. Bullock*, 3 Hawks 298. But in Massachusetts where, during the life of her husband, a married woman

makes her will, it is not valid to pass her estate after his death without republication. *Osgood v. Breed*, 12 Mass. 525.

of, and domiciled as a *feme sole*, the property she brought her husband on  
 in, a foreign her marriage, probate was granted of her will, made ac-  
 country. cording to the law of that country (*d*).

## SECTION III.

*Persons incapable from their Criminal Conduct.*

Formerly traitors and felons were from their criminal conduct incapable of making testaments from the time of \*their conviction: for then their goods and chattels were no longer at their own disposal, but forfeited to the King (*e*). But if a convict, traitor, or felon obtained the King's pardon, and was thereby restored to his former estate, then he might make his testament, as if he had not been convicted (*f*). And if he had goods as executor to another the same were not forfeited by conviction, whence it followed of such goods he might make his will (*g*). Now, however, that forfeiture of lands and goods for treason and felony has been abolished by stat. 33 & 34 Viet. c. 23, it would seem to follow that traitors and felons are no longer incapacitated from making wills.<sup>71</sup>

died in Pennsylvania, it was held that his widow was entitled to an interest in his estate as provided by the community laws of France. *Harral v. Harral*, 12 Stew. (N. J.) 279.

(*d*) In the Goods of Maraver, 1 Hagg. 498. See *post*, Pt. I. Bk. IV. Ch. IV. § VI.

(*e*) 2 Black. Comm. 499. Swinb. Pt. 2, ss. 12, 13. Godolph. Pt. 1, c. 12.

(*f*) Swinb. Pt. 2, s. 12, pl. 3. Godolph. Pt. 1, c. 12, pl. 1.

(*g*) Godolph. Pt. 1, c. 12, s. 2. 4 Burn, Ecc. L. 61.

71. Under the old law, in England, although one convicted of felony forfeited all his estate and lost his capacity to acquire any other property, yet if the accused died before conviction, or stood mute, there was no forfeiture and his testament was good. And the wills of traitors, aliens, felons and those out-

lawed were valid except against the king. But in this country the forfeiture in the case of those convicted of crime is limited to the lifetime of the offender. Therefore the remainder of the estate, the life estate of the convict being deducted, remained at the disposal of the felon, and such remainder was devisable by last will and testament of the felon made at any time before his execution. By the act of 1796 in Kentucky all rights of the commonwealth are transferred immediately to the representatives of the convict in case of intestacy, and no new forfeiture was created by this act. *Rankin v. Rankin*, 6 Mon. 531.

One convicted of crime can make a will in Georgia (1858, Code, § 2376; 1873, § 2411); and in Kentucky (1802, 3 Litt. 71). But a convict while in prison cannot make a will in Rhode Island. (1872, G. S. 568).

Neither could a *felo de se* make a will of goods and chattels; for they were forfeited by the act and manner of his death (*h*); *felo de se.* although he might make a devise of his lands, for they were not subjected to any forfeiture (*i*). But though the goods were forfeited so that the will could not operate on them, it did not follow that he was incapable of making a will and appointing an executor; and Sir C. Cresswell granted probate of the will of a person who had been found *felo de se* by a coroner's inquest, acting, it should seem, on the distinction between the operative effect of a testamentary paper and its title to probate (*k*). Indeed, probate may have been requisite in such a case, not only for the purpose of passing property held by the deceased *in auter droit*, but also to enable the executor to exercise his undoubted right to traverse the inquisition (*l*). But now it would seem to follow from the above statute that a *felo de se* \*is no longer incapacitated from making a will of goods and chattels.<sup>72</sup>

Outlaws are incapable of making a will (*m*), as long as the outlawry subsists; for their goods and chattels are forfeited during that time (*n*). But a man outlawed in a personal *Outlaws.* action may, it is said, in some cases make executors: for he may have debts upon contract which are not forfeited to the King: and those executors may have a Writ of Error to reverse the outlawry (*o*).

Before the stat. 53 Geo. III. c. 127, there was some doubt whether *Persons excom-* an excommunicate person could make a will (*p*); but, by *municate.* that statute, excommunication is not to be pronounced, except in certain cases; and by section 3, in those cases, parties excom-

(*h*) 2 Black. Comm. 499. Swinb. Pt. 2, s. 20. See *post*, Pt. II. Bk. III. Ch. IV. as to the executors or administrators of the deceased traversing an inquisition or presentment of *felo de se*.

(*i*) 3 Inst. 55. 4 Burn, Ecc. L. 62.

(*k*) In the Goods of Bailey, 2 Sw. & Tr. 156.

(*l*) See *post*, Pt. II. Bk. III. Ch. IV. as to the executors or administrators of the deceased traversing an inquisition or presentment of *felo de se*.

72. But where a testator speaks of the death of a legatee, he means natural death, not civil death; hence imprisonment for life will not avoid a legacy to

one contingent upon the death of the legatee. *Avery v. Everett*, 36 Hun 6.

(*m*) See stat. 33 & 34 Vict. c. 23, s. 1.

(*n*) 2 Black. Comm. 499. Godolph. Pt. 1, c. 12, s. 8. Swinb. Pt. 2, s. 21, pl. 4. But it seemeth, that he who is outlawed in an action personal may make his testament of his lands; for they are not forfeited: Swinb. Pt. 2, s. 21, pl. 7.

(*o*) *Shaw v. Cutteris*, Cro. Eliz. 851. 4 Burn's Ecc. L. 62. Wentw. c. 1, p. 37, 14th edition. Outlawry in civil proceedings has now been abolished. 42 & 43 Vict. c. 59, s. 3.

(*p*) Swinb. Pt. 2, s. 22. Wentw. c. 1, p. 38. 4 Burn's Ecc. L. 62.

municated shall incur no civil incapacity whatever. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments, (as usurers, libellers, and others of a worse stamp), by the common law their testaments are good (q).

Persons guilty of crimes short of felony.

(q) 2 Black. Comm. 499.

## \*CHAPTER THE SECOND.

## OF THE FORM AND MANNER OF MAKING A WILL OR CODICIL.

Before the passing of the statute 1 Vict. c. 26 (*Act for the Amendment of the Laws with respect to Wills*), no solemnities of any kind were necessary for the making of a will of personal estate. The fifth section of the Statute of Frauds, which required the formalities of signature and attestation for a devise of lands, did not extend to wills of personal property. The nineteenth section made it necessary that they should, generally speaking, be reduced *into writing* in the testator's lifetime; inasmuch as it was thereby enacted, that no nuncupative will (where the estate thereby bequeathed exceeded the value of 30*l.*) should be good, except under certain circumstances which will be hereafter pointed out (*a*). But no other formality whatever was necessary to give them effect and operation. Whence it often happened that a will, intending to dispose of both real and personal estate, was inoperative as to the former, and at the same time a perfect disposition of the latter.<sup>1</sup>

The Wills Act repeals the Statute of Frauds so far as relates to wills (*viz.* sects. 5, 6, 12, 19, 20, 21, 22, and 23), and contains enactments, the result of which is, that, on or after the first day of January, 1838, the solemnities prescribed by the act are required to render valid any will or other testamentary disposition of every description of property without distinction; so that the same formalities of execution and attestation are necessary, whether the instrument disposes of real or personal estate.<sup>2</sup>

(*a*) *Post*, sect. VI.

1. But the use of the word "devise" does not restrict the operation of the will to real estate only. *Estate of Pfuelb*, Myrick's Prob. 38. And, on the other hand, while the word "legacy," in its technical sense, refers to personal property only, it has been so construed by the courts as to include land. *Cole v. Covington*, 86 N. C. 295, 298; *Ladd v. Harvey*, 1 Fost. 514; *Williams v. McCombs*, 3 Ired. Eq. 450.

2. Under the old law it was held that

a will was in the nature of a conveyance, and therefore that it could operate only on lands of which the testator was seized at the time of the *factum*. *George v. Green*, 13 N. H. 521; *Thompson v. Scott*, 1 McCord. Ch. 32; *Brewster v. McCall's Devisees*, 15 Conn. 273; *Kemp's Executors v. McPherson*, 7 Harr. & J. 320; *Hays v. Jackson*, 6 Mass. 149; *ante* p. 5, n. 2. But under the recent statutes which have enabled a person to dispose by will of any land to which he may be entitled at the time of his death, *i. e.*, at the time when



\*These enactments are contained in the following sections of the Statute of Victoria.

Sect. 9. "No Will [or codicil, or other testamentary disposition] (b) shall be valid, unless it shall be in writing,<sup>3</sup> and executed in manner hereafter mentioned; (that is to say,) it shall be signed at the foot or end thereof (c) by the testator, or by some other person in his presence and by his direction;<sup>4</sup> and such signature shall be made or ac-

Every will shall be in writing and signed by the testator in the presence of two witnesses at one time:

the instrument becomes operative, there is growing up a tendency to draw a marked distinction between the nature of a conveyance and a will. It is now said that a will is never a conveyance; a conveyance transfers property during life, while a will can effect a transfer only after death. Death transfers the property, the will says only where it shall go, *Comstock v. Adams*, 23 Kans. 524; a will simply designates where the title shall go. *Martindale v. Smith*, 31 Kans. 273; *Green v. Green*, 34 Id. 740; *City of Leavenworth v. Stille*, 13 Id. 548.

(b) See the Interpretation clause, sect. 1, *Preface*. See also 3 Curt. 478, 479.

3. In the United States statutes similar to the Wills act generally prevail. 4

Kent 501; 1 Redf. on Wills 4, 168. In *Alabama* and other territory under the northwestern ordinance of 1787, the first provision for wills required them to be in writing. The act of 1806 required this only as to devises of real property, and contained for bequests of personalty exceeding \$100 in value, the provisions of § 19 of the Statute of Frauds, as to calling on witnesses and proof by them, and for all nuncupative wills of personalty the provisions of § 19 as to time and place. Subsequently by the code all wills were required to be in writing, except bequests of personal property not exceeding \$500 in value, and the provisions of § 19 were applied to all nuncupative wills. The provisions of § 20

(c) A statutory construction has been put upon these words by stat. 15 Vict. c. 24. See *post*, p. \*67.

4. Signature at the end of the will is required by statute in Arkansas, Idaho, Kansas, Montana, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota and Tennessee. Other statutes require the will to be "subscribed" by or for the testator: California, Connecticut and Kentucky. As to what constitutes a signing "at the foot or end thereof," see *In re Conway*, 124 N. Y. 455; *Hitchcock v. Thompson*, 6 Hun 279; *Sisters of Charity v. Kelly*, 7 Id. 290; S. C., 67 N. Y. 409; *Brady v. McCrosson*, 5 Redf. 431; *Will of Cohen*, Tuck. 286; *Matter of O'Neil*, 27 Hun 130; *Tonnele v. Hall*, 4 Comst.

140; *Gilman v. Gilman*, 1 Redf. 354; *Lewis v. Lewis*, 13 Barb. 17; *Butler v. Benson*, 1 Id. 526; *Wineland's Appeal*, 118 Pa. St. 37; *Ginder v. Farnum*, 10 Id. 98; *Baker's Appeal*, 107 Id. 381; *Stricker v. Groves*, 5 Whart. 386; *Hallowell v. Hallowell*, 88 Ind. 251; *Allen v. Everett*, 12 B. Mon. 379; *Flood v. Praggoff*, 79 Ky. 607; *Glancy v. Glancy*, 17 Ohio St. 134; *Owens v. Bennett*, 5 Harr. (Del.) 367; *Warwick v. Warwick*, 86 Va. 596; *Waller v. Waller*, 1 Gratt. 454; *Roy v. Roy*, 16 Id. 418; *Adams v. Field*, 21 Vt. 256; *Miles' Will*, 4 Dana 1; *Boone v. Lewis*, 103 N. C. 40.

As to the signing of the will by another person for the testator in the various American states, see *post*, p. 105, n. 8.

knowledge by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall sub-

were also enacted, and § 21. In *Arkansas* by the territorial law of 1815 the provisions of §§ 19 and 20 are made applicable to nuncupative wills; likewise § 21. But it is only required that persons present be called on by testator to witness where the value of the property bequeathed exceeds \$200, and in such case the fact must be proved by two witnesses. The provisions of § 19 with the above changes are extended to all nuncupative wills by the Revised Statutes of 1838, and all nuncupative wills are prohibited which bequeath property in excess of \$500. It is also provided that there shall be no probate of a nuncupative will after the lapse of six months, unless reduced to writing within fifteen days after making and signed by the witnesses; nor shall such will be proved within twenty days after testator's death, nor without citation as in § 21 of the statute of frauds. All other wills must be in writing. In *California* all wills must be in writing except nuncupative wills. The provisions of § 19 of the statute of frauds are contained in the act of 1850, to be proved by two witnesses present, but the provision as to place was afterwards struck out by amendment of 1874. Moreover, no nuncupative will could be made for property exceeding \$500 in value. This was changed to \$1,000 by the code of 1872, by which it was further provided that "the decedent must at the time have been in actual military service in the field or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death; or the decedent must have been at the time in expectation of immediate death from an injury received the same day." Section 20 of the statute of frauds remains, the time for reducing to writing being enlarged to thirty days; likewise § 20,

reduction to writing being made, however, a condition to probate. In *Colorado* all wills must be in writing except nuncupative wills. A nuncupative will of personal property is valid if reduced to writing within a "reasonable time" (formerly thirty days), and proved by two credible witnesses. The witnesses must also prove that they were present at the pronouncing of the will, and believe that the testator was of sound mind and memory, and that the testator called upon some person present to bear witness, and that the will was made during his last sickness and reduced to writing within ten days. No letters testamentary on such will can issue for sixty days after testator's death, and there could be no probate without citation of widow or next of kin. In the *District of Columbia* devises of real property were required to be in writing by the code of 1816, and now no nuncupative will is allowed, except wills of soldiers and sailors not exceeding \$200 in amount. In *Connecticut* real property can only be devised by written will, and this requirement was extended in 1848 to wills of personal property. In *Delaware* all devises of land must be in writing. Nuncupative wills of personal property were at first valid, if reduced to writing and subscribed by two witnesses within two days after testator's death, and proved within six months, by acts of 1700 and 1706. By act of 1753 nuncupative wills of personal property exceeding £50 in value were invalid, unless proved by two witnesses who were present at the publication, and unless made during testator's last sickness, and at his home or place where he had resided at least ten days, except in case of surprise or sudden death before returning home. And such will must be proved within six months, and must have

scribe the will in the presence of the testator;<sup>5</sup> but no form of attestation shall be necessary."

been reduced to writing within six days after being pronounced, and no probate or letters could be granted on such will within fourteen days after testator's death. These provisions were changed in 1829 to the present law, which makes nuncupative wills valid only to the amount of \$200, and requires that they be published in the presence of two witnesses, and reduced to writing within three days, and postpones their probate for thirty days after testator's death. In *Florida* devises of real property are required to be in writing, and nuncupative wills were only valid, if pronounced during testator's last sickness in the presence of two or more witnesses (since 1828, three) called upon by testator to bear witness. Originally such will must have been reduced to writing within six days, and proved within six months; now changed to a prohibition of probate after six months, unless reduced to writing and sworn to by the witnesses within six days after being pronounced. No probate can be granted on such will until sixty days after testator's death, and upon citation of widow and next of kin. Such will

may be revoked by parol, if the revocation be reduced to writing, read to and approved by the testator, and the facts proved by three witnesses. In *Georgia* the English statute of 29 Charles II., c. 3, is printed in full in Schley's edition of English statutes in force in that state. By act of 1852 all wills must be in writing, except nuncupative wills. All property may pass by nuncupative will. Nuncupative wills must be proved by three witnesses present at the publication of the will, and called on by the testator to bear witness to it, and can only be executed during testator's last sickness, and at his house or his residence for at least ten days before his death, unless he was surprised by sudden sickness and death away from home, and such will must be reduced to writing within thirty days after being pronounced, and proved within six months after testator's death. In *Idaho* it is provided that all wills, except nuncupative wills, must be in writing. Nuncupative wills may be made, but they must be reduced to writing within thirty days after the words were spoken; and must be admitted to probate within six months after

5. In New York the signatures of subscribing witnesses are effectual only when such witnesses sign after the testator. *Rugg v. Rugg*, 21 Hun 383; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Knapp v. Reilly*, 3 Dem. 427, 432. But in Pennsylvania the witnesses may sign first. *Miller v. McNeill*, 35 Pa. St. 217. And in New Jersey the validity of the will is not affected by the fact that one of the witnesses signed before the testator. *Mundy v. Mundy*, 2 McCart. 290, 294. So too in Connecticut it is held that it makes no difference in what order the testator and witnesses sign, provided

it be all part of one transaction. *O'Brien v. Gallagher*, 25 Conn. 229.

As to statutory provisions of the various states as to the witnesses requisite for the due execution of wills, see *post*, p. 117, n. 16.

Holograph wills in general require no attestation. Such wills, when written throughout and signed by the testator, are recognized as valid by statute of Arkansas, California, District of Columbia, Florida (formerly), Kentucky, Louisiana, Michigan (formerly), Mississippi, Missouri (formerly), Montana, North Carolina, Pennsylvania, Tennessee, Texas, Virginia and West Virginia.

Sect. 11. "Provided always, and be it further enacted, that any soldier being in actual military service (d), or any mariner or seaman being at sea (e), may dispose of his personal estate as he might have done before the making of this Act."

exceptions as to  
wills of soldiers  
and mariners:

they were spoken, and not sooner than fourteen days after the death of testator. In *Illinois* written wills were provided for by the northwestern ordinance of 1789 and by the act of 1819, and the revised code of 1829 requires all wills to be in writing. Nuncupative wills of personal property are, however, made valid if reduced to writing within ten (since 1829, twenty) days, and proved by two credible disinterested witnesses, who must swear that they heard the testator pronounce such will and call upon some person or persons present to bear witness to it, and that they believe the testator to be of sound mind; and such will must have been made in testator's last sickness, and cannot be proved until sixty days after his death. In *Indiana* all wills of real property must be in writing. Nuncupative wills were excepted, but these were not valid if they disposed of property exceeding \$80 in value (changed by act of 1829 to \$50, and in 1852 to \$100), unless proved by two witnesses who were present, and unless testator called on some person or persons present to bear witness to the will; and such will must have been made during testator's last sickness, and (until 1852) at his home or place of abode for ten days at least prior to his death, unless surprised away from home by sudden sickness and death. By the acts of 1807 and 1818 no probate could be granted on such will after six months from testator's death, unless it had been reduced to writing within six days after it was pronounced; but in 1829 it was enacted that no probate could be granted after six months,

and such will must have been reduced to writing within six days in all cases—changed in 1831 to fifteen days. Nor could probate be granted of such will except on citation of widow or next of kin, and (until 1829) at least fourteen days after testator's death. In *Iowa* all wills must be in writing, except nuncupative wills of personal property (limited in 1843 to \$300), and such will must be proved by two competent witnesses. Prior to 1843 it was further required that such will be reduced to writing within twenty days, and be proved by two credible witnesses, who must swear that they were present and heard the testator declare the same and call upon some person or persons present to bear witness to it, and that they believe that testator was of sound mind and memory, and that the said will was made in testator's last sickness, or on a voyage at sea, or a field of battle, "or under such other circumstances that it could not be reduced to writing by the testator," and no letters testamentary were to be issued on such will until sixty days after testator's death. In *Kansas* every will must be in writing, except nuncupative wills of personal property made in testator's last sickness, and reduced to writing within ten days, and subscribed by two competent witnesses; and it must be proved that the testator was of sound mind and memory, and not under restraint, and called upon some person or persons present to bear witness to his will, and such will must be offered for probate within six months after testator's death. Before 1865 nuncupative

(d) See *post*, p. \*104.

(e) See *post*, p. \*105.

The construction of this section will be considered hereafter (f).

Sect. 13. "Every Will executed in manner heretofore required, shall be valid without any other publication thereof." publication not requisite.

wills were limited to \$300 worth of personal property, and before 1859 to \$200 worth of property, and such will must have been made during testator's last sickness, and at his home or residence of at least ten days previous to his death, except in case of surprise by sickness and death away from home. The act of 1859 required such will to be proved in one year, and the act of 1855 required that it be reduced to writing within thirty days after it was pronounced and proved within six months after testator's death, but not within fourteen days and after citation of widow or next of kin. In *Kentucky* nuncupative wills were provided for by the act of 1785, as by act of 29 Car. II., c. 3, to be made during testator's last sickness and at his home or residence of at least ten days prior to his death, unless surprised away from home by sickness and death, and if the property bequeathed exceeded £10 in value it must be proved by two witnesses that testator called on some person present to bear witness, and probate of such will must be made within six months after testator's death, unless it had been reduced to writing within six days after it was pronounced, nor within fourteen days, or without citation of widow or next of kin. By the Revised Statutes of 1851, however, power to make a verbal will is given only to soldiers and sailors. In *Louisiana* verbal testaments are abrogated, and nuncupative, or open wills, like mystic or sealed wills, must be in writing. In *Maine* all wills must be in writing except nuncupative wills. Nuncupative wills, if the property bequeathed exceeds \$100 in value must be published

in the presence of three witnesses during testator's last sickness and at his home or place of abode for at least ten days previous to his death, except in case of surprise by sickness and death away from home. No probate of such will can be made more than six months after testator's death, unless it has been reduced to writing within six days after its publication; nor until fourteen days after testator's death and on citation. In *Maryland* the statute of 29 Car. II., c. 3, is included in Chancellor Kilty's list of English statutes "introduced, used or practiced by the courts of law or equity in this state." Sections 19 and 20 of this statute were afterwards made part of the Maryland statute law, with change in limitation of amount from £30 to \$300. All devises of real property must be in writing. In *Massachusetts* the act of 29 Car. II., c. 3, was substantially enacted in 1692, and by the same act devises of real estate were required to be in writing. An earlier act of 1671 required but two witnesses to a nuncupative will, but provided that it should be reduced to writing within three days, and proved at the next term of court. The act of 1784 substantially re-enacts this law, fixing the limit to unwitnessed parol wills at £50. By the general statutes of 1859, however, no provision is made for other nuncupative wills than those of soldiers and sailors. In *Michigan* devises of real property must be in writing. Nuncupative wills of personal property exceeding \$100 in value were provided for and restricted in the same manner as by the statute of frauds. In 1811 the number of necessary witnesses was reduced to two, and such wills were

(f) See *post*, pp. \*104, *et seq.*

The statute does not extend to wills made before Jan. 1, 1838.

It must, however, be observed, that this statute does not extend to any will made before January 1, 1838 (g). As to the law with respect to wills made at an earlier date, see the former editions of this work, Pt. I. Bk. II. Ch. II.

required to be written down and attested within six days after testator's death. By the existing law, no nuncupative will is valid for property exceeding in value \$300. In *Minnesota* all except nuncupative wills must be in writing, and nuncupative wills are now permitted only to soldiers and sailors in actual service. Formerly nuncupative wills were allowed in the same manner and with the same restrictions, where the property bequeathed exceeded \$150 in value, as by the statute of 29 Car. II., c. 3. In *Mississippi* devises of real property are required to be in writing, and the provisions and restrictions of the statute of frauds, except as to attestation, apply to all nuncupative wills, and if the property bequeathed exceeds in value \$100, it must be proved by two witnesses that the testator called on some person or persons present to bear witness to the will. In *Missouri* the provisions of the statute of frauds, except as to attestation, were applied to all nuncupative wills, and if such will disposed of property exceeding in value \$200, it must be proved by two witnesses that the testator called on some person or persons present to bear witness to it. In 1821 the time to reduce to writing was changed from six to thirty days; so, 1825, R. L. 790, §§ 5, 7; but § 4 of this act prohibited all nuncupative wills for more than \$200 worth of property, and applied the provisions of § 23 of the act of 1808 to all nuncupative wills. In *Montana* every will, other than a nuncupative will, must be in writing. Nuncupative wills must be for property

not exceeding \$1,000 in amount; must be made only by persons in actual military service or doing duty on board a ship at sea, in actual contemplation, fear or peril of death or in expectation of death from injuries received the same day. They must be spoken in the presence of two witnesses; the words must be reduced to writing within thirty days after they were spoken; cannot be probated until the testator has been dead fourteen days and must be probated within six months after they were spoken. In *Nebraska* personal property to the amount of \$200 might be bequeathed by a verbal will made in the presence of two competent witnesses, by the act of 1855, and all other wills were required to be in writing. In 1866, however, the provisions of the statute of frauds were enacted to apply to nuncupative wills exceeding \$150 in amount. In *Nevada* all but nuncupative wills must be in writing, and no nuncupative will is valid for more than \$1,000 worth of property; and all nuncupative wills must be made during testator's last sickness, and proved by two witnesses present at the time, and the testator must have called upon the persons present, or some of them, to bear witness to his will. No proof of such will can be made more than three months after it was spoken, nor can it be admitted to probate within fourteen days after testator's death, or without citation of widow or next of kin, nor unless first reduced to writing by the probate judge. In *New Hampshire* the statute of frauds, as relating to nuncupative wills of personal property to the value of

(g) But every will re-executed or republished or revived by any codicil is, for the purposes of the act, to be deemed

to have been made at the time the same was so re-executed, republished, or revived (sect. 34).

It may here be remarked, that where a will without date is properly executed according to the former law, but not executed pursuant to the new act, and the case is altogether \*bare of circumstances which can afford the Court any infor-

*Presumption as to the time when a will without date was made.*

\$100 was enacted in 1822, and §§ 19 and 20 were re-enacted in 1878. In *New Jersey* the provisions of the statute of 29 Car. II., c. 3, are applied to nuncupative wills of property not exceeding \$80 in value. All other wills must be in writing. In *New York* statutory provision was first made for written wills in 1649 by an ordinance of the directors and council of New Netherland. This ordinance provides that "whereas, it is daily observed that \* \* \* grave mistakes are committed in the writing and drawing up of evidences by private persons who are neither qualified thereto by oath nor called thereto by authority, whereby frequently many things are written to the advantage of those who have the papers drawn up, interspersed with sinister, obscure and dubious words," therefore all "contracts, testaments," &c., "which shall not be written by the secretary or other authorized person" shall be invalid. And it was further enacted in 1656 that "all skippers, commissaries, supercargoes, assistants, secretaries, notaries, auditors and others, who as public persons write wills, shall particularly take care that they are acquainted with the testators, and be careful that they duly comprehend the testator's intention, and that on and in their respective ships and places of residence all the people's wills be correctly written and registered in a book, and signed by the testator and two credible witnesses besides the skipper," special provision being made for soldiers marching against the enemy. By the statute of wills of 1787 the provisions of the act of 29 Car. II., c. 3, as to nuncupative wills, were enacted, but by the Revised Statutes of 1829, no nuncupative wills are allowed

except those of soldiers and sailors in actual service. In *North Carolina* the act of 1784 applied the provisions of the statute of frauds to all nuncupative wills of property above the value of £100. This was changed by the act of 1841, which required wills of personality to be executed with the same formalities as wills of realty, and all wills in *North Carolina* must now be executed in writing. In *North Dakota* every will, other than nuncupative wills, must be in writing. Nuncupative wills must be for property not exceeding \$1,000; must be made in the presence of two witnesses and must be made by a person in actual military service, or doing duty on shipboard at sea and in actual contemplation, fear or peril of death, or in expectation of death from injuries received the same day; must be probated within six months after being spoken and not sooner than fourteen days after the death of the testator. In *Ohio* nuncupative wills are only allowed for personal property, can only be made during testator's last sickness, and must be proved by two disinterested witnesses, and it must be proved by them that the testator was at the time of sound mind and memory and not under restraint, and that he called on some person present to bear witness to his will, and must since 1840 be reduced to writing and subscribed by the witnesses within ten days. Formerly no probate of such will could be made after six months unless it had been reduced to writing within six days, but since 1816 there can be no probate after six months, and until 1824 the will must have been reduced to writing in six, now ten, days. In *Oregon* all wills must be in writing, except nuncupative wills to an

mation as to the time when the will was made,<sup>6</sup> it has been held, that the presumption is, that it was made before the act came into opera-

amount not exceeding \$200, and such will must have been made under the circumstances required by the statute of frauds, and proved by two witnesses, and cannot be proved after six months, unless reduced to writing within thirty days, nor can it be proved within fourteen days after testator's death, nor without citation of widow or next of kin. In *Pennsylvania* all wills must be in writing, except nuncupative wills of personal property, which may be made under the circumstances set out in the English statute, without limitation as to amount bequeathed; but if the amount exceeds \$100, the will must be declared by the testator in the presence of two witnesses to be his will. There is no special provision as to the probate of such wills. In *Rhode Island* wills of personal, as of real, property must be in writing. In *South Carolina* the provisions of the statute of 29 Car. II., c. 3, became law in 1712 by formal enactment. To this was added in 1733 the requirement that such wills should be proved by competent witnesses. Since 1789 nuncupative wills for property of not more than £10, now \$50, value may be made and proved as prescribed by the English statute, except that there can be no probate after twelve months, and it is not postponed for fourteen days after testator's death. In *South Dakota* every will, other than nuncupative wills, must be in writing. Nuncupative wills must be for property not exceeding \$1,000; must be made in the presence of two witnesses; and must be made by a person in actual military service, or doing duty on shipboard at sea and in actual contemplation, fear or peril of death, or

in expectation of death from injuries received the same day; and must be probated within six months after being spoken, and not sooner than fourteen days after the death of the testator. In *Tennessee* the provisions of the English statute apply, the limitation of amount therein being fixed at £100 in 1784 and changed to \$250 in 1852. In *Texas* the provisions of the statute of frauds were copied into the statute of 1840, with a change of £30 to \$30, and by omission of all amount this was afterward made applicable to all nuncupative wills. So in *Vermont* by act of 1797 changing £30 to \$200; but the provisions as to probate have been dropped from the latter statutes. So in *Virginia*, by act of 1748, changing the number of witnesses to two, and the amount from £30 to £10. This act continued in force (changing amount to \$30), until 1840, when wills of personality, except nuncupative wills, were required to be executed like wills of real property, and by the code of 1873, no exception is made except in favor of soldiers and sailors. The law of *West Virginia* is in this respect like that of *Virginia*. In *Washington* every will, except nuncupative wills, must be in writing. Nuncupative wills are not valid for more than \$200 of property and unless declared before two witnesses; they must be made during the last illness of the testator at his dwelling-house or where he had been residing for at least ten days, except when the testator is taken sick away from home, and except mariners or soldiers disposing of their wages or personal property; and must be probated within six months from the speaking. In

6. Dates of wills, however, are not conclusive. And where a Circuit Court, upon trial, has filed findings as to which of two wills is the later, the findings will

not be disturbed, unless there be a total want of evidence to support them. *Austin v. Fielder*, 40 Ark. 144.



tion; inasmuch as every one is presumed to know the law, and the Court, in the absence of evidence tending to a contrary conclusion, is bound to presume that the will was executed according to the law as it stood at the time the instrument was written (*h*).

## SECTION I.

*Of the Signature by the Testator.*

With respect to the signature of a will, made (or re-executed or republished) (*i*) on or after the 1st day of January, 1838 (*k*), it is required by the stat. 1 Vict. c. 26, s. 9, that it "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction."

Signature of  
wills made after  
Jan. 1, 1838:  
1 Vict. c. 26, s. 9:

It seems clear that the making of a mark by the testator is a sufficient signing to satisfy the statute.<sup>7</sup> It was held by the Court of Queen's Bench, in *Baker v. Denning* (*l*), that

signature by  
mark sufficient.

*Wisconsin* nuncupative wills for an amount exceeding \$150 must be executed and proved according to the provisions of the statute of frauds. All devises of real property must be in writing. In *Wyoming* all wills must be in writing.

But where a codicil disposing of personal property was found among the papers of the testator, in the handwriting of the testator, signed and with an attestation clause not subscribed by any witnesses, it was held that it was evidently the purpose of the testator to acknowledge and publish this codicil in the presence of witnesses, and that it was incomplete and invalid as a testamentary paper. *Power v. Davis*, 3 MacArth. 153. See also *Crispin v. Winkelman*, 57 Iowa 523.

(*h*) *Pechell v. Jenkinson*, 2 Curt. 273. As to the presumption in the case of alterations appearing on the face of a will, see *post*, Pt. I. Bk. II. Ch. III. § I.

(*i*) See *supra*, p. \*63, note (*g*).

(*k*) For a statement of the law and authorities as to wills made prior to this date, see the former editions of this work: Pt. I. Bk. II. Ch. II. § I.

7. *Higgins v. Carlton*, 28 Md. 115; *Smith v. Dolby*, 4 Harr. (Del.) 350; *Pool v. Buffum*, 3 Oreg. 438; *Upchurch v. Upchurch*, 16 B. Mon. 102, 113; *Cozens' Will*, 61 Pa. St. 196; *Ray v. Hill*, 3 Strobb. 297; *Succession of Carroll*, 28 La. Ann. 388; *Flannery's Will*, 24 Pa. St. 502; *Asay v. Hoover*, 5 Id. 21; *Jackson v. Van Dusen*, 5 Johns. 144; *Butler v. Benson*, 1 Barb. 526; *Nickerson v. Buck*, 12 Cush. 332; *Sprague v. Luther*, 8 R. I. 252. *Flood on Wills* 313, 321; *Walkem on Wills* 178; 1 Redf. on Wills 203, 206 and notes; 4 Kent 513, 516.

It has been held that, although the name of the testator be written to the will at his request and in his presence, but with the intention that he should execute it himself by a mark, the execution will not be valid if the testator fail

(*l*) 8 A. & E. 94.

under the Statute of Frauds (s. 6), the making of a mark by a deviser, to a will of real estate, is a sufficient signing; *and that is sufficient, without reference to any question whether he could write at the time.*

to affix his mark. *Main v. Ryder*, 84 Pa. St. 217. But in Kentucky the statute (1851, R. S., c. 106, § 5; 1873, G. S., c. 113, § 5) seems to invalidate a will signed by a mark. And it was held in Pennsylvania, in 1846, that a mark was insufficient, and thereupon, in 1848 (P. L. 16; *Purd. Dig.* 1474, § 7), it was enacted that a mark should be a sufficient signature.

Signature by a mark is sufficient in New York, *Chaffee v. Baptist Missionary Convent*. 10 Paige 85; *Jackson v. Jackson*, 39 N. Y. 158; *Simpson's Will*, 2 Redf. 29, 32; *Van Kleeck v. Phipps*, 4 Id. 99; *Walsh's Will*, Tuck. 132; so too in Pennsylvania, *Main v. Ryder*, *ubi supra*; also in Missouri, *St. Louis Hospital v. Williams*, 19 Mo. 609; *St. Louis Hospital v. Wegman*, 21 Id. 17; *Northcutt v. Northcutt*, 20 Id. 266; and in Arkansas, *Will of Cornelius*, 14 Ark. 675; and in New Jersey, *McElwaine's Will*, 3 C. E. Gr. 499; so too in South Carolina, Kentucky, Maryland, Delaware, Oregon, Louisiana, Massachusetts and Rhode Island. See cases above cited. By statute in Louisiana, if the will is not signed by the testator he must declare that he does not know how, or is not able, to sign, and express mention must be made of his declaration, and of the cause that hinders him from signing. C. C. La., § 1579.

In Missouri, if the testator execute his will by making his mark, this must be the only signature. *St. Louis Hospital v. Williams*, 19 Mo. 609. But in Virginia, if the testator's name be signed for him by another, the adding of a mark is a work of supererogation. *Rosser v. Franklin*, 6 Gratt. 1.

In Pennsylvania execution by mark must be on account of sickness or infirm-

ity and at the request of testator, and both execution and request must be proved by the oath of two witnesses. *Greenough v. Greenough*, 11 Pa. St. 489; *Grabill v. Barr*, 5 Id. 441; *Asay v. Hoover*, Id. 21.

It is essential that testator be conscious at the time of making his mark, *Dunlop v. Dunlop*, 10 Watts 153; if unconscious and he afterward ratify his mark, this will not answer without a re-execution. Id. The fact that a wrong name is set to a testator's mark will not avoid his will. *Long v. Zook*, 13 Pa. St. 400.

But where the testator had intended to affix his mark, and another wrote testator's name for the purpose, but the testator failed to affix his mark, it seems that the name so written cannot be regarded as the name of the testator written by another for purposes of execution, therefore the will must be rejected on account of its incompleteness. *Main v. Ryder*, *ubi supra*.

An imperfect or indistinct subscription of the testator's name may be regarded as his mark. *Hartwell v. McMaster*, 4 Redf. 389. A will which testator executed by a mark may be proved, even when one only of the subscribing witnesses can be examined. *Simpson's Will*, 2 Id. 29.

And in one case where the testator had been paralyzed in the hand so as to have lost the power of writing, a mark made by him was held to be a sufficient execution. *Estate of Williams*, 13 Phila. 302.

But in general it seems that execution by a mark is *prima facie* evidence of inability to write or to read writing, and in such cases there should be evidence by the subscribing witnesses in explanation of the reason for and circumstances attending such method of execution, or

So in *Wilson v. Beddard* (m), on the trial of an issue *devisavit vel non*, directed by the Court of Chancery, Parke, B., said, that it was necessary, under that statute, that the will should be signed by the testator, but not with his name, for his mark was sufficient if made by his hand \*though that hand was guided by another person; and Sir L. Shadwell, V. C., afterwards held, that this proposition was correct.

These decisions appear to be equally applicable to the Statute of Victoria as to the Statute of Frauds, for the language of both acts in this respect is almost identical, the words of the latter being that all devises and bequests of lands shall be in "writing and signed by the party so devising the same or by some other person in his presence and by his express directions, &c." (n).<sup>8</sup> Accordingly it has been held in

satisfactory evidence of knowledge by the testator of the contents of the will. *Bar-tee v. Thompson*, 8 Baxt. 508.

But where a will was executed by the mark of the testator, and at the time of probate one only of the witnesses is living, the execution of the will cannot be proved by the testimony of that witness alone, but there must be proof by the testimony of other persons who were present at the *factum*, showing beyond doubt that the testator made his mark as testified to by the subscribing witness. *Re Phelps*, 16 Civ. Pro. 424. This ruling is contrary to the decision of the surrogate in *Walsh's Will*, Tuck. 132, and in accord with the decision in *Simpson's Will*, 2 Redf. 29, 32.

An act validating wills executed by means of marks is not retroactive. *Shinkle v. Crock*, 17 Pa. St. 159; *Davies v. Morris*, Id. 205; *Burford v. Burford*, 29 Id. 221.

(m) 12 Sim. 28.

(n) See *Accord*. In the *Goods of Bryce*, 2 Curt. 325; in which case a will made since Jan. 1, 1838, was admitted to probate, on motion, the testatrix having signed it with a mark, and notwithstanding her name did not appear on the face of the instrument. See also In the *Goods of Amiss*, 2 Robert. 116, *post*, p. \*82. So

where one *Thomas Douce* put his mark to a testamentary paper in which he was described throughout as *John Douce*, the Court, on being satisfied on affidavit that *Thomas Douce* duly executed the paper, granted probate thereof as his will: In the *Goods of Douce*, 2 Sw. & Tr. 593. Again, where a will purporting to be that of *S. Clarke*, and delivered by her as such for safe custody to one of her executors shortly before her death, was executed by mark against which appeared the name of *S. Barrell* (her maiden name), it was held, that there being no doubt of the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it: In the *Goods of Clarke*, 1 Sw. & Tr. 22. But where the deceased who resided with her sister, prepared two wills for their respective execution, the legacies in each and the disposition of the residue being almost identical, and by mistake executed the will prepared for her sister, the Court held that the deceased did not know and approve of the contents of the document she executed, and refused probate of it. In the *Goods of Hunt*, L. R. 3 P. & D. 250.

8. In New York the testator's name may be written by another, at his re-

the construction of the Statute of Victoria, that when, in the testator's presence, and by his directions, another person stamped the will, by way of signature, with an instrument on which the testator has had his usual signature engraved, so that it might be stamped on letters or other documents requiring his signature, this was a due execution of the will (o).

Again, wills have been admitted to probate which have \*been signed by the testator under an assumed name, the court being of opinion that such assumed name might stand for, and pass as, the *mark* of the testator (p).

Signature under  
an assumed  
name.

In the construction of the Statute of Frauds, it was once considered that the putting of a seal by the testator was a sufficient signing; for that *signum* was no more than a mark, and sealing is a sufficient mark that it is his will (q).

Sealing not a  
sufficient signa-  
ture.

quest, *Simpson's Will*, 2 Redf. 29, 32; *Will of Merchant*, Tuck. 151, 167; and in Arkansas, *Will of Cornelius*, 14 Ark. 675; and Missouri, *McGee v. Porter*, 14 Mo. 611; and Pennsylvania, *Vernon v. Kirk*, 30 Pa. St. 218; and Oregon, *Pool v. Buffum*, 3 Oreg. 438; and Wisconsin, *Will of Jenkins*, 43 Wis. 610. Similar provision is made by statute in Alabama, California, Colorado, District of Columbia, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wyoming. In some states the statute requires the person signing by testator's direction for him to sign the will himself as a witness also (as in California), and state that he had signed at the testator's request for him—Arkansas, Kansas and Oregon. This was also the

law in Missouri from 1845 to 1853. In Pennsylvania the testator's signature is required "unless prevented by extremity of last sickness" (see *infra*). But even since the act of 1848 in Pennsylvania, where the will is signed for the testator, his *mark* is not sufficient ratification of the act in the absence of other proof of signer's authority. *Greenough v. Greenough*, 11 Pa. St. 489.

So too in California the name of the testator may be subscribed to the will by one of the attesting witnesses, and if the testator then declares the document to be his will in the presence of the witnesses, that is a sufficient execution. *Estate of Toomes*, 54 Cal. 509. And in Illinois the testator's signature may be written by another in his presence and by his direction, *Chaney v. Home F. & F. Miss. Soc.*, 28 Ill. App. 621; so also in Ohio. *Haynes v. Haynes*, 33 Ohio St. 598.

But not in New Jersey, where it is requisite that there should be some mark or *signum* made by the testator himself.

(o) *Jenkins v. Gaisford*, 3 Sw. & Tr. 93.

(p) In the Goods of Glover, 5 Notes

of Cas. 553. In the Goods of Redding, 2 Robert. 339.

(q) *Lamayne v. Stanley*, 3 Lev. 1.

But this doctrine has been since overruled (*r*). Whence it appears to follow, that sealing would not be regarded as a signing within the statute of Victoria.<sup>9</sup>

The will is required by that act to be signed "*at the foot or end thereof*." The Statute of Frauds merely requires that the will shall be "signed;" and it was held, that a will in the testator's own handwriting commencing, "I, John Styles, do declare this to be my last Will, &c." was sufficiently "signed" within that statute, although not subscribed with his name (*s*). With a view, perhaps, to prevent future controversy, as to whether a will so signed is a complete and perfect instrument, the statute of Victoria required that the signature of the testator shall be at the foot or end of the will.<sup>10</sup>

The signature under the Wills Act is required to be at the foot or end.

In *re McElwaine's Will*, 3 C. E. Gr. 499.

But if the signature be made by another for the testator, it will not be a valid execution if the testator be unconscious at the time. *Sanders v. Stiles*, 2 Redf. 1.

(*r*) *Smith v. Evans*, 1 Wils. 313.

9. A seal was once held to be necessary to the proper execution of a will, *Dormer v. Thurland*, 2 P. Wms. 511; especially if required by the instrument creating a power which it is intended to execute. *Ross v. Ewer*, 3 Atk. 163; *MacAdam v. Logan*, 3 Bro. Ch. 310. But in general a seal is now held to be unnecessary. *Hight v. Wilson*, 1 Dall. 94; *Avery v. Pixley*, 4 Mass. 460; *Piatt v. McCullough*, 1 McLean 69. It is not required by statute in Virginia, and "by long custom of Virginia," a scroll is sufficient in such case. *Pollock v. Glassell*, 2 Gratt. 453. It is, however, required by statute in Nevada (1862, P. L., c. 61, § 3), and New Hampshire (1822, P. L. 10, § 1; 1878, G. L., c. 193, § 6). In Louisiana it is necessary in case of "mystic" wills (1825, Code § 1572; ed. 1870, § 1579). In Alabama sealing is expressly dispensed with. Sealing was formerly required in Massachusetts, Ohio and Vermont.

But where a will is executed in New

Jersey its character is not changed by the addition of a seal. *Wuesthoff v. Germania L. I. Co.*, 107 N. Y. 580.

And where the testimonium clause speaks of a seal, but a seal is not in fact affixed (the will being otherwise properly executed), this does not show that the testator considered the will not fully executed when he signed it, and does not invalidate the will. *Ketchum v. Stearns*, 8 Mo. App. 66.

(*s*) *Coles v. Trecothick*, 9 Ves. 249.

10. In New York the subscription of the testator must be at the end of the will, 2 R. S. 63, § 40; *Dennett v. Taylor*, 5 Redf. 561; *M'Guire v. Kerr*, 2 Bradf. 244; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Walsh's Will*, Tuck. 132; *O'Neil's Will*, 91 N. Y. 516; so too in Ohio. *Glancy v. Glancy*, 17 Ohio St. 134; also in Pennsylvania. *Hays v. Harden*, 6 Pa. St. 409. In *Owens v. Bennett*, 5 Harr. (Del.) 367, where a clause was written after the signature of the testator, it was held that what followed the testator's signature must be rejected.

In Connecticut the statute says that the will must be *subscribed*. In Kentucky it must be signed at the end. *Flood v. Pragoff*, 79 Ky. 607.

The purpose of the act in requiring the will to be signed at the end is to prevent

But questions of this kind do not appear to be altogether excluded by the operation of this enactment: And a new ground of contest arose out of it, as to what may be considered a signing of the will at the end or foot thereof.

Doubts arose whether a signature by the testator in the body of the *testimonium* or attestation clause was sufficient; and also, whether a signature below the latter clause, when it runs beneath the conclusion of the will, was a compliance with the act. On the question, whether the will was well executed, if there was a blank space between the conclusion of the will and the signature of the testator, a lamentably large number of points and decisions occurred. In the earlier \*cases Sir H. Jenner Fust put a very liberal construction on this part of the act.

fraudulent additions thereto, and the statute should be construed so as to accomplish this purpose. *Younger v. Duffie*, 5 Civ. Pro. 84.

But where the will began "I, A. W., \* \* \* declare this to be my last will and testament," and the name did not appear anywhere else in the will, but it was enclosed in an envelope endorsed "My will—A. W.," the will was not signed by the testator in compliance with the statute, *Warwick v. Warwick*, 86 Va. 596; so too if a paper be folded up and endorsed by the testator, as his, "R.'s Will," this will not be a sufficient signing. *Roy v. Roy*, 16 Gratt. 418.

In the case of *Sisters of Charity v. Kelly*, 7 Hun 290, the will was signed in the middle of the last clause, being the clause appointing executors, and after the clauses disposing of the property: it was held to have been a sufficient compliance with the statute as to place of signature; but on appeal, (67 N. Y. 409,) this judgment was reversed, there appearing to have been two signatures by the testator, and it being held that the one in the clause appointing executors was not valid, because not acknowledged, and that the one in the attestation clause would not avail, because written after the signatures by the witnesses. And where, after the

signature, there is a final clause, appointing an executor, the will is not signed at the end thereof within the meaning of section 6 of the Pennsylvania act of 1833. *Wineland's Appeal*, 118 Pa. St. 37. But in New York such a clause is not considered essential to the will and is rejected, leaving the signature at the end. *Brady v. McCrosson*, 5 Redf. 431.

Where the testator subscribed his name below the attestation clause and along with the witnesses, it was held to be a subscription at the end of the will. *Will of Cohen*, Tuck. 286. And in such case, it is competent to show that he did not sign as a witness, but for purpose of execution, *Boone v. Lewis*, 103 N. C. 40. And in a case in Indiana where the name of the testator, together with a seal, appeared after the attestation clause, on the right, with the names of the witnesses on the left, it was said that as a ground of contest this was frivolous. *Hallowell v. Hallowell*, 88 Ind. 251. And where the date follows the signature this is not a failure to sign at the end of the will. *Flood v. Pragoff*, 79 Ky. 607.

When a part of the will is carried to the back of the blank upon which the will is written, while the signature is upon the face, this is not a signature at the end of the will. *In re Conway*, 124

But afterwards that learned judge, in concurrence with the Judicial Committee of the Privy Council (*t*), felt it necessary to take a more rigid view of this enactment, on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it. And accordingly probate was refused in a great number of subsequent cases on this objection, and the intention of a great many testators unfortunately defeated.

This led to the passing of the stat. 15 Vict. c. 24, which, after reciting that, by the stat. 1 Vict. c. 26, it had been enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, proceeds to enact, by sec. 1, that "every Will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite (*u*) to the end of the Will (*x*), that it

Stat. 15 Vict. c. 24.

When signature to a will shall be deemed valid.

N. Y. 455; *Matter of O'Neil*, 27 Hun 130; *Baker's Appeal*, 107 Pa. St. 381.

See *ante* p. 95, *n.* 3:

(*t*) *Willis v. Lowe*, 5 Notes of Cas. 428. S. C. 1 Robert. 618, note (*b*). *Smee v. Bryer*, 6 Notes of Cas. 20. Suppl. xii S. C. 1 Robert. 616. 6 Moo. B. C. 404.

(*u*) A signature written crossways on the second page of a paper, on the first and third pages of which the will was written, was held sufficient. In the *Goods of Powell*, 4 Sw. & Tr. 34. Where the testator's signature was written partly across the last line but one of the will, and entirely above the last line, with the exception of one letter which touched the last line, it was held that the will was signed at the foot or end thereof: In the

*Goods of Woodley*, 3 Sw. & Tr. 429. The same was held under the stat. 15 Vict. c. 104, of a will made in France, and signed not at the end of the will, but at the end of a notarial minute which followed in the same sheet. *Page v. Donovan, Dea.* & Sw. 278. A signature at the end of several sheets of the will except the last has been held insufficient, the signature not being at the end of the will. *Sweetland v. Sweetland*, 4 Sw. & Tr. 6. A will ended on the second page of a folded sheet of paper, and the rest of the page was in blank. The attestation clause and signatures of the testator and the attesting witnesses were written on the third page: the signature of the testator being opposite the clause appointing executors,

(*x*) Where a will was written on a piece of parchment, and at one corner at the bottom of the parchment a piece of paper was pasted, and a stamp impressed on it, upon which paper the signatures of the testator and the attesting witnesses were subsequently made; it was held by Sir C. Cresswell, that the signature must be ac-

cepted as a signature on part of the will, so as to be within the stat. 15 Vict. c. 24: In the *Goods of Gausden*, 2 Sw. & Tr. 362. And this decision was followed by a similar one in another case before the same judge, in *Cook v. Lambert*, 3 Sw. & Tr. 46; and see In the *Goods of Horsford*, L. R. 3 P. & D. 211.

shall be apparent \*on the face of the Will that the testator intended to give effect by such his signature to the writing signed as his Will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the Will, or by the circumstance that a blank space shall intervene between the concluding word of the Will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause or of the \*clause of attestation (y), or shall follow or be

the attestation clause being written beneath the signatures and ending opposite to the concluding words of the will, and the signatures of the attesting witnesses being at the bottom of the attestation clause: It was held that the signature was so placed beside or opposite to the end of the will that it was apparent on the face of the will that the testator intended to give effect by his signature to the writing as his will, and that the will was therefore entitled to probate. In the Goods of Williams, L. R. 1 P. & D. 4. A will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signatures of the testator and attesting witnesses, which were written crossways on the second page. It was held that the will was duly executed. In the Goods of Coombs, L. R. 1 P. & D. 302. Where in a testamentary paper executed by the deceased the last sentence commenced immediately above the signature of the deceased, and was continued in three short lines to the left of it, the two last lines being somewhat below the signature, and this sentence was written before the deceased signed her name, it was held that the execution was valid, and that the last sentence should be included in the probate. In the Goods of Ainsworth, L. R. 2. P. & D. 151. A duly attested signature on the earlier pages of a will has been held insufficient in cases where an unattested signature appeared on later pages. In the Goods of Dilkes, L. R. 3. P. & D. 164; Phipps v. Hale, L. R. 3.

P. & D. 166. A mark made on his deathbed by a paralyzed man in the middle of a testamentary paper duly witnessed was held *insufficient*, not being signed at the foot or end. Margary v. Robinson, 12 P. D. 8. A codicil on the third sheet of a duly executed will executed by the signature of the testator and attesting witnesses in the margin of the first sheet of the will was held *insufficient*, Sir J. Hannen saying that "the Legislature has never departed from this standard that the execution of a testamentary paper must be signed at the foot or end thereof." In the Goods of Hughes, 12 P. D. 107.

(y) It is to be observed that questions may still arise, as to the validity of a signature placed among the words of the *testimonium* clause, or the clause of attestation, where the testator has only written his name, without otherwise subscribing the will, so that it may be contended that it does not appear whether he intended it or not for his signature to the will. In the following cases the Court, being satisfied that the deceased intended by signing his name in the attestation clause to execute his will, granted probate. In the Goods of Walker, 2 Sw. & Tr. 354. In the Goods of Casmore, L. R. 1 P. & D. 653. In the Goods of Huckvale, L. R. 1 P. & D. 375. In the Goods of Pearn, 1 P. D. 70. The Court will in some cases presume that the testator has signed his name prior to the attestation, although there be no direct proof of that fact. In the Goods of Huckvale, L. R. 1 P. & D. 375. In the



after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses (z), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the Will whereon no clause or paragraph or disposing part of the Will shall be written above the signature (a), or by the \*circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the Will is written to contain the signature (b); and the enumeration of the above circumstances shall not restrict the generality of the above enactment; 11

Stat. 15 Vict. c. 24.

Goods of Pearn, 1 P. D. 70. Where the will of the deceased had an imperfect attestation clause, and the name of the deceased appeared written beneath the signatures of the attesting witnesses, and the witnesses were both dead, and no evidence could be given as to the order in which the signatures were made, the Court nevertheless decreed probate of the will: In the Goods of Puddephatt, L. R. 2 P. & D. 97. See also in the Goods of Jones, 46 L. J. P. & M. 80. Where the will was in the handwriting of the testator and his name formed the concluding words of the last clause of the will, it was admitted to probate, the Court (Sir C. Cresswell) being satisfied *that the name was intended to be a signature*: Trott v. Skidmore, 2 Sw. & Tr. 12. As to what the act means by "*among the words of the testimonium clause*," see In the Goods of Mann, 28 L. J., P. M. & A. 50.

(z) In the Goods of Jones, 4 Sw. & Tr. 1.

(a) In the Goods of Williams, L. R. 1 P. & D. 4. Hunt v. Hunt, L. R. 1 P. & D. 209. In the Goods of Jones, 4 Sw. & Tr. 1. In the Goods of Wright, 4 Sw. & Tr. 35.

(b) A will was written across the second and third sides of a sheet of note-paper, the lower part of such sides being left blank, the attestation clause and signatures of the testator and witnesses

were written at the back of the will across the top of the first and fourth sides of the paper. The testator wrote the will in the presence of the witnesses immediately before he executed it. The Court, being satisfied that the paper was written before the signatures were put there, granted probate (distinguishing the case from In the Goods of Hammond, 3 Sw. & Tr. 90, in which there was no evidence of the paper being written before the signatures). In the Goods of Archer, L. R. 2 P. & D. 252.

11. Will of Cohen, Tuck. 286; Waller v. Waller, 1 Gratt. 454; Allen v. Everett, 12 B. Mon. 379; Gilman v. Gilman, 1 Redf. 354; Roy v. Roy, 16 Gratt. 418; Armstrong v. Armstrong, 29 Ala. 538; Lewis v. Lewis, 13 Barb. 17; Glancy v. Glancy, 17 Ohio St. 134; Ginder v. Farnum, 10 Pa. St. 98; Butler v. Benson, 1 Barb. 526; Stricker v. Groves, 5 Whart. 386; Hays v. Harden, 6 Pa. St. 409; Adams v. Field, 21 Vt. 256; Sarah Miles' Will, 4 Dana 1; Flood on Wills 321; 1 Redf. on Wills 210; 1 Jarman on Wills (5th Am. ed.) 206.

The signing of a will, to be a sufficient signing, must be such as upon its face, and from the frame of the instrument, appears to have been intended to give it authenticity as a will. It must be evident that the name written was regarded as and intended for a signature, and that

but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath (c), or which follows it (d), nor shall it \*give effect to any disposition or direction inserted after the signature shall be made (e).

the instrument was complete without further signing. And this must appear from the paper itself. *Waller v. Waller*, 1 Gratt. 454.

(c) A will contained a reference to "executors hereafter named," but did not appoint executors. A clause appointing executors was written immediately underneath the testator's signature. It was held that this clause being underneath the signature, the probate must go without it. In the Goods of Dallow, L. R. 1 P. & D. 189. Where from the obvious sequence and sense of the context it appears to the satisfaction of the Court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate. In the Goods of Kimpton, 3 Sw. & Tr. 427. A will was written on the second and third sides of a sheet of foolscap, on the first side of which there was a lithographed form of will. The deceased signed her name in the presence of witnesses at the foot of the lithographed form, and it was held that the first page might be treated as the last page of the will, and that the paper was entitled to probate. In the Goods of Wotton, L. R. 3 P. & D. 159. The deceased in his will, which was written by himself on the first side of a half-sheet of paper, gave his property to

his wife for life, and then intending to dispose of certain freehold cottages on the death of his wife, commenced a sentence which he left incomplete. After the incomplete sentence was an asterisk and the words "see over." The will which covered the whole of the first side was executed at the bottom of that side, and at the top of the second side was another asterisk and a devise of the cottages to his daughter. This bequest was written before the will was executed. It was held that the words on the second side were in the nature of an interlineation, and formed part of the will. In the Goods of Birt, L. R. 2 P. D. 214. See also In the Goods of Malen, 54 L. J., P. & M. 91. In the Goods of Greenwood [1892] P. 7. See *post*, Alterations and Interlineations, p. \*122 *et seq.*

(d) In order to get rid of the objection that the will was not signed at the foot or end, the court has formerly, in some cases, thought itself justified in regarding a portion running below the signature as forming no part of the will, and granting probate exclusive of that portion. *Keating v. Brooks*, 4 Notes of Cas. 253, 260. But in the more modern case of *Sweetland v. Sweetland*, 4 Sw. & Tr. 6, it is laid down that "the Court would not be justified in fixing upon a signature in the midst of what the testator intended as his will, and treating it as an execution of all that preceded, and granting probate of so much of the will to the dis-

(e) Where the testator, after signing his name to his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature, and immediately afterwards the witnesses signed

their names, the court held that the testator did not sign or acknowledge his signature to the will, as containing such clause, and that probate should issue without it: In the Goods of Arthur, L. R. 2 P. & D. 273.

Sect. 2. "The provisions of this Act shall extend and be applied to every Will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such Will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such Will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the Will, by a court of competent \*jurisdiction, in consequence of the defective execution of such Will."

Stat. 15 Vict. c. 24.

Act to extend to certain wills already made.

Sect. 3. "The word 'will' shall, in the construction of this act, be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of Her Majesty Queen Victoria."

Interpretation of "Will."

Sect. 4. "This Act may be cited as 'The Wills Act Amendment Act, 1852.'"

Short title of act.

It should be observed that there is no provision in either of these acts that the will shall be written continuously.<sup>12</sup> Therefore 'it has been held that if a will is otherwise duly executed, it is no objection that it contains blank spaces in the body of it (f).

Blank spaces in the body of a will are unobjectionable.

regard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes. It does not become the Court in a laudable anxiety to give effect to the document to twist or distort the plain meaning of the statute by ingenious construction, and virtually break the law to mend the testator's blunder"—by Lord Penzance. This has been followed in the cases of *In the Goods of Dilkes*, L. R. 3 P. & D. 164; and *Margary v. Robinson*, 12 P. D. 8.

12. While it is a careless proceeding to draft so important an instrument, leaving blank spaces in the body of the

document, yet this is no sufficient ground for refusing probate. *Matter of Collins*, 5 Redf. 20. But no rule can be laid down as to the leaving of spaces in the body of a will; each case must rest upon its own attendant circumstances on this point. *Soward v. Soward*, 1 Duv. 126, 134; *Tilghman v. Steuart*, 4 Harr. & J. 156. The leaving of blank space is more especially undesirable where the blank divides a continuous sentence. *Matter of Collins*, *ubi supra*.

(f) *Corneby v. Gibbons*, 6 Notes of Cas. 679. *In re Corder*, 1 Robert. 669. *In re Kirby*, 6 Notes of Cas. 693.

What is a sufficient signing by "some other person:"

The stat. 1 Vict. c. 26, s. 9, enacts that the will may be signed either by the testator, "or some other person in his presence and by his direction." 13

The signature by the direction of the testator, may it appears notwithstanding the contrary view expressed by Lord St. Leonards in his

13. In Virginia, if the testator's name be signed for him by another, the adding of a mark is a work of supererogation. *Roser v. Franklin*, 6 Gratt. 1. Where a will is thus executed it must be at the request of the testator, and, generally, it must appear in the attestation clause that such request was made. But if the testator frequently request another person to sign the will for him, and that person refuses on account of misapprehension of the law, such refusal, with continued exertion at each opportunity to have the will signed, is not a compliance with the law. *Stricker v. Groves*, 5 Whart. 386.

In New Jersey it is not sufficient that the signature be made by another, though at the request and in the presence of the testator: the signing required by the statute must be *some* signature, making some mark or *signum* on the paper, some act, not words merely. In *re McElwaine's Will*, 3 C. E. Gr. 499.

In Louisiana, if the will be not signed by the testator, he must declare that he does not know how or is not able to sign, and express mention must be made of his declaration, and of the cause that hinders him from signing. C. C. La., § 1579.

And where the testator is too weak to write, or for any reason unable to write, the guiding of the hand holding the pen by another person, so as to attach a signature to the instrument is a sufficient execution. *Campbell v. Logan*, 2 Bradf. 98; *Burk's Will*, 2 Redf. 239; *McMechen v. McMechen*, 17 W. Va. 683.

So too if the hand be so guided in making simply a mark. *Walsh's Will*, Tuck. 132. And it seems that for this purpose there need be no positive request by the testator. *McMechen v. McMechen*,

*ubi supra*. And such a proceeding is sufficient compliance with the statute, whether for signature or mark, if the testator's purpose to sign and his best physical effort to do so participate in the act. *Fritz v. Turner*, 1 Dick. 515.

In California it is sufficient signing if the name of the testator be subscribed by one of the attesting witnesses if the testator then declare it to be his will, *Estate of Toomes*, 54 Cal. 509; *Matter of Langan*, 74 Id. 353; but if signed for testator by one not a witness, the testator should call the attention of the witnesses to the fact that the signature was made for him by his authority. *Estate of Taney*, *Myrick's Prob.* 210. And in Missouri the signing for the testator by another must be in his presence and by his direction. *Elliott v. Welby*, 13 Mo. App. 19. See *Armstrong v. Armstrong*, 29 Ala. 538, 541, as to what is equivalent to a signing of the will by another for the testator.

And it is not sufficient that the testator knows that some one is signing his will for him, there must be more than assent—there must be express direction, either by gesture or other unambiguous token. *Waite v. Frisbie*, 45 Minn. 361. And it seems that if the testator be physically able to sign the will, signature by a third person by his direction is invalid. *Estate of Baldwin*, 17 Phila. 458.

In regard to requisites by statute, where wills are signed by another for the testator, see *Will of Cornelius*, 14 Ark. 675; *McGee v. Porter*, 14 Mo. 611; *Northcutt v. Northcutt*, 20 Id. 266; *Simpson v. Simpson*, 27 Id. 288; *Vernon v. Kirk*, 30 Pa. St. 218; *Pool v. Buffum*, 3 Oreg. 438; *Abraham v. Wilkins*, 17 Ark. 292; *Will of Jenkins*, 43 Wis. 610. See also *Flood*

essay on the Law of Wills, p. 38, be by one of the attesting witnesses (*g*), and if the person signing for the testator, signs in his own name and not in that of the testator, such signature is sufficient (*h*).

Where it is proved that the testator duly acknowledged a signature to the attesting witnesses, it has been considered sufficient, *primâ facie*, without proving that the signature is in his handwriting, or that it was made "by some other person in his presence and by his direction" (*i*).<sup>14</sup>

Whether the acknowledgment by the testator of a signature suffices, without showing who wrote it.

It is not necessary that all the sheets or papers of which a will consists should be signed by the testator: or that they should all be connected together: It is enough if they were in the same room where the execution took place; and it must be presumed, *primâ facie*, that they were so (*k*).

Signature where the will consists of several sheets:

So where a duly executed will followed by several additions and alterations, at the end of which appeared the signature of the testator and attesting witnesses, it was held that the signature and attestation clause applied to all the dispositive clauses written above them, although these had been apparently written at different times (*l*).

or of several clauses written at several times.

## SECTION II.

### *Of the Attestation of Wills and Codicils of personal estate.*

The stat. 1 Vict. c. 26, s. 9 (*m*), enacts, that no will (or testament or

on Wills 330; 1 Redf. on Wills 204, *et seq.*

(*g*) In the Goods of Bailey, 1 Curt. 914. *Smith v. Harris*, 1 Robert. 262.

(*h*) In the Goods of Clark, 2 Curt. 329.

(*i*) *Gaze v. Gaze*, 3 Curt. 456, *per Sir H. Jenner Fust*.

14. When a will is produced with signature properly affixed, the presumption is that the testator knew the contents. *Doran v. Mullen*, 78 Ill. 342; *Bartee v. Thompson*, 8 Baxt. 508. And this rule is the same whether the testator could write or not, *i. e.*, there is no distinction between those who can write and those who cannot. *Doran v. Mullen*, *ubi supra*.

But where the testator is blind or illiterate, no such presumption arises. In such cases more is required than formal proof of execution, *viz.*, proof of knowledge of contents. *Bartee v. Thompson*, *ubi supra*.

(*k*) *Gregory v. The Queen's Proctor*, 4 Notes of Cas. 620, 639. *Post*, p. \*85. *Marsh v. Marsh*, 1 Sw. & Tr. 528. *Rees v. Rees*, L. R. 3 P. & D. 84.

(*l*) In the Goods of Catrall, 3 Sw. & Tr. 419.

(*m*) As to the law with respect to wills made before 1 Jan., 1838, the date of the commencement of the Wills Act, see former editions of this work. Pt. I. Bk. II. Ch. II. § II.

As to wills, &c.,  
made on or after  
Jan. 1, 1838:

the signature  
must be made or  
acknowledged in  
the presence of  
two or more wit-  
nesses present at  
one time, and  
they shall attest  
and subscribe the  
will in testator's  
presence:

codicil, or any other testamentary instrument), shall be valid unless the *signature* shall be "made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." 15

The Statute of Frauds required, with respect to a will of lands, that it should be "attested and sub-

15. In all the states, except Louisiana, New York and Pennsylvania, the witnesses are required to sign the will *in the testator's presence*. In Arkansas, California, Nebraska and New York it must be "at the request" of the testator.

The provisions of the statute of wills in Louisiana are taken from the Code Napoleon, and are very peculiar as compared with similar statutes throughout the United States; for a fuller discussion of the requirements for the execution of wills in Louisiana, see *infra*.

In Alabama the witnesses must sign in the presence of the testator, *Moore v. Spier*, 80 Ala. 129; Code, § 2204. But not of each other. Code, § 2294; *Moore v. Spier*, *ubi supra*; so too in Illinois. *Chaney v. Home F. & F. Miss. Soc.*, 28 Ill. Ap. 621. But in Illinois there is no necessity that the testator shall actually see the witnesses sign; he should, however, be in a position where he could. *Will of Storey*, 20 Ill. App. 183. And in New Jersey it is a compliance with the statute if the witnesses sign in a room adjoining the one in which the testator was, the connecting door being open, although the testator did not actually see them. *Manderville v. Parker*, 4 Stew. (N. J.) 242. In Missouri the witnesses must *subscribe* their names in the presence and at the request of the testator. *Elliott v. Welby*, 13 Mo. Ap. 19. And in Oregon at the request of the testator. *Luper v. Werts*, 19 Oreg. 122.

In New Jersey the execution and pub-

lication of the will in the presence of one witness, the other witness being called in afterwards, is not sufficient. *Ludlow v. Ludlow*, 8 Stew. (N. J.) 480. However, in New York, if a witness has begun his signature before the publication of the will, but while he is signing the testator declares it to be his will and the witness completes his signature after such declaration, this is sufficient. *Will of Phillips*, 98 N. Y. 267. The signatures of the witnesses following the attestation clause raise a strong presumption that they signed in the presence of the testator, which will be overcome only by clear and satisfactory proof to the contrary. *Will of O'Hagan*, 73 Wis. 78.

By the statute, in Louisiana, wills are divided into three classes, nuncupative or open testaments, mystic or sealed testaments and holographics. C. C. La., § 1574. Nuncupative wills may be executed by public act, or under private signature; if by public act, they must be dictated to a notary public in the presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place; if by private signature, they must be made in the presence of five resident or seven non-resident witnesses, or the testator may produce before such witnesses a will already made and declare it to be his last will. C. C. La., §§ 1578, 1581. Mystic or closed wills must be signed by the testator himself, whether written by himself or by another; they must then

scribed in the presence of the deviser, by three or four credible witnesses." 16

be sealed, and delivered so sealed to a notary public and seven witnesses; the testator must then declare in their presence that such paper contains his last will. The notary shall then draw up a superscription on the envelope and that shall be signed by the notary and witnesses. If any one of the witnesses does not know how to sign, express mention shall be made thereof, but in all cases at least two witnesses must sign. C. C. La., §§ 1584, 1587.

In Louisiana, in the case of nuncupative wills by public act, the notary cannot judge of the competency of the witnesses. What he is required to do is to state facts in regard to the witnesses and to show that the act has been complied with. Succession of Vollmer, 40 La. Ann. 593. And in wills of this class if the notary fail to mention that the will was written by him, it will be a nullity. Succession of Dorries, 37 La. Ann. 833; Miller v. Schumaker, 42 Id. 398. So too, if the will contains no express mention that it was received or dictated by the testator, and written down by the notary, all in the presence of the witnesses. Dalton v. Wickliffe, 35 La. Ann. 355. And where such omissions occur they are fatal to the will, as it is not permissible to supply the evidence *aliunde*. Succession of Vollmer, *ubi supra*; Succession of Dorries, *ubi supra*.

The description of the witnesses required by law is sufficiently complied with if their names, number and residence are given. Succession of Escobel, 42 La. Ann. 1086. When a will describes a witness as domiciled in a certain place, that will be a sufficient description of the residence, because domicile, *ex vi termini*, includes residence. Succession of Escobel, *ubi supra*. And in order that the execution of a nuncupative will by public act may be ordered it is not necessary that the will be

proved. For that purpose it makes full proof of itself. King v. Vairin, 28 La. Ann. 452.

Nuncupative wills under private signature are invalid if executed before two witnesses only, and if there be three witnesses, of whom one is not able to understand the language, the law will consider that there were but two witnesses and will reject the will. Succession of Dauterive, 39 La. Ann. 1092. And such wills need not be shown to have been dictated by the testator when written out of the presence of the witnesses, but an affirmative answer from the testator to the question whether the paper contains his last will amounts to the presentation required by law. Pharr v. Belmont, 39 La. Ann. 294; Wood v. Roane, 35 Id. 865. And a person who has acted as amanuensis for the testator is not on that account disqualified from acting as a witness to the will. Wood v. Roane, *ubi supra*.

An interruption of the dictation while the notary writes what has just been dictated is not such interruption as to vitiate the will. Starrs v. Mason, 32 La. Ann. 8.

Nor will such a will be invalidated because the notary may use words not used by the testator if he express clearly the intention of the testator. Id.

Nor is such a will vitiated because the testator, an uneducated person, called in counsel to advise about the use of words, especially technical words. Landry v. Tomatis, 32 La. Ann. 113.

See also *post*, p. 168 *et seq*.

16. And the meaning is that such witnesses shall be persons who are not disqualified by mental imbecility, interest or crime from giving testimony in courts of justice. Fuller v. Fuller, 83 Ky. 345; Hawes v. Humphrey, 9 Pick. 350; Cornell v. Isham, 1 Day 35; Taylor v. Taylor, 1 Rich. 531; Rucker v. Lambdin, 12 Sm. & M. 230; Eustis v. Parker, 1 N. H. 273; Estate of Noble, 22 Ill. App. 535;

It will be observed, that besides the change from three to two in the number of witnesses, there are several important differences between the exigencies of the two statutes.<sup>17</sup>

*Smalley v. Smalley*, 70 Me. 545; *Warren v. Baxter*, 48 Id. 193; *Haven v. Hilliard*, 23 Pick. 10; *Carlton v. Carlton*, 40 N. H. 14.

And the competency of the witness will be presumed until the contrary is shown. *Herbert v. Berrier*. 81 Ind. 1.

17. Two attesting witnesses are required to a will in Alabama, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Three witnesses are necessary in Connecticut, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, South Carolina and Vermont. In Pennsylvania, when a will is offered for probate, the execution thereof must be proved by at least two witnesses, but there need be no subscribing witnesses to the will. Even where there are subscribing witnesses to the will the witnesses for probate may be other than those who subscribed. *Rhorer v. Stehman*, 1 Watts 442, 463; *Hight v. Wilson*, 1 Dallas 94; *Arndt v. Arndt*, 1 Serg. & R. 256.

Where the statute requires that the will be executed in the presence of "credible witnesses," it seems that the word "credible" is used as identical in meaning with "competent." *Brown v. Pridgen*, 56 Tex. 124; *Kennedy v. Upshaw*, 66 Id. 442; *Hawes v. Humphrey*, 9 Pick. 350; *Amory v. Fellowes*, 5 Mass. 219; *Workman v. Dominick*, 3 Strobb. 589; *Patten v. Tallman*, 27 Me. 17; *Haven v. Hillard*, 23 Pick. 10; *Rucker v. Lambdin*, 12 Sm. & M. 230; *Hall v. Hall*, 18 Ga. 40; *Morton v. Ingram*, 11

*Ired.* 368; *Taylor v. Taylor*, 1 Rich. 531; *Higgins v. Carlton*, 28 Md. 115; *Nixon v. Armstrong*, 38 Tex. 296. And they must be competent at the time of attesting. *Stewart v. Harriman*, 56 N. H. 25, and cases last above cited. In Louisiana women are absolutely disqualified from acting as witnesses to any testamentary paper. *Succession of Roth*, 31 La. Ann. 315. The attestation of a will is as to the genuineness of the testator's signature, and not in any respect as to the contents. *Flood v. Pragoff*, 79 Ky. 607. But incompetent, unnecessary witnesses do not vitiate the will, nor do irrelevant recitals. *Conoly v. Gayle*, 61 Ala. 116.

And it is sufficient if the witness was competent at the time of the *factum* of the will, although he may have become incompetent afterwards. *Amory v. Fellowes*, *ubi supra*; *Sears v. Dillingham*, 12 Mass. 358; *Higgins v. Carlton*, *ubi supra*. In that case the will may be proved by the other witness or witnesses. *Sears v. Dillingham*, *ubi supra*; *Deakins v. Hollis*, 7 Gill & J. 311. But an interested witness is not competent to prove that he was not interested when the facts which he is to prove occurred. This must be made to appear by other testimony. *Gill's Will*, 2 Dana 447.

And if a witness be incompetent, because entitled to a beneficial interest, he may become competent by assignment of the interest to which he would otherwise be entitled. *Deakins v. Hollis*, *ubi supra*; *Kerns v. Soxman*, 16 Serg. & R. 315; *Cook v. Grant*, Id. 198; *Search's Appeal*, 13 Pa. St. 108. But see *Haus v. Palmer*, 21 Id. 296, where it is held that he cannot by assignment, but that he may by a release. Also by release, in Maryland. *Shaffer v. Corbett*, 3 Harr. & McH. 513; *Weems v. Weems*, 19 Md. 334. And in



The Statute of Frauds merely required, that the witnesses should attest and subscribe *the will*; and it was held in the construction of this enactment, that it was unnecessary for the testator actually to *sign* his will in the presence of the \*three witnesses who subscribed the same; but that any acknowledgment before them, that it was his will, made their attestation and subscription complete (n). It was further held, that it was sufficient if the testator acknowledged *in fact*, though not in words, to the witnesses that the instrument was his will, even though such acknowledgment conveyed no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of signing; and consequently, that if the witnesses subscribed their names as witnesses, at the testator's request, *without seeing his signature*, or being informed of the nature of the instrument, the statute was satisfied (o). But the statute of Victoria requires further, that the *signature* of the

what is a sufficient acknowledgment of the testator's signature to the witnesses

Texas. *Nixon v. Armstrong*, 38 Tex. 296. But it is otherwise in North Carolina. *Allison v. Allison*, 4 Hawks 141.

An executor is a competent witness to the execution of a will, *Children's Aid Society v. Loveridge*, 70 N. Y. 387; *Rugg v. Rugg*, 83 Id. 592; and in some cases it is held that either an executor or a mere trustee may be a witness. *Comstock v. Hadlyme*, 8 Conn. 254, 262; *Den v. Allen*, 1 Penn. 35; *Dorsey v. Warfield*, 7 Md. 65; *Malloy v. McNair*, 4 Jones L. 297; *Peralta v. Castro*, 6 Cal. 354; *Snyder v. Bull*, 17 Pa. St. 54. And in the following cases it is said that an executor as such is not incompetent as a witness: *Wyman v. Symmes*, 10 Allen 153; *Murphy v. Murphy*, 24 Mo. 526; *Henderson v. Kenner*, 1 Rich. 474; *Overton v. Overton*, 4 Dev. & Bat. 197; *Noble v. Burnett*, 10 Rich. 505; *Richardson v. Richardson*, 35 Vt. 238; *Meyer v. Fogg*, 7 Fla. 292; *Rucker v. Lambdin*, 12 Sm. & M. 230; *Kelly v. Miller*, 39 Miss. 17; *Orndorff v. Hummer*, 12 B. Mon. 619; *Estep v. Morris*, 38 Md. 417; *McDaniel's Will*, 2 J. J. Marsh, 331.

But prior to the adoption of the Revised Code (1856) in North Carolina, an executor could not be a witness in favor

of the will, even by renouncing and releasing his interest. *Gunter v. Gunter*, 3 Jones L. 441. And this restriction extended to the wife of such executor. *Huie v. McConnell*, 2 Jones L. 455. But if an executor receive, under the will, other and greater interest than commissions, this will disqualify him as a witness in Kentucky. *Orndorff v. Hummer*, 12 B. Mon. 619. But in Alabama an executor is an incompetent witness, nor can he become a competent witness by renunciation of his executorship. *Gilbert v. Gilbert*, 22 Ala. 529. And also in Delaware. *Davis v. Rogers*, 1 Houst. 44.

But where a witness is interested as a legatee in favor of the will and as an heir adversely to it, and the preponderance is in favor of defeating the will, such witness is not competent. *Will of Bonse*, 18 Ill. App. 433.

(n) *Ellis v. Smith*, 1 Ves. Jun. 11. *Case-ment v. Fulton*, 5 Moo. P. C. 138, by Lord Brougham.

(o) *White v. Trustees of the British Museum*, 6 Bing. 310. *Wright v. Wright*, 7 Bing. 457. *Johnson v. Johnson*, 1 Cr. & M. 140.

testator "shall be *made or acknowledged* by the testator" in the presence of the two attesting witnesses.<sup>18</sup> Soon after the act came into operation, a doubt appears to have been suggested (*p*), whether an acknowledgment of the signature was intended to be effectual in any

18. The prevailing rule in the United States is that acknowledgment of his signature to the witnesses by the testator is compliance with the statute. *Dudleys v. Dudleys*, 3 Leigh 436; *Rosser v. Franklin*, 6 Gratt. 1; *Adams v. Field*, 21 Vt. 256; *Dickie v. Carter*, 42 Ill. 376; *Allison v. Allison*, 46 Id. 61; *Tucker v. Oxner*, 12 Rich. L. 141; *Higgins v. Carlton*, 28 Md. 115; *Rogers v. Diamond*, 13 Ark. 474; *Abraham v. Wilkins*, 17 Id. 292; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Denton v. Franklin*, 9 Id. 28; *Swift v. Wiley*, 1 Id. 114; *Cochran's Will*, 3 Bibb 491; *Reed v. Watson*, 27 Ind. 443; *Brown v. McAllister*, 34 Id. 375; *Turner v. Cook*, 36 Id. 129; *Loy v. Kennedy*, 1 Watts & S. 396; *Thompson v. Davitte*, 59 Ga. 472; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Lewis v. Lewis*, 13 Barb. 17; *Coffin v. Coffin*, 23 N. Y. 9; *Tarrant v. Ware*, 25 Id. 425, *n.*; *Peck v. Carey*, 27 Id. 9; *Baskin v. Baskin*, 36 Id. 416; *Will of Merchant*, Tuck. 151, 167; *Will of Harder*, Id. 426; *Phillips v. Phillips*, 1 How. Pr. N. S. 291; *Mealey's Estate*, 11 Phila. 161; *Chaney v. Home F. & F. Miss. Soc.*, 28 Ill. App. 621; *Yoe v. McCord*, 74 Ill. 33; *Pharr v. Belmont*, 39 La. Ann. 294.

It was not so in New Jersey under the act of 1714, but this was changed by the act of 1851 so that acknowledgment in presence of the witnesses is sufficient. *Compton v. Mitton*, 7 Halst. 70; *Mickle v. Matlack*, 2 Harr. 86; *Combs v. Jolly*, 2 Gr. Ch. 625; *Will of Alpaugh*, 8 C. E. Gr. 507. But to say "This is my will—Take it and sign it," is not a sufficient acknowledgment under the New Jersey statute. In *re Booth*, 127 N. Y. 109. So too in Massachusetts under the present statute, and where the signature

was made by another for testator. *Hall v. Hall*, 17 Pick. 373; *Dewey v. Dewey*, 1 Metc. 349; *Hogan v. Grosvenor*, 10 Id. 56; *Tilden v. Tilden*, 13 Gray 110; *Chase v. Kittredge*, 11 Allen 49.

Acknowledgment or adoption of the signature is sufficient. *Will of Convey*, 52 Iowa. 197. And where one witness having signed, the will was taken before a justice of the peace and he was asked to certify officially to the will, which he did, it was held that he was a sufficient second witness and that the will was properly executed. *Payne v. Payne*, 54 Ark. 415. So too, in California, the testator need not *sign* in presence of the witnesses. *Estate of Crittenden*, Myrick's Prob. 50. Nor need it be either signed or sealed in presence of witnesses, in New Hampshire. *Welch v. Adams*, 63 N. H. 344. And where a testator who could read and write produced a will already signed and declared it to be his will and requested three witnesses to attest it, and they did, it was held that the whole instrument, *including the signature*, was acknowledged. *Thompson v. Devitte*, 59 Ga. 472.

But where a testatrix who did not sign in presence of the witnesses nor acknowledge her signature to them, merely said "this is my will," it was neither sufficient signing nor acknowledgment. *Matter of Shaffer*, 2 How. Pr. N. S. 494. But where one witness saw the testator sign, but the other did not, both being present, one witness asked if it was testator's will, executed by him and he desired them to attest, held to be a valid execution. *Matter of Bedell*, 32 N. Y. St. Rep. 1022.

(*p*) In the Goods of Regan, 1 Curt. 908.

other case than where the signature had been made "by some other person" by the direction of the testator: But Sir H. Jenner Fust was clearly of opinion, that the statute meant, that whether the signature be made by the testator, or by some other person, if it be acknowledged by the testator in the presence of the two witnesses, the execution shall be good. A more difficult question hereupon arises, in cases where the signature is made by the testator, but not in the presence of the attesting witnesses, as to what shall be a sufficient acknowledgment of it by him in their presence (q). The result of the cases

(q) The whole law as to what is a sufficient acknowledgment of a signature, not written by the testator in the presence of the witnesses, has recently been very fully discussed in the cases of *Blake v. Blake*, 7 P. D. 102; *Wright v. Sanderson*, 9 P. D. 149, and *Daintree v. Fasulo*, 13 P. D. 67, 102, and the result seems to be that where the evidence is such that the Court concludes that the witnesses (or either of them) did not see the signature, the fact that the testator spoke to the witnesses of the attested document as his will, or stated that he had signed the will, but the witnesses were not able to see his signature, that is not a sufficient acknowledgment. In *Blake v. Blake*, it was decided that to constitute a sufficient acknowledgment, within sect. 9 of the Wills Act, the witnesses must at the time of acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his will, or that his signature is inside the paper. In this case, Jessel, M. R., after expressing his approval of the law as laid down by Dr. Lushington in *Hudson v. Parker*, 1 Rob. 14, discusses the judgment of Sir C. Cresswell in *Gwillim v. Gwillim*, 3 Sw. & Tr. 200, and dissents from the view of Lord Penzance, expressed in *Beckett v. Howe*, L. R. 2

P. & D. 1, that Sir C. Cresswell meant to lay down the doctrine that, if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. But it is to be observed that in the absence of affirmative proof that the witnesses did not see, or could not have seen, the signature of the testator, the Courts will, (unless there is evidence to the contrary), in the absence of fraud, presume in a case where there is a proper attestation clause, or where the evidence shows that the testator knew the law, that the attesting witnesses saw the acknowledged signature. *Woodhouse v. Balfour*, 13 P. D. 2; not so, however, where there is no formal attestation clause and no affirmative evidence that at the time of attestation the deceased's name was on the paper; for the mere production of it to the witnesses with a request that they will sign it as a paper, is not in itself sufficient to justify the Court in drawing the inference that it was already signed by the deceased: *Fischer v. Popham*, L. R. 3 P. & D. 246. In *Blake v. Knight*, 3 Curt. 547, 561, in dealing with the question of what evidence should lead the Court to pronounce for or against the validity of a will duly attested on the face of it, Sir H. Jenner Fust said: "The first point to consider is whether it is absolutely necessary to have positive affirmative testimony by the subscribed witnesses that the will was actually

\*appears to be, that where the testator produces the will, with his signature visibly apparent on the face of it, to the wit\*nesses, and

signed in their presence or actually acknowledged in their presence? is it absolutely necessary under all circumstances that the witnesses should concur in stating that these facts took place? or is it absolutely necessary where the witnesses will not swear positively that the Court should pronounce against the validity of the will. I think these are not absolute requisites to the validity of a will. I think the Court must take into consideration all the circumstances of the case and judge from them collectively whether there was not at least an acknowledgment of a signature already existing on the face of the will at the time of attestation? The testator must have known how to give validity to a testamentary paper in the year 1838. No doubt the memory of the witnesses fails them with reference to circumstances happening nearly four years ago. The Court cannot safely trust to the memory of witnesses under such circumstances: it must attend to the facts of the case, and say whether it is satisfied that the name of the deceased was written to the will when the witnesses signed it, whether it was signed in their presence, or signed beforehand and acknowledged in their presence." And the same learned judge in *Cooper v. Bockett*, 3 Curt. 659, 663 (affirmed in the Privy Council), said that "where the *res gestæ* do not confirm the impressions of the witnesses the Court must look at the circumstances of the case as it is always at liberty to do." In *Wright v. Sanderson* (*ubi sup.*), Lord Selborne, after quoting these two judgments of Sir H. Jenner Fust, and after stating that the reasons given by Dr. Lushington for the decision of the Judicial Committee in *Lloyd v. Roberts*, 12 Moo. P. C. 165, proceed on the same principles and upon the presumption of

the due execution of a holograph will on the face of which everything is regular, and where there is no question of fraud, affirms the judgment of Sir J. Hannen, pronounced for the validity of a holograph codicil in a case in which neither of the attesting witnesses could say anything as to what writing was on the paper, nor as to whether the testator's signature was there when they signed, and where both said that they did not see him sign. Lord Justice Fry in the same case held that as the codicil *ex facie* appeared to be properly executed and the presumption *omnia rite esse acta* was strengthened by the conduct of the testator, which showed an anxious and intelligent desire to do everything regularly, that presumption was not rebutted by the evidence of the witnesses who appeared to have been nervous and confused on the occasion of the attestation, and whose recollection of what took place was evidently imperfect. So, too, in *Daintree v. Fasulo*, 13 P. D. 67, 102, Butt, J., in holding that a codicil was entitled to probate in a case in which the witnesses were not aware that the paper was a testamentary paper, and had no clear recollection as to the signature, points out that his decision is in accordance with that of Sir H. Jenner Fust in the case of *In the Goods of Thomson*, 4 Not. of Cas. 643, and that that case notwithstanding the observations of Lord Penzance in *Pearson v. Pearson*, L. R. 2 P. & D. 451, was not inconsistent with the decision of the Privy Council in *Ilott v. Genge*, 4 Moo. P. C. 265, because the leading feature in *Ilott v. Genge*, viz., that the witnesses were not allowed to see the testator's signature, which was covered up, did not exist in the case of *In the Goods of Thomson*. This view was affirmed in the Court of Appeal.

requests them to subscribe it, this is a sufficient \*acknowledgment of his signature (r): But not where they are unable to see the signature, and the testator merely calls them in to sign, without giving them any explanation of the instrument they are signing (s).<sup>19</sup> So in a case before Sir C. Cresswell, the witnesses were invited by the testator to

It will be observed that in the case of *Blake v. Blake* also the signature was covered up. It may be that there is a distinction between the rule in the cases where the testator acknowledges his signature, and in cases where he signs in the presence of the witnesses, as to what opportunity or possibility there must be of the witnesses seeing what it is that is written. See *Smith v. Smith*, L. R. 1 P. & D. 143. On the application of the maxim "*omnia præsumuntur rite esse acta*," see *Woodhouse v. Balfour*, 13 P. D. 2, and *post*, p. \*91.

(r) In the following cases there was held to be a sufficient acknowledgment: *Gaze v. Gaze*, 3 Curt. 451. *Blake v. Knight*, *ib.*, 547. *Keigwin v. Keigwin*, *ib.*, 607. In the Goods of *Davis*, *ib.*, 748. In the Goods of *Ashmore*, *ib.*, 756. *Cooper v. Bockett*, 3 Curt. 649; 4 Moo. P. C. 419. In the Goods of *Thomson*, 4 Not. of Cas. 643. *Leech v. Bates*, 6 Not. of Cas. 704. *Faulds v. Jackson*, 6 Not. of Cas. Supp. 1. *Burgoyne v. Showler*, 1 Rob. 12. *Bosanquet v. Bosanquet*, 2 Rob. 577. *Lloyd v. Roberts*, 12 Moo. P. C. 158. *Gwillim v. Gwillim*, 3 Sw. & Tr. 200. *Vinnicombe v. Butler*, 3 Sw. & Tr. 580. *Beckett v. Howe*, L. R. 2 P. & D. 1. *Inglesant v. Inglesant*, L. R. 3 P. & D. 172. *Daintree v. Fasulo*, 13 P. D. 67, 102. It is not necessary that a testator should state to the witnesses that it is his signature: the production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the statute: *Ilott v. Genge*, 3 Curt. 172, 175, *per* Sir H. Jenner Fust. See also *Blake v. Knight*, *ibid.* 563, 564. In

the Goods of *Thomson*, 4 Notes of Cas. 643. *Leech v. Bates*, 6 Notes of Cas. 704, by Sir H. Jenner Fust. The like was held where the testator had intimated to the same effect by *gestures*: In the Goods of *Davies*, 2 Robert. 337. The request of another person in the presence of the testator may be equivalent to a request by the testator himself. *Faulds v. Jackson*, 6 Notes of Cas. Suppl. 1. *Re Jones, Dea. & Sw.* 3. *Inglesant v. Inglesant*, L. R. 3 P. & D. 172.

(s) In the following cases there was held to be no sufficient acknowledgment: *Ilott v. Genge*, 3 Curt. 160 (affirmed in Privy Council, 4 Moo. P. C. 265). *Hudson v. Parker*, 1 Rob. 14. In the Goods of *Summers*, 2 Rob. 295. *Croft v. Croft*, 4 Sw. & Tr. 10. In the Goods of *Swinford*, L. R. 1 P. & D. 630. *Pearson v. Pearson*, L. R. 2 P. & D. 451. *Morritt v. Douglas*, L. R. 3 P. & D. 1. *Fisher v. Popham*, L. R. 3 P. & D. 246. *Blake v. Blake*, 7 P. D. 102. It is not sufficient merely to produce the paper to the witnesses where it does not appear that the signature of the testator was affixed to it at the time. *Ilott v. Genge*, 3 Curt. 160, 181, *per* Sir H. Jenner Fust. In the Goods of *Ashton*, 5 Not. of Cas. 548.

19. A mere tacit signing of the instrument without any information as to its nature will not be sufficient; the witnesses must be informed in some way by the testator personally that the document is a will. *Estate of Fusilier*, Myrick Prob. 40. But if the witnesses sign in the presence of the testator without objection on his part, he knowing what they are doing, this is sufficient without any particular request from him to sign. Will of

witness his signature on a paper which appeared to them to be a blank : They saw no writing whatever on it, and the signature they witnessed was on the fourth side of a sheet of paper folded in the middle : On the first side of that sheet, when the paper was produced for probate, there appeared to be a codicil ; but there was no evidence that anything was written on the paper \*before the signatures were put there : And on that ground, the learned judge, after consideration, refused to admit the paper to probate (t).

It may here be observed, that the Wills Act further enacts, by sect. 13, "that every will executed in manner hereinbefore mentioned shall be valid without any other publication thereof." And it has been said (u), that the result of this enactment is, that the testator need not inform the witnesses of the nature of the instrument they are attesting, and that even if he deceives them and leads them to believe that it is a deed, and not a will, the execution is good notwithstanding.<sup>20</sup>

Meurer, 44 Wis. 392. But in Oregon they must either have seen him sign the will, heard him acknowledge it, or observed acts which unmistakably indicated that he had signed it. Luper v. Werts, 19 Oreg. 122.

But it is impossible for a person, under the statute, to acknowledge his signature unless the witnesses see the signature which the person attempts to acknowledge. Matter of Mackay, 44 Hun 571.

(t) In the Goods of Hammond, 3 Sw. & Tr. 90. It will be seen from the cases cited above that evidence is admissible as to whether the signature of the testator was on the will at the time of attestation. But sometimes it happens that no direct evidence is forthcoming. In such cases the court is at liberty to judge from the circumstances of the case whether it was probable that the name of the testator was on the will at the time of attestation. In the Goods of Huckvale, L. R. 1 P. & D. 375. In the Goods of Pearn, 1 P. D. 70. The fact that there is an attestation clause in the proper form would seem itself to be some evidence that the name of the testator was on the will at the time of attestation. In the Goods of Huck-

vale (*ubi sup.*). In the Goods of Pearn (*ubi sup.*). Wright v. Rogers, L. R. 1 P. & D. 678. Woodhouse v. Balfour, 13 P. D. 2. See further on this point, Smith v. Smith, L. R. 1 P. & D. 143. But the existence of an attestation clause is not conclusive. In the Goods of Swinford, L. R. 1 P. & D. 630. Croft v. Croft, 4 Sw. & Tr. 10. Fischer v. Popham, L. R. 3 P. & D. 246.

(u) Sugden's Essay, p. 140, citing Trimmer v. Jackson, 4 Burn, E. L. 130. British Museum v. White, 3 Moo. & P. 689.

20. There must be, in some of the states, an actual publication, and such publication must be some act that will intimate to the witnesses that the instrument is the will of the testator, and it must be some declaration or expression different and distinct from a request to sign as a witness. This is so in New York, Heyer v. Berger, 1 Hoff. Ch. 1 ; Torry v. Bowen, 15 Barb. 304 ; Lewis v. Lewis, 13 Id. 17 ; Newhouse v. Godwin, 17 Id. 236 ; Abbey v. Christy, 49 Id. 276 ; Gilbert v. Knox, 52 N. Y. 125 ; Auburn Theo. Sem. v. Calhoun, 62 Barb. 381 ; McKinley v. Lamb, 64

Again, in the construction of the Statute of Frauds, it was held that the act did not require that the witnesses should subscribe in the presence of each other, but that they might attest the execution separately, at different times (v). But \*the Wills Act makes it necessary that both the witnesses to the will shall be present, at the same time, when the signature is made or acknowledged by the testator. And they must attest in the presence of the testator, *though not of each other* (x). And it appears to be now fully established that the act is not complied with, unless both

the attestation must be *after* the testator has signed or acknowledged his signature to both the witnesses being present at the same time:

and they must attest in the presence of the testator, though not of each other;

Id. 199; and in New Jersey, *Compton v. Mitton*, 7 Halst. 70; *Combs v. Jolly*, 2 Gr. Ch. 625; *Mickle v. Matlack*, 2 Harr. (N. J.) 87; *Morehouse v. Cotheal*, 1 Zab. 480; also in North Carolina; and in Arkansas. *Rogers v. Diamond*, 13 Ark. 474.

A request made by a third person in the hearing of the testator is, in law, the request of the testator, if he be conscious and does not object. *Cheatham v. Hatcher*, 30 Gratt. 56.

In New York, however, no particular form of publication is required, Will of Beckett, 35 Hun 447; but in some way it must be made known to the witnesses that it is a will and that the testator desires them to attest its execution, *Moore v. Moore*, 2 Bradf. 265; where testatrix simply said that it was all right, it was held sufficient, *Campbell v. Logan*, 2 Bradf. 98; in another case reading aloud followed by the act of signature was held to be a sufficient testamentary declaration, *Vaughan v. Burford*, 3 Id. 78; to the same effect, *Carle v. Underhill*, Id. 105; *Burk's Will*, 2 Redf. 239; *Thompson v. Stevens*, 62 N. Y. 634.

Where one witness, in the presence of testator, said to the other witnesses that this was the will of the testator who desired them to sign it as witnesses, to which the testator made no reply, it was sufficient, *Gilbert v. Knox*, 52 N. Y. 125; so too where the statement is made to all the witnesses by the draftsman, *Peck v. Cary*, 27 N. Y. 9; In *Coffin v. Coffin*, 23 Id. 9, one witness, in presence of the other, asked the testator whether he wished them to sign as witnesses, to which the testator answered, "Yes," held to be sufficient publication; so too the reading of the attestation clause in testator's presence, even after it was signed by the witnesses, *Stewart's Will*, 2 Redf. 77; *Van Hoffman v. Ward*, 4 Id. 244; so too "Will you witness my will?" or "I want you to witness my will," is a sufficient compliance with the statute, *Will of Harder*, Tuck. 426, 429; and an assent upon the part of the testator to questions put by the scrivener will answer, *Will of Higgins*, 94 N. Y. 554; *Whitbeck v. Patterson*, 10 Barb. 608; *Thompson v. Stevens*, 62 N. Y. 634; *Coffin v. Coffin*, 23 Id. 9; and in one

(v) *Ellis v. Smith*, 1 Ves. Jun. 12.

(x) *Cooper v. Bockett*, 3 Curt. 659, per Sir H. Jenner Fust. *Faulds v. Jackson*, 6 Notes of Cas. Suppl. 1. In the *Goods of Webb*, Dea. & Sw. 1. In *Case-ment v. Fulton*, 5 Moo. P. C. C. 130, the

same court held (without adverting to their previous decision) that the witnesses must attest *in the presence of each other*. This case, however, has not been followed.

witnesses shall attest and subscribe after the testator's signature shall have been made or acknowledged to them<sup>21</sup> when both are actually

case the testator said, "Evidently I give all that I possess to my mother; I do not know my father," and then, speaking of the witnesses, said, "Let them sign," it was held that the publication was sufficient. *Van Hoffman v. Ward*, 4 Redf. 244. But where the scrivener said, "Do you acknowledge, in the presence of these witnesses, that you signed this paper as your last will and testament?" it was held to be insufficient, *Rumsey v. Goldsmith*, 3 Dem. 494, 503; so too it was held that the answer, "Yes," to the inquiry whether testator was making his will, was insufficient. *Matter of Simmons*, 30 N. Y. St. Rep. 446. And in Louisiana, where the will, having been written out of the presence of the testator and witnesses, is read by one of the witnesses in the presence of the testator and the other witnesses, and then that witness says, "Is this paper that has just been read your will?" to which the testator answers, "It is," this is sufficient, *Bourke v. Wilson*, 38 La. Ann. 320; and in a similar case the court said: "We do not see how it could have been better presented." *Buntin v. Johnson*, 28 Id. 796.

As in New York, so in other states no particular form of publication is required. In California a question put by the scrivener to the testator, in the presence of the witnesses, "Is that your

will?" and the answer "Yes," is sufficient publication. *Estate of Johnson*, 57 Cal. 529; so the publication is sufficient if testator declares in the presence of the witnesses that a will subscribed by one witness, in testator's name, is his will, and the witnesses thereupon all sign as witnesses. *Estate of Toomes*, 54 Cal. 509.

And in Maine, Massachusetts, Kentucky, Illinois, Indiana, South Carolina and Virginia, it is only requisite that it be evident that the testator knew that the instrument was his will and intended to execute it, and that it should be attested as his will. *Cilley v. Cilley*, 34 Me. 162; *Osborn v. Cook*, 11 Cush. 532; *Swett v. Boardman*, 1 Mass. 258; *Dewey v. Dewey*, 1 Metc. 349; *Hogan v. Grosvenor*, 10 Id. 54; *Verdier v. Verdier*, 8 Rich. 135; *Black v. Ellis*, 3 Hill (S. C.) 68; *Beane v. Yerby*, 12 Gratt. 239; *Ray v. Walton*, 2 A. K. Marsh. 71; *Dickie v. Carter*, 42 Ill. 376; *Brown v. McAlister*, 34 Ind. 375. And in Georgia the acknowledgment of his signature by the testator is a sufficient publication. *Webb v. Fleming*, 30 Ga. 808. But in Pennsylvania it need not even be declared to be a will, the declaration by the testator that it is his *act and deed* being sufficient. *Loy v. Kennedy*, 1 Watts & S. 396.

In Kentucky it is said that in all adjudications involving publication and attestation of wills a substantial, rather

21. As a general proposition, a will cannot be attested unless signed by the testator, or by some one by him authorized. *Reed v. Watson*, 27 Ind. 443. But in Pennsylvania the witnesses may sign first. *Miller v. McNeill*, 35 Pa. St. 217. And in New Jersey the validity of the will is not affected by the fact that one of the witnesses signed before the testator. *Mundy v. Mundy*, 2 McCart.

290, 294. So too, in Connecticut it is held that it makes no difference in what order the testator and witnesses sign, provided it be all part of one transaction. *O'Brien v. Gallagher*, 25 Conn. 229.

But if there be no proof to the contrary, the presumption is that the testator signed before the witnesses. *Allen v. Griffin*, 69 Wis. 529.

See *ante*, p. 97, n. 5.



present at the same time (y). And if one of the witnesses has subscribed *before* the testator signs or acknowledges his signature in the presence

than a literal, compliance with the statute has been demanded, and if its object and intention were reached without violation of its express language, that is all that has been required. *Porter v. Ford*, 82 Ky. 191; *Soward v. Soward*, 1 Duv. 126; so too in New York, a substantial compliance with the statute will suffice. In *re Voorhis*, 125 N. Y. 765; *Will of Phillips*, 98 Id. 267. Any communication of the idea that the instrument is a will is sufficient, *Seguine v. Seguine*, 2 Barb. 385; *Remsen v. Brinkerhoff*, 26 Wend. 325; and this knowledge must be evinced with reasonable definiteness, *Hunt v. Mootrie*, 3 Bradf. 322; so that the testamentary character of the instrument evidently has been communicated to the witnesses. *Ex parte Beers*, 2 Bradf. 162. It is immaterial what expression is used if the proper meaning be conveyed, *Ham v. Case*, 1 Redf. 307; and such meaning may be conveyed either by words or signs, *Estate of Crittenden*, *Myrick's Prob.* 50; *Ludlow v. Ludlow* 8 Stew. (N. J.) 480; *Haynes v. Haynes*, 33 Ohio St. 598. When the testatrix merely bowed her head in response to interrogations it was sufficient publication. *Baldwin v. Baldwin*, 81 Va. 405.

So in Vermont a declaration, in presence of the testator, by the person who drew the will is a sufficient publication. *Denny v. Pinney*, 60 Vt. 524. This will suffice in Indiana also. *Dyer v. Dyer*, 87 Ind. 13; *Conway v. Vizzard*, 122 Id. 266; *Bundy v. McKnight*, 48 Id. 502.

While in Illinois no declaration by the testator that it is his will is essential, *Will of Storey*, 20 Ill. App. 183; nor in Wisconsin. *Allen v. Griffin*, 69 Wis. 529. And in Connecticut the witness need not know that the instrument attested is a will. *Canada's Appeal*, 47 Conn. 450. And in Iowa it is not in any way essential to the validity of a will that the character and purposes of the instrument should be stated to the witnesses by the testator or by any one on his behalf. *Will of Hulse*, 52 Iowa 662.

But although declarations made by a third person will suffice if the testator be strong and well, when the attestation is at the end of a long sickness, and when the testator is within a few hours of death and very weak, such declaration will not answer unless there be clear proof of their adoption by the testator. *Heath v. Cole*, 15 Hun 100.

But where one witness who signed in an adjoining store returned with the testator to the office where the scrivener was and there asked the testator "*if he acknowledged that to be his work,*" whereto the testator assented, this was held not to be a sufficient publication. *Larabee v. Ballard*, 1 Dem. 496. Nor is it a sufficient publication where testator asked the witnesses to "sign as witnesses," but made no declaration as to the nature of the document. *Will of Harris*, Tuck. 293, 300. Nor where but one of the witnesses is informed that it is a will. *Will of Newton*, Id. 349. But where the testator

(y) *Moore v. King*, 3 Curt. 243. *Cooper v. Bockett*, *ibid.* 648. 4 Moo. P. C. 419. See also *In the Goods of Allen*, 2 Curt. 331. *In the Goods of Olding*, 2 Curt. 865. *In the Goods of Simmonds*, 3 Curt. 79. *In the Goods of Byrd*, 3 Curt. 117. *Pennant v. Kingscote*, 3 Curt.

643, 647. *Hindmarsh v. Charlton*, 8 H. of L. 160. The words of the act are prospective, such witnesses "*shall attest and shall subscribe the will in the presence of the testator:*" 3 Curt. 660, *per Sir H. Jenner Fust.*

of both, and the other witness alone then subscribes in the presence of the former witness and the testator, this is not sufficient even though the former witness then expressly acknowledges the signature which he has previously made: For the act says that the testator may *acknowledge* his signature; but does not say that the witnesses may *acknowl-*

said "I have papers that I want you to sign" and "this is my will; I want you to witness it," and, after the attestation, "I declare this to be my last will and testament," it was not a good execution; there was neither sufficient signing nor acknowledgment. *Mitchell v. Mitchell*, 16 Hun 97.

On the other hand where a testatrix had previously conversed with one of the witnesses informing such witness that she intended to make her will, and that when she did, she desired such person to be a witness to the will; the will having been made, the testatrix said to this witness: "This is the paper I spoke to you about signing. It may make you come into court, but you need not be afraid," this was sufficient publication as to that witness. *Will of Beckett*, 35 Hun 447.

But where one witness is told in the room and at the time of the execution and the other witness is told in another room and when asked to act as a witness the publication is sufficient. *Matter of Forman*, Tuck. 205.

Where the subscription as a witness to the will is by one who is unable to understand the testator, or make himself understood by him, and to whom the declaration and request of the testator must be translated, it will not be a sufficient publication. *Stein v. Wilzinski*, 4 Redf. 441.

However, the declaration by the testator need not be made in the very act of signing; it is sufficient if the acts be done on one occasion so as to form parts of the same transaction. *Matter of Collins*, 5 Redf. 20; *Jackson v. Jackson*, 39 N. Y. 153; *Brady v. McCrosson*, 5 Redf.

431. "The order of the several things constituting one complete execution by the testator is not material, if they are, in fact, done, as nearly as may be, at the same time." *Woodruff, J., in Jackson v. Jackson, supra*. The result of the cases seems to be that if the will be produced by the testator with his signature plainly visible and the witnesses be by him requested to witness his will, there need be no other or further acknowledgment of the signature. *Will of Harder*, Tuck. 426, 430; *Robinson v. Smith*, 13 Abb. Pr. 359; *Baskin v. Baskin*, 36 N. Y. 416; *Willis v. Mott*, Id. 490.

But it is enough (in the absence of an acknowledgment) if the testator sign in the presence of the witness, and it will be deemed to be done in the presence of the witness if he be in an adjoining room, the door to which was open. *Spaulding v. Gibbons*, 5 Redf. 316; *Will of Meurer*, 44 Wis. 392. And in Delaware, formal execution is a sufficient publication. *Smith v. Dolby*, 4 Harr. (Del.) 350. This seems also to be the rule in Vermont. *Dean v. Dean*, 27 Vt. 746.

It is unimportant that the publication was made to the witnesses on different occasions and when they were apart from each other *Barry v. Brown*, 2 Dem. 309; to the same effect, *Hoysradt v. Kingman*, 22 N. Y. 372.

In a case where the testator had paralysis of the vocal organs and was not able to converse, but had a custom of communicating his desires to those who knew him by a semi-articulate method, a declaration made to the witnesses by means of these sounds used for speech, together with signs and gestures, was

edge their subscriptions.<sup>22</sup> Thus, in *Moore v. King* (z), a testator signed a codicil in the presence of a witness (his sister) who, at his desire, at-

held to be a good publication of the will. *Lane v. Lane*, 95 N. Y. 494.

But where an attempt is made to procure the execution of a will by one who is *in extremis* and his name be subscribed by another for him, who also signs as a witness and asks another to attest the execution, which he does, all in the presence of decedent and while he is yet alive, but so low as to raise a doubt as to his being conscious of the transaction, it will not be deemed a publication of the will. *Sanders v. Stiles*, 2 Redf. 1. So too, where during the attestation the testator becomes unconscious, the attestation is bad and the will void. *McMechen v. McMechen*, 17 W. Va. 683. But where the testator is in a stupor but intelligent when roused, if so roused for the attestation it will be sufficient. *Walker v. Walker*, 67 Miss. 529.

22. In Alabama the witnesses need not sign in the presence of each other, *Hoffman v. Hoffman*, 26 Ala. 535; *Moore v. Spier*, 80 Id. 129; nor in Wisconsin, *Will of J. B. Smith*, 52 Wis. 543; nor in New Hampshire, *Welch v. Adams*, 63 N. H. 344; nor in Missouri, *Cravens v. Faulconer*, 28 Mo. 19; *Elliott v. Welby*, 13 Mo. App. 19; nor in New York, *Hoysradt v. Kingman*, 22 N. Y. 372; *Willis v. Mott*, 36 Id. 486; *Neugent v. Neugent*, 2 Redf. 369; *Matter of Bogart*, 67 How. Pr. 313; nor in Illinois, *Chaney v. Home F. & F. Miss. Soc.*, 28 Ill. App. 621; nor in Connecticut, since the act of 1885. *Gaylor's Appeal*, 43 Conn. 82; *Lane's Appeal*, 57 Id. 182.

In Arkansas the witnesses need not sign in the presence of the testator, either actually or constructively, *Abrahams v. Wilkins*, 17 Ark. 292; *Rogers v. Diamond*, 13 Id. 474, 487; nor in Alabama, as

to personalty, *Ex parte Henry*, 24 Ala. 638; nor in New York, *Rudden v. McDonald*, 1 Bradf. 352; *Jackson v. Christman*, 4 Wend. 277; nor in Illinois, *Will of Storey*, 20 Ill. App. 183; but they must in Rhode Island. *Pawtucket v. Ballou*, 15 R. I. 58.

In Pennsylvania the witnesses need not see the testator sign, *Mealey's Estate*, 11 Phila. 161; nor in Illinois, *Yoe v. McCord*, 74 Ill. 33; nor in Iowa, *Will of Convey*, 52 Iowa 197; nor in Missouri, *Cravens v. Faulconer*, 28 Mo. 19; *Elliott v. Welby*, 13 Mo. App. 19; nor in Massachusetts, *Hull v. Hull*, 17 Pick. 373; *Dewey v. Dewey*, 1 Metc. 349; *Tilden v. Tilden*, 13 Gray 110; *Nickerson v. Buck*, 12 Cush. 332; nor in New Jersey, *Compton v. Mitton*, 7 Halst. 70; *Combs v. Jolly*, 2 Gr. Ch. 625; *Mundy v. Mundy*, 2 McCart. 290; nor in Vermont, *Adams v. Field*, 21 Vt. 256; *Roberts v. Welsh*, 46 Id. 164; nor in Virginia, *Rosser v. Franklin*, 6 Gratt. 1; *Parramore v. Taylor*, 11 Id. 220; nor in Maryland, *Stirling v. Stirling*, 64 Md. 138.

If the attestation by the witnesses be at the testator's request, and at the time of the execution or acknowledgment, it may be done in an adjoining room and out of sight of the testator, *Lyon v. Smith*, 11 Barb. 124; but it is essential that, although they do not subscribe in each other's presence, their subscribing be with the knowledge or at the request of the testator, *Neugent v. Neugent*, *ubi supra*; and the attestation must be in the actual conscious presence of the testator; while he need not see them sign, yet he must be able to see the attestation if desired and he must be conscious. *Allen's Will*, 25 Minn. 39.

But prior to the act of 1885 in Connecticut it was essential that the wit-

(s) 3 Curt. 243.

tested and subscribed it: On a subsequent day, when the sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying in the presence of both parties and pointing to his signature, "This is a codicil signed by myself and by my sister, as you see; you will oblige me, if you will add your \*signature, two witnesses being necessary:" That party then subscribed in the presence of the testator and his sister, *the latter who was standing by him, pointing to her signature and saying, "There is my signature, you had better place yours underneath:"* She did not, however, re-subscribe: And it was held by Sir H. Jenner Fust, that the instrument was not sufficiently attested under the new statute.

It will be observed that the provision of the Statute of Frauds, requiring that the witnesses shall attest and subscribe *in the presence of the testator*, is continued in the statute of Victoria, and as the language in both the acts is the same in this respect, it should seem that the decisions which have taken place as to the former will govern the construction of the latter. The result of them is, that it is not requisite that the testator should actually see the witnesses sign, but that it is sufficient if he might have seen them if he chose to look (a).<sup>23</sup> Thus where a will was executed by the testa-

nesses should sign in the presence of each other. *Lane's Appeal*, 57 Conn. 182. And such an act is not retroactive, therefore a will which was invalid under the old law is not validated by the act of 1885. *Ib.*

But the will must be complete when it is published and attested. *Chisholm's Heirs v. Ben*, 7 B. Mon. 408; *Vernam v. Spencer*, 3 Bradf. 16; *Jones v. Jones*, 3 Metc. (Ky.) 266; *Barnes v. Syester*, 14 Md. 507; *Waller v. Waller*, 1 Gratt. 454.

See *ante*, p. 126, n. 21.

(a) *Shires v. Glasscock*, 2 Salk. 688. *Day v. Smith*, 3 Salk. 395. *Todd v. Winchelsea, M. & Malk*. 12.

23. The requirement that the witnesses sign "in presence of the testator" means that they must not withdraw from the continued observation of his senses, although the testator himself

may refrain from using such senses. *Reynolds v. Reynolds*, 1 Speers 253; *Baldwin v. Baldwin*, 81 Va. 405. But although the witnesses attest the will in the same room with the testator and he see them, yet if he can see their backs only, this is not a good attestation. *Graham v. Graham*, 10 Ired. L. 219. *Contra*, *Nock v. Nock*, 10 Gratt. 106.

In whatever room the witnesses and testator may be, whether in the same or adjoining rooms, or whether in the same house or not, if the witnesses be in such a relative position to the testator that he could see them sign if he wished, this is sufficient. *Gallagher v. Filkeary*, 29 Ill. App. 415.

So where, after the execution of the will, it was taken into an adjoining room, where the witnesses signed, and where the testator could have seen them

trix in her carriage and the witnesses subscribed in the attorney's office, opposite to the window of which the carriage was, so that she might have seen them through the window while subscribing, it was held that the statute was satisfied (b). But where the witnesses signed in an adjoining room to that in which the testator was, and the door between them was open, but he was not in such position that he could see them, it was held that the attestation was ill (c). In a case in the Prerogative Court (d), where the question arose on a will made after the Wills Act came into operation, the witnesses had attested in the room where testator was lying in bed with the bed-curtains closed around him, so that he could not, for that \*reason have seen the witnesses while they

through the open door, if he would, that was held to be in presence of the testator, *Will of Meurer*, 44 Wis. 392; *Ambree v. Weishaar*, 74 Ill. 109; and where he could have seen them by turning his head, which he was physically able to do. *Walker v. Walker*, 67 Miss. 529. And where the witnesses signed their names at a bureau at the foot of the bed in which the testator was propped up and he could see the top of the pen, this was sufficient. *Ayres v. Ayres*, 16 Stew. (N. J.) 565.

As to the general subject of the conscious presence of the testator, see *Russell v. Falls*, 3 Harr. & McH. 457; *Edelen v. Hardey*, 7 Harr. & J. 61; *Boldry v. Parris*, 2 Cush. 433; *Hill v. Barge*, 12 Ala. 687; *Wright v. Lewis*, 5 Rich. 212; *Ray v. Hill*, 3 Strobb. 297; *Lamb v. Girtman*, 33 Ga. 289; *Robinson v. King*, 6 Ga. 539; *Howard's Will*, 5 Mon. 199; *Rucker v. Lambdin*, 12 Sm. & M. 230; *Watson v. Pipes*, 32 Miss. 451.

It has been held that if it be proved that it was physically impossible for the testator to see the witnesses sign, the will was not sufficiently executed. *Aikin v. Weckerly*, 19 Mich. 482, 505; *Will of Downie*, 42 Wis. 66; *Jones v. Tuck*, 3 Jones (N. C.) 202; *Graham v. Graham*, 10 Ired. 219; *Maynard v. Vinton*, 59 Mich. 139. But in a case where the testator was lying on his bed, unable to

move, his sight being unimpaired, but, owing to an injury, he could only look upward; the witnesses signed at a table in an adjoining room, about nine feet from the testator; he did not see them sign, but he saw the will afterwards and expressed his satisfaction; a codicil was soon after, and under similar circumstances, executed in the same room and at a point about four feet from the testator, who still gazed toward the ceiling; he was not moved, and it was physically impossible for him to see the witnesses sign; yet this will was held to have been attested in the presence of the testator. *Riggs v. Riggs*, 135 Mass. 238.

But to the contrary effect is *Maynard v. Vinton*, *supra*, where it is held that if the testator does not see the attestation, because he is indifferent as to actually seeing it, the execution will be good; but if in his position it is impossible to see and his position is not changed, the execution is bad.

(b) *Casson v. Dade*, 1 Bro. C. C. 99.

(c) *Doe v. Manifold*, 1 M. & S. 249. *Winchelsea v. Wauchope*, 3 Russ. 441. Held, *accord.* since the Wills Act, in the *Goods of Newman*, 1 Curt. 914. In the *Goods of Ellis*, 2 Curt. 395. In the *Goods of Colman*, 3 Curt. 118. *Jenner v. Finch*, 5 P. D. 106.

(d) *Newton v. Clarke*, 2 Curt. 320.

were subscribing; Sir H. Jenner Fust was of opinion that where a paper is executed by the deceased in the same room where the witnesses are, who attest it in the same room where the testator was at the time, they do attest it in the presence of the testator, though he may not actually see them sign: The will was accordingly admitted to probate. But in a subsequent case in the same court (e), where the testatrix lay with the curtain closed, and her back to the attesting witnesses when they subscribed, and it appeared that she could not by possibility have seen them do so, even if the curtains had not been closed, by reason of her inability, from her state of weakness, to have turned herself in her bed into a position in which she could have seen them sign, the same judge held that the statute was not complied with, and he distinguished the case from the former one where the testator could have seen but that the curtains were closed; And the learned judge added that in the present case there would have been no difference, in principle, if the witnesses had signed the will down-stairs. Sir John Dodson held that where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names (f).<sup>24</sup>

Though the testator was blind, yet it must be shown that he could have seen the witnesses sign, had he had his eyesight (g).<sup>25</sup>

(e) *Tribe v. Tribe*, 7 Notes of Cas. 132. S. C. 1 Robert. 775.

(f) *Norton v. Basset*, Dea. & Sw. 259. In the Goods of Trimmel, 11 Jurist, N. S. 248, 249, Sir J. P. Wilde laid it down that the true test is, whether the testator might have seen, not whether he did see the witnesses sign their names. The testator must, it would seem, be conscious of the presence of the attesting witness: *Right v. Price*, Doug. 241. In the Goods of Kellick, 3 Sw. & Tr. 578; *Jenner v. Ffinch*, 5 P. D. 106.

24. But where, after subscribing their names as witnesses in another room, the witnesses returned to the testator, and one of them, in presence of the others, placing his finger on the signatures, said "Here is your will, witnessed," it was held, in Virginia, that this was a sub-

stantial subscribing of their names as witnesses in the presence of the testator. *Sturdivant v. Birchell*, 10 Gratt. 67. But in Maryland, Massachusetts and Georgia a will so executed is held to be, *prima facie*, illegally executed. *Edelen v. Hardey*, 7 Harr. & J. 61; *Boldry v. Parris*, 2 Cush. 433; *Lamb v. Girtman*, 33 Ga. 289.

(g) In the Goods of Piercy, 1 Robert. 278.

25. But it is not essential to the validity of the will that it should be read to the testator in the presence of the witnesses, *Weir v. Fitzgerald*, 2 Bradf. 42; *Harrison v. Rowan*, 3. Wash. C. C. 580; *Wampler v. Wampler*, 9 Md. 540; *Martin v. Mitchell*, 28 Ga. 382; *Clifton v. Murray*, 7 Id. 564; *Day v. Day*, 2 Gr. Ch. 549; *Pettes v. Bingham*,

The Wills Act provides (*gg*) that “no form of attestation shall be necessary.” It is, therefore, sufficient if the wit\*nesses, without any attestation clause of any description, merely subscribe their names (*h*).<sup>26</sup> But it must be observed, <sup>no form of attestation necessary:</sup> that unless there is an attestation clause, reciting that the formalities prescribed by the act have been complied with, the executor cannot

10 N. H. 514; *Worthington v. Klemm*, 144 Mass. 167; not even when the testator is blind, *Mealey's Estate*, 11 Phila. 161; *Wampler v. Wampler*, *ubi supra*; or is very illiterate. *King v. Kinsey*, 74 N. C. 261.

It is sufficient if the court be satisfied by competent evidence that the contents of the will were known to and approved by the person executing it, at the time of its execution. *Day v. Day*, *ubi supra*; *Pettes v. Bingham*, *ubi supra*; *Worthington v. Klemm*, *ubi supra*. See also *Harris v. Vanderveer's Ex'r*, 6 C. E. Gr. 561; *Lyons v. Van Riper*, 11 Id. 337; *Gerrish v. Nason*, 22 Me. 438; *Downey v. Murphey*, 1 Dev. & B. 82, 87; *Stewart v. Lispenard*, 26 Wend. 255; *McNinch v. Charles*, 2 Rich. 229; *Tomkins v. Tomkins*, 1 Bailey 92; *Chandler v. Ferris*, 1 Harr. (Del.) 454. In *Day v. Day*, *ubi supra*, it was held that if it be established, either by direct evidence or by circumstances so conclusive as to admit of no reasonable doubt, that the will in question was truly copied from a previous will, with the contents of which the testator was acquainted, the instrument will be admitted to probate although it was neither read by him nor in his hearing. If, however, there are material departures from the provisions of such previous will, especially if the alterations be not in accordance with the known

feelings of the testator toward one of the legatees in the previous will, then it must be clearly shown that the testator fully knew and understood such alterations in the subsequent will. And in *Pettes v. Bingham*, *ubi supra*, it is said: “The presumption of law, under such circumstances, clearly must be, that he had knowledge of what he thus executed and published, as a will, without fraud, and when he was of sane mind.” And in *Wampler v. Wampler*, *ubi supra*, where the testator was blind, it appeared that he had dictated the will, which was taken to be sufficient. And in *McNinch v. Charles*, *ubi supra*, certain letters written by the testator were considered sufficient evidence to show that the testator was familiar with the contents of the will.

But it is not essential to convince the court by positive testimony to the effect that the testator actually knew the contents of the will; such fact may be inferred from circumstances and it is feasible to establish the testator's knowledge by circumstantial evidence. *Gerrish v. Nason*, *ubi supra*.

Nor is it enough to warrant a denial of probate that it does not appear affirmatively that the will was read to the testator where he was capable of reading it himself. *Kahl v. Schober*, 8 Stew. (N. J.) 461. And in the case of a person of ordinary attainments, if the will has been

(*gg*) Section 9.

(*h*) *Bryan v. White*, 2 Robert. 315. An attestation clause forms no part of a [will or] codicil even when written by the testator, and therefore, a recital by mistake in an attestation clause to a codi-

cil that a former codicil was cancelled does not revoke that codicil: In the *Goods of Atkinson*, 8 P. D. 165.

26. The statute of New Jersey does not prescribe any form in which the witnesses shall certify their attestation.

obtain probate in the usual way on his own oath alone; but must produce an affidavit from one of the attesting witnesses, or some other satisfactory evidence showing that the solemnities have been performed as required by the statute (i).

The decisions (k) on the construction of the Statute of Frauds appear to make it clear that in the case of the witnesses, as well as of the testator (l), a subscription by mark is sufficient, notwithstanding the witness be able to write.<sup>27</sup> And

the witnesses  
may subscribe by  
mark:

in the possession of the testator long enough for him to have read it, the proponent need not prove that any one saw him read it or heard it read to him or in his presence. *Brick v. Brick*, 17 Stew. (N. J.) 282. And the fact that the testator could neither read nor write does not render proof that he knew the contents necessary; the execution raises the presumption of knowledge. *Patton v. Hope*, 10 Stew. (N. J.) 522.

(i) See *post*, Pt. I. Bk. IV. Ch. II. § III: and see the Rules of 1862 & 1871 (non-contentious), Nos. 4, 5, 6 and 7.

(k) *Harrison v. Harrison*, 8 Ves. 185. *Addy v. Grix*, *ibid*, 504.

(l) See *Baker v. Denning*, 8 A. & E. 94, *ante*, p. \*64.

27. *Compton v. Mitton*, 7 Halst. 70; *Campbell v. Logan*, 2 Bradf. 90; *Meehan v. Rourke*, Id. 385; *Jackson v. Van Dusen*, 5 Johns. 144; *Jackson v. Jack-*

*son*, 39 N. Y. 153; *Chase v. Kittredge*, 11 Allen 49; *Adams v. Chaplin*, 1 Hill (S. C.) Eq. 265; *Prigden v. Prigden*, 13 Ired. 259; *Collins v. Nicols*, 1 Harr. & J. 399; *Ford v. Ford*, 7 Humph. 92; *Jesse v. Parker*, 6 Gratt. 57; *Chaffee v. Baptist Mis. Con.*, 10 Paige 85; *Davis v. Semmes*, 51 Ark. 48.

So a witness may sign for another witness unable to write, who makes his mark attested by the signing witness. *Estate of Derry*, *Myrick's Prob.* 202.

Nor does the statute of Virginia prescribe any particular form or place on the instrument for the signatures of the witnesses, but, unless the will be holographic, they must sign *as witnesses*, *Peake v. Jenkins*, 80 Va. 293; therefore, where the signature is "J. by H.," "Witness L.," H. cannot be considered as a witness and the will is not properly executed. *Ib*.

*Allaire v. Allaire*, 8 Vr. 312, 325; S. C., 10 Vr. 113.

Nor is any formal attestation clause necessary in California. *Estate of Crittenden*, *Myrick's Prob.* 50. But if there be no attestation clause, or if it does not contain all the requisites to the making of a will, there must be affirmative proof of its execution in the manner and with the formalities prescribed by statute. *Allaire v. Allaire*, *ubi supra*; *Mundy v. Mundy*, 2 McCart. 290.

And the words "Signed and sealed in presence of" are sufficient as to form. *Herbert v. Berrier*, 81 Ind. 1.

The attestation clause is not a part of

the will and is not required as a part of its due execution by *any* law. *Jackson v. Jackson*, 39 N. Y. 153; *Burk's Will*, 2 Redf. 239, 243; *Taylor v. Brodhead*, 5 Id. 624.

And when there is no attestation clause and the witnesses sign immediately underneath the signature of the testator, this is a substantial compliance with the statute, *Will of Phillips*, 98 N. Y. 267; and that although no place of residence is added to the signatures of the witnesses. *Id*. But the absence of, or defects in, the attestation clause will not prevent probate. *Re Bogert*, 4 Civ. Pro. 441.



these decisions have been followed, in the Ecclesiastical Court, in the construction of the Wills Act (*m*). So where a will was attested by one witness in his own handwriting, and he also held and guided the hand of a second witness, who could not write or read, and in this way the second witness's name was written as attesting witness, the testator having desired the two to attest; this was held a sufficient attestation under the Wills \*Act (*n*). But an attestation by *sealing* will not satisfy the statute (*o*). or with a guided hand:  
but not by seal:

It has been decided several times that, in the case of a witness, an acknowledgment by him of his previously subscribed signature is not a sufficient compliance with this act (*p*).<sup>28</sup> Accordingly where an attesting witness to a will, on the re-execution thereof by the testator, merely traced over his previous signature with a dry pen, Sir H. Jenner Fust held that this amounted to no more than an acknowledgment of the signature, which had been held not to be a sufficient compliance with the statute, inasmuch as it acknowledgment of signature  
not sufficient:

(*m*) In the Goods of Ashmore, 3 Curt. 756. In the Goods of Amiss, 2 Robert. 116. S. C. 7 Notes of Cas. 274. See also *Hindmarsh v. Charlton*, 8 H. of L. 160. The initials of the witnesses may constitute a sufficient subscription and attestation, if made by them for their signatures as attesting the execution: In the Goods of Christian, 2 Robert. 110. So also the initials of a testator and the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid under Section 21 of the Wills Act; In the Goods of Blewitt, 5 P. D. 116; though the initials of the witnesses in the margin, if merely placed to attest the alteration, will not serve as an attestation to the will itself: In the Goods of Martin, 1 Robert. 712.

(*n*) *Harrison v. Elvin*, 3 Q. B. 117. In the Goods of Frith, 1 Sw. & Tr. 153. *Lewis v. Lewis*, 2 Sw. & Tr. 153. But the one witness cannot subscribe for the other: In the Goods of White, 2 Notes of Cas. 461. In the Goods of Leverington, 11 P. D. 80. The desire that another should sign for a witness cannot be

construed to be a subscription by that witness, even though he cannot write; for he might make his mark: In the Goods of Cope, 2 Robert. 335. So in a case where the two attesting witnesses, who were able to write, held the top of the pen, whilst another person (the drawer of the will) wrote their names, Sir H. J. Fust rejected the motion for Probate, and observed, that where a person's hand is guided, the act is his own, but that here another person signed the names of the witnesses: In the Goods of Kilcher, 6 Notes of Cas. 15.

(*o*) In the Goods of Byrd, 3 Curt. 117.

(*p*) *Moore v. King*, 3 Curt. 253.

28. But it has been held in Virginia that where the name of the witness was subscribed to the paper, not as a witness, but for some other purpose, and afterwards the testator requested him to become a witness, he might adopt such prior signature. *Pollock v. Glassell*, 2 Gratt. 439. But the acknowledgment of the witnesses' signature is a nullity in Rhode Island, even when made to the testator. *Pawtucket v. Ballou*, 15 R. I. 58.

there must be either the name of the witness or a mark intending to represent it:

requires the witness to *subscribe* the will (*q*). And it is now settled by the decision of the House of Lords (*r*), that to make a valid subscription and attestation there must be either the name of the witness, or some mark intended to represent it (*s*). It was further held in that case that a correction of \*an error in the previous writing of his name, or his acknowledgment of it, or the adding a date to it, will not be sufficient for this purpose (*t*).

The act, though it requires that the testator shall sign the will at the foot or end of it, is silent as to the part of the instrument where the witnesses shall subscribe. It was said by Dolben, J., in *Lea v. Libb* (*u*), with reference to the Statute of Frauds, that if a will is written on different sheets of paper, and each of the three witnesses subscribe on a different sheet, it is a good subscription within that statute. If this be good law, it should seem to be equally applicable to the Statute of Victoria. And it has been held, accordingly, in several cases in the Ecclesiastical Court that

in what part of the will they must subscribe:

(*q*) *Playne v. Scriven*, 1 Robert. 772: In the Goods of Maddock, L. R. 3 P. & D. 169. Where the deceased executed his will in the presence of two witnesses, one of whom also made his mark in attestation of the signature of the deceased, and the second witness then wrote the names of the deceased and the witness opposite their respective marks, and also the word "witness," but did not subscribe his own name, the Court held that he did not by any word he wrote attest the signature of the deceased, and that the execution was invalid: In the Goods of Eynon, L. R. 3 P. & D. 92.

(*r*) *Hindmarsh v. Charlton*, 8 H. of L. 160, affirming the decision of Sir C. Cresswell, 1 Sw. & Tr. 433.

(*s*) A witness need not sign his own name if the name actually subscribed be intended to represent his name: *Re Oliver*, 2 Eccl. & Adm. 57. But a will signed by the deceased in the presence of two persons, one of whom subscribed it with his own name, and the other with the name of her husband was refused

probate: In the Goods of Leverington, 11 P. D. 80. The signing of a Christian name if not intended as a perfect signature is not sufficient: In the Goods of Maddock, L. R. 3 P. & D. 169. But where the witness subscribed "Servant to Mrs. Sperling," but without any name; this was held a sufficient attestation: In the Goods of Sperling, 3 Sw & Tr. 272. See further as to what is a sufficient attestation, *Griffiths v. Griffiths*, L. R. 2 P. & D. 300.

(*t*) And in a case where an attesting witness to a will which had once been duly executed, attested a second execution of the same will by no other act than by writing the word "Bristol" (the name of the city), at the end of her name and the name of the street in which she dwelt (which she had written when she attested the former execution), it was held by Sir H. Jenner Fust that the latter attestation was insufficient: In the Goods of Trevanion, 2 Rob. 311.

(*u*) *Carth*. 37.

it matters not, under that statute, in what part of the will the attesting witnesses sign their names; provided it appears that the signatures were meant to attest the requisite signature of the testator (*x*). The same question was decided, after full consideration, by the Court of Queen's Bench, in the case of *\*Roberts v. Phillips (y)*, upon the language of the Statute of Frauds, which requires that a will of lands shall be "attested and subscribed" by the witnesses: It was thereupon contended, that the primary meaning of the word "subscribed" is *written under* and that it must here mean *written under the concluding words of the will*, and signature of the testator, and so preventing any spurious additions after the execution: But the court held that the word "subscribed" might well be understood as merely denoting a signing of the name without any reference to the part of the paper on which the name is to be written; and that the requisition as to the will being subscribed by the witnesses was complied with, where the witnesses, who saw it executed by the testator, immediately signed their names on any part of it at his request with the intention of attesting it.—This decision is plainly applicable to the construction of the word "subscribe" in the Wills Act.<sup>29</sup>

(*x*) In the Goods of Davis, 3 Curt. 748. In the Goods of Chamney, 1 Robert. 757. But where there were two testamentary instruments, it was held not sufficient for the witnesses to subscribe their names at the end of the first of them alone, notwithstanding they were both written on the same sheet of paper: In the Goods of Taylor, 2 Robert. 411. And where an intended will was written in duplicate, one copy of which was signed only by the testator, and the other only by the attesting witnesses, it was held that neither paper was entitled to probate: In the Goods of Hatton, 6 P. D. 204.

(*y*) 4 E. & B. 450. This case was followed in the case of In the Goods of Streatley [1891] P. 172, where the attesting witnesses to a will signed their names in the margin of the first and second sheets opposite to certain amendments.

29. In New York the witnesses must

sign at the end of the will. *Butler v. Benson*, 1 Barb. 526; *Coffin v. Coffin*, 23 N. Y. 9; *Peck v. Cary*, 27 Id. 9; *Brady v. McCrosson*, 5 Redf. 431; *Hewitt v. Hewitt*, Id. 271; *Dennett v. Taylor*, Id. 561; *Hewitt's Will*, 91 N. Y. 261. While under the Kentucky statute requiring subscription, endorsement will not answer. *Soward v. Soward*, 1 Duv. 132. But in Mississippi the witnesses may sign on any part of the instrument. *Murray v. Murphy*, 39 Miss. 214.

The witnesses are required by statute to sign at the end of the will in Arkansas, California, Idaho, Montana, Nebraska, New York, North Dakota and South Dakota; and to "subscribe" in Alabama, District of Columbia, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Rhode

attestation of a  
will written on  
several sheets:

No provision is contained in the act as to wills written on several sheets. And, therefore, in this respect also, the decisions on the construction of the Statute of Frauds appear to be authorities: And, they have established that if a will be written on several or even separate sheets, and the last alone be attested, the whole will is well executed, provided the whole be in the room, and although a part may not have been seen by the witnesses; and that it is a question for a jury whether all the papers constituting the will were in the room;<sup>30</sup> and further, that the presumption is in the affirmative(z). But where a will was signed by the testator and \*also by two witnesses in the margin of the first four sheets, but in the

Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin.

And it is not necessary to understand that the provision that the witnesses shall sign at the end of the will means that their signatures shall immediately follow the signature of the testator, the attestation clause may intervene, *Williamson v. Williamson*, 2 Redf. 449; and a memorandum of erasures and interlineations may be appended to the attestation clause. *McDonough v. Loughlin*, 20 Barb. 238.

And where the will consisted of four pages of note-paper gummed together and the writing was all on one side of the paper, except the attestation clause, which was on the opposite side, the will having been folded, it was attested at the end thereof. *Matter of Dayger*, 47 Hun 127.

But where, after the signatures of the witnesses, a clause is added, appointing an executor, this will not vitiate the will; but the part preceding the attestation will be admitted to probate as the will of the testator. *Brady v. McCrosson*, 5 Redf. 431.

But where a will was attested by one witness and four and a half years afterwards an endorsement is made thereon in these words: "The within is the basis on

which I desire to have my affairs disposed of should no other will be made by me," and this endorsement is also signed by one witness, the second witness cannot be considered as a witness to the will and the will is invalid. *Patterson v. Ransom*, 55 Ind. 402. And it would seem that, even if the second witness could be taken to be a witness to the will this would not save the will, as it could not be claimed that the two attestations were part of one and the same transaction. *Id.*

30. The several sheets need not be physically united. *Wikoff's Appeal*, 15 Pa. St. 281; *Jones v. Habersham*, 63 Ga. 146. But letters and parol declarations are no substitute for a will, *Russell v. Switzer*, 63 Ga. 711.

(z) *Bond v. Seawell*, 3 Burr. 1773. *Gregory v. The Queen's Proctor*, 4 Notes of Cas. 620, 639. *Marsh v. Marsh*, 1 Sw. & Tr. 528. In cases where the attestation is not on the same sheet of paper as the signature of the testator the attestation must be on a paper physically connected with that sheet: In the Goods of *Braddock*, 1 P. D. 433. At all events this must be so where the paper, which has not on it the attestation, is a codicil or other testamentary document complete in itself: In the Goods of *Pearse*, L. R. 1 P & D. 382; In the Goods of *Hatton*, 6 P. D. 204.

fifth and last sheet the signature of the testator alone appeared, probate of the will was refused, the court (Sir J. Dodson) being of opinion that the signatures on the earlier sheets were intended merely to guard against other sheets being interpolated, and there being nothing to show that the signatures in the margin were intended to attest that signature of the testator which alone would give effect to the paper as a will (a).

Again, the authorities with respect to the Statute of Frauds appear to apply to the Wills Act, upon the question, whether an unattested will or other paper may be rendered valid as a testamentary disposition, by being referred to and adopted by a will or codicil properly attested. Those authorities have established, that if the testator, in a will or codicil or other testamentary paper duly executed, refers to an existing unattested will or other paper, the instrument so referred to becomes part of the will (b).<sup>31</sup> But the reference must be \*distinct, so as, with the

*in what cases unattested papers referred to by a will or codicil duly executed become a part of it.*

(a) *Ewen v. Franklin*, Dea. & Sw. 7. See *Accord.* *Phipps v. Hale*, L. R. 3 P. & D. 166.

(b) *Habergham v. Vincent*, 2 Ves. 228. *Utterton v. Robins*, 1 A. & E. 423. *Doe v. Evans*, 1 Cr. & M. 42. The intention to incorporate must be clear and the document it would seem, should be of a testamentary character: In the Goods of Hubbard, L. R. 1 P. & D. 53, but comp. *Bizzev v. Flight* (*ubi infra*). Where a will (dated in 1841) revoking all former wills referred to a clause in a former will, Sir H. Jenner Fust refused to grant probate of so much of the former will as was necessary to explain the latter will: In the Goods of Sinclair, 3 Curt.

746. However, where a will expressly annulling all former wills nevertheless referred to a prior will put up in the same box with the present, "that in so far as any of the provisions therein contained may be applicable to existing circumstances at the time of my death, they may be carried into effect, and I recommend them accordingly with this view to the consideration of my executors," the same learned judge held that probate must be taken of the two papers as together containing the will: In the Goods of Duff, 4 Notes of Cas. 274. See also, in the Goods of Bangham, 1 P. D. 429. The principles and practice, as to incorporating, in the probate of wills of

31. But there may be cases where such reference in the will does not make the papers referred to a part of this will so as to be entitled to probate. *Estate of Myer*, Myrick's Prob. 205. Such is the case where the reference is indefinite. *Ludlum v. Otis*, 15 Hun 410. And such is always the case as to papers not in existence at the time of the execution of the will. *Chase v. Stockett*, 72 Md. 235. But if the paper be written contemporaneously

with the will, that is sufficient. *Siler v. Dorsett*, 108 N. C. 300.

And where a testator had a will prepared and also a deed of trust, but the will alone was executed, the deed of trust cannot be incorporated into the will by a recital therein that the testator had conveyed certain property by a deed of trust to trustees. *Hunt v. Evans*, 134 Ill. 496.

assistance of parol evidence when necessary and properly admissible, to exclude the possibility of mistake (c); and the paper referred to must be already written (d).<sup>32</sup> Accordingly, in *De Zichy Ferraris v. Lord*

personalty, papers sufficiently referred to by such wills but not *per se* testamentary, are fully discussed and explained in the judgment of Dr. Lushington, in *Sheldon v. Sheldon*, 1 Robt. 81; *Bizzey v. Flight*, 3 C. D. 269; In the Goods of Howden, 43 L. J. P. & M. 26. In theory the incorporated document should always be included in the probate, but in practice the Court does not always insist on this, notably where the paper referred to is in the hands of another party who will not part with it, and the Court has no power to order its production: In the Goods of Battersbee, 2 Rob. 439; In the Goods of Sibtherp, L. R. 1 P. & D. 106; or where the document is bulky: In the Goods of Lansdowne, 3 Sw. & Tr. 194; In the Goods of Dundas, 32 L. J. P. & M. 165; nor does it insist on including the whole where part only is material: In the Goods of Limerick, 2 Rob. 313. As to the incorporation of foreign wills, see In the Goods of Howden, 43 L. J. P. & M. 26; In the Goods of Astor, 1 P. D. 150.

(c) Where a will refers to a paper, such paper cannot be incorporated with the will unless it be clearly identified with the description of it given in the will and be shown to have been in existence at the time the will was executed.

Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved there can be no incorporation of the paper with the will: *Singleton v. Tomlinson*, 3 App. Cas. 404; In the Goods of Kehoe, 13 L. R. Ir. 13, Prob. The following are some of the principal cases on the sufficiency of the proof of identity: *Smart v. Prujean*, 6 Ves. 565; *Dillon v. Harris*, 4 Bligh, N. S. 321. In the Goods of Smith, 2 Curt. 796. In the Goods of Greaves, 1 Sw. & Tr. 250. In the Goods of Almosnino, 1 Sw. & Tr. 508. In the Goods of Drummond, 2 Sw. & Tr. 8. In the Goods of Allnutt, 3 Sw. & Tr. 167. In the Goods of Brewis, 3 Sw. & Tr. 473. *Dickinson v. Stidolph*, 11 C. B., N. S. 341. In the Goods of Luke, 34 L. J., P. & M. 105. *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6. In the Goods of Sunderland, L. R. 1 P. & D. 198. In the Goods of Lady Truro, *ibid.* 201. In the Goods of Watkins, L. R. 1 P. & D. 19. In the Goods of Dallow, *ibid.* 189. In the Goods of Gill, L. R. 2 P. & D. 6. In the Goods of Mercer, L. R. 2 P. & D. 91. In the Goods of Heathcote, 6 P. D. 30. In the Goods of Daniell, 8 P. D. 14.

(d) The following are some of the cases as to the necessity of the incorpo-

32. Where a paper is so referred to as to amount to an incorporation of it into the will it becomes so a part of the will that no distinct proof of the paper is required, nor is it essential that it should be recorded or even filed in the court of probate. The proof of the will sets up and establishes the paper as a consequence of the reference. In *Thompson v. Quimby*, 2 Bradf. 449, it was held that a schedule, not attached to the will, but

therein referred to, could have no testamentary character, and that the schedule, as well as the clause in the will referring to it, was void, and would have been so had the schedule been attached to the will. But it was otherwise held in *Tonelle v. Hall*, 4 Comst. 140, where a map of lots attached to the will after the signature and attestation clause was considered to have been incorporated into the will. But in *Bowlby v. Thunder*,

\*Hertford (e), where a testator by will, duly executed, directed his executors to pay legacies which he should give by any testamentary writing signed by him, *whether witnessed or not*, it was held that such a clause could not give effect to legacies bequeathed by an unattested paper made after the Wills Act came into operation.—Again, in the same case, it appeared that the testator, before Jan. 1, 1838 (at which date the Wills Act came into operation) had made a will and several codicils, some duly executed, others only signed by the testator: After Jan. 1, 1838, he made and signed a codicil (B), but the same was not duly attested: Afterwards, by a codicil (C), duly executed and at-

rated paper being already in existence. *Wilkinson v. Adam*, 1 Ves. & B. 445. *Utterton v. Robins*, 1 A. & E. 423. In the Goods of Gill, L. R. 2 P. & D. 6. *Singleton v. Tomlinson*, 3 App. Cas. 404. A testamentary paper duly executed in order to incorporate another must refer to it as a written instrument then existing in such terms that it may be ascertained. *Smart v. Prujean*, 6 Ves. 565. *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6. In the Goods of Sunderland, L. R. 1 P. & D. 198. The republication of a will by the execution of a codicil will not of itself entitle an unexecuted paper written or signed between the date of the

will and the date of the codicil to probate. But where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document although not in existence until after the execution of the will is entitled to probate by force of the codicil. In the Goods of Truro, L. R. 1 P. & D. 201. In the Goods of Stewart, 3 Sw. & Tr. 192. In the Goods of Matthias, 3 Sw. & Tr. 100.

(e) 3 Curt. 468. S. C., on appeal, 4 Moo. P. C. 339, *nomine Croker v. Lord Hertford*.

105 Pa. St. 173, a writing on the same sheet, after the will itself, was held to constitute no part of the will. It is laid down in *Newton v. Seaman's Friend Soc.* 130 Mass. 91, that if a will duly executed and witnessed incorporates into itself by reference a paper not so executed and witnessed, containing directions as to the disposition of the testator's estate, such paper if in existence and clearly identified as the paper referred to, becomes a part of the will and should be admitted to probate as such. And in this conclusion the Massachusetts court follows the decisions in *Jackson v. Babcock*, 12 Johns. 389; *Chambers v. McDaniel*, 6 Ired. 226; *Beale v. Cunningham*, 3 B. Mon. 390; *Harvy v. Chouteau*, 14 Mo.

587 and *Loring v. Sumner*, 23 Pick. 98, 102. And to the same effect are *Thayer v. Wellington*, 9 Allen 292; *Hopkins v. Holt*, 9 Wis. 230; *Murphy v. Black*, 41 Iowa 488; *Greve v. Camery*, 69 Id. 220; *Wood v. Sawyer*, Phill. (N. C.) 251.

And in *Estate of Shillaber*, 74 Cal. 144, a document referred to in a will—not in existence at the time of the execution of the will—was properly denied probate. In this case the will was holographic and the document referred to was a letter in the handwriting of the executor. And in order to incorporate such an instrument into a will the reference must be too clear for any mistake. *Matthews v. McDade*, 72 Ala. 377; *Siler v. Dorsett*, 108 N. C. 300.

tested, he ratified and confirmed his will and “*codicils* :” And it was held that the unattested codicil (B) was not so identified with the duly attested codicil (C) as to be ratified by, or incorporated with it ; the word “*codicils*” being more completely and properly applicable to the codicils which had been made before Jan. 1, 1838 (*f*). But in *Ingoldby v. Ingoldby* (*g*), where a testator made a codicil to \*his will in 1845, attested by one witness, and the day before his death dictated a paper (which was afterwards duly executed according to the Wills Act) as “another codicil to my Will,” without more specifically referring to the defectively executed instrument, it was held that both codicils were entitled to probate :<sup>33</sup> And Sir H. Jenner Fust distinguished, in delivering his judgment, this case from that of Lord Hertford, where there were codicils duly executed and codicils not duly executed ; there being in the present case only one paper which came under the description of codicil, and no other paper to which the testator could have referred under that description.<sup>34</sup>

(*f*) See also *Accord. Haynes v. Hill*, 1 Robert. 795. In the Goods of Phelps, 6 Notes of Cas. 695. In the Goods of Hakewell, Dea. & Sw. 14. In the Goods of Matthias, 3 Sw. & Tr. 100.

(*g*) 4 Notes of Cas. 493. Just as a codicil which republishes a former will, may, if the words of reference are sufficiently clear, incorporate not only the republished will, but also documents not in existence at the date of the execution of the republished will, so a later testamentary paper may entitle to probate a prior imperfectly executed testamentary paper : but this is, as appears from the text, merely an instance of incorporation, and subject to the same rules, see : In the Goods of Truro, L. R. 1 P. & D. 201. The question of incorporation may arise in respect of testamentary writing appearing on the duly executed paper, see : In the Goods of Heathcote, 6 P. D. 30. In the Goods of Watkins, L. R. 1 P. & D. 19. In the Goods of Dallow, L. R. 1 P. & D. 189, but this question in such case would only arise if the Court was of opinion that the writing was not parcel of the will, so as either to be part of that

which was duly executed by the signature at the foot or end thereof, or so part of it as to invalidate the execution as not complying with the Wills Act, see *ante* p. \*71, note (*d*). The fact that the codicil is on the same paper is not of itself sufficient to incorporate it. In the Goods of Brewis, 3 Sw. & Tr. 473. In the Goods of Watkins, L. R. 1 P. & D. 19 ; nor are the words “This is a fourth codicil to my Will,” although the unexecuted codicil commenced “This is a third codicil” : *Stockil v. Punshon*, 6 P. D. 9. See however, In the Goods of Heathcote, 6 P. D. 32, per Hannen, P.

33. In *Beall v. Cunningham*, 3 B. Mon. 390, it was held that a codicil duly executed and attached, or referring to a paper which before was never duly signed, published and attested as a will, will have effect of giving operation to the whole as one will.

34. But in one case it was held that an unattested codicil *in testator's handwriting*, will not be effectual to bring into operation a former unattested will. *Sharp v. Wallace*, 83 Ky. 584.



The decision in Lord Hertford's Case of the former of the points above mentioned appears to have applied, under the existing law, to testamentary dispositions of all kinds, the doctrine which had been already established as to devises of real estate under the Statute of Frauds, viz., that a testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil (*h*).

A will cannot create a power of disposition by a future unattested paper.

The doctrines above stated as to the incorporation of un\*attested papers with duly executed wills and codicils were fully confirmed, and very many of the cases which are collected in the notes to the foregoing pages were cited and discussed by Lord Kingsdown in delivering the opinion of the Privy Council in the case of *Allen v. Maddock* (*i*), and his Lordship proceeded to state the law as follows: "The result of the authorities, both before and since the late Act, appears to be, that where there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified" (*k*).

Parol evidence admissible to identify the reference.

Where a will referred to two memorandums and only one could be found, it was held that effect must be given to that which was found,—for either the ordinary presumption must prevail, that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be ap-

Will referring to two memorandums and where one only can be found.

(*h*) *Johnson v. Ball*, 5 De G. & Sm. 85, 91. See also *Briggs v. Penny*, 3 De G. & S. 525. Re *Boyes*, 26 C. D. 531.

(*i*) 11 Moore, P. C. 427, 461. See also S. C., *coram* Sir J. Dodson, Dea. & Sw. 325.

(*k*) But the reference in a will may be in such terms as to exclude parol testimony as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular: but the

authorities seem clearly to establish that where there is a reference to any written document described as *then existing* in such terms, that it is capable of being ascertained, parol evidence is admissible to ascertain it. *Allen v. Maddock*, 11 Moore, P. C., at p. 454. In the *Goods of Dallow*, L. R. 1 P. & D. 189. In the *Goods of Sunderland*, L. R. 1 P. & D. 198. In the *Goods of Kehoe*, 13 L. R. Ir. 13.

plied that the apparent testamentary intentions of a testator are not to be disappointed, merely because he made other dispositions of his property which are unknown by reason of the testamentary paper which contained them not being forthcoming (*l*).

In acting upon the doctrines established by the authorities \*which there has been occasion to cite in the foregoing pages, no little difficulty has occurred with respect to the evidence given by the subscribed witnesses of the circumstances attending the attestation, particularly where the witnesses have been examined for the first time (as must very often happen) at a period long after the transaction. For it may be that they have no recollection at all on the subject, so that they are quite unable to affirm that the will was executed according to the statute: Or it may be that one affirms and the other negatives, or that both negative, a compliance with the statute.<sup>35</sup>—The result of the cases on this subject appears to be, that although, if a party be put to proof of a will, he must examine

Effect of the evidence of the attesting witnesses as to the circumstances of the attestation.

(*l*) *Dickinson v. Stidolph*, 11 C. B., N. S. 341.

35. "The failure of recollection of the subscribing witness to a will, as to what occurred at the time of signing, will not defeat the probate thereof, if the attestation clause and the surrounding circumstances establish its execution." *Potter v. McAlpine*, 3 Dem. 108, 116; *Rugg v. Rugg*, 83 N. Y. 592; *Matter of Will of Cottrell*, 95 Id. 329; *Lane v. Lane*, Id. 494; *Will of Higgins*, 94 N. Y. 554; *Haynes v. Haynes*, 33 Ohio St. 598; *Will of Meurer*, 44 Wis. 392; *Estate of Wright*, 67 How. Pr. 117; *Matter of Graham*, 30 N. Y. St. Rep. 292. And where the attestation clause states that the will was signed in the presence of the testator the burden is thrown upon those who oppose the probate. *Tappen v. Davidson*, 12 C. E. Gr. 459; *Patton v. Hope*, 10 Stew. (N. J.) 522. And the attestation clause is *prima facie* evidence of all the facts stated therein. *Allaire v. Allaire*, 8 Vr. 312, 325.

And the attestation clause being complete, the presumption is in favor of the due execution of the will, *Pepoon's Will*,

91 N. Y. 255; *Matter of Austin*, 45 Hun 1; *Ayres v. Ayres*, 16 Stew. (N. J.) 565; but not in opposition to positive testimony. *Woolley v. Woolley*, 95 N. Y. 231; *Haynes v. Haynes*, *ubi supra*.

In cases where an attesting witness has no recollection of the execution of the will, but recognizes the signatures, he may be asked, if, taking such recognition into consideration, he believes that the paper was executed as therein recited. *Estate of Gharky*, 57 Cal. 274.

Even in a case where neither witness will testify certainly that testator declared or acknowledged the signature as his, *Will of Higgins*, *ubi supra*; and where the clause is complete and perfect the testimony of one of the witnesses throwing doubt upon the transaction is not sufficient to prevent probate. *McCurdy v. Neall*, 15 Stew. (N. J.) 333; *Re Bogert*, 4 Civ. Pro. 441. And where a witness to the will, who testifies against the due execution of the will, has an interest to set aside the will, his evidence alone cannot be received to contradict the presumption of due execution. *Matter of Bogart*, 67 How. Pr. 313.

the attesting witnesses, it is not absolutely necessary, for the validity of the will, to have their positive affirmative testimony that the will was actually signed or actually acknowledged in their presence before they subscribed (m).

Not necessary to have positive affirmative evidence of execution.

For if the will on the face of it appears to be duly executed, the presumption is "*omnia esse rite acta*;" even though there should be an attestation clause, omitting to state some essential particular, *e. g.*, that the will was signed in the joint presence of both witnesses (n). So in a case where an affidavit was \*required from the attesting witnesses (there being no attestation clause) as to the due execution of the will under the statute, and one of them deposed that he saw the deceased sign, in the presence of himself and the other witness, but the latter could not recollect whether the deceased signed her name in his presence or not, probate was allowed to pass on motion (o). Again, it has been held, that where the attesting witnesses depose contrary to each other, (as where

Presumption.

Where attesting witnesses contradict each other.

And the testimony of a witness denying that he signed at the request of the testator, &c., is viewed with suspicion, *Spoonemore v. Cables*, 66 Mo. 579; *Cheat-ham v. Hatcher*, 30 Gratt. 56; *Lambert v. Cooper*, 29 Id. 61; and it is competent to offer, in rebuttal of his testimony, his affidavit made on application for probate in which he deposed to the affirmative. *Spoonemore v. Cables*, *ubi supra*.

(m) *Blake v. Knight*, 3 Curt. 547. *Gregory v. The Queen's Proctor*, 4 Notes of Cas. 620. *Thomson v. Hall*, 2 Robert. 426. See further as to this point, *Gwillim v. Gwillim*, 3 Sw. & Tr. 200. *Beckett v. Howe*, L. R. 2 P. & D. 1. As to the meaning and authority of these cases see, however, *Blake v. Blake*, 7 P. D. 102. *Wright v. Sanderson*, 9 P. D. 149 and *ante*, p. \*76.

(n) *Wright v. Sanderson*, 9 P. D. 149. *Lloyd v. Roberts*, 12 Moo. P. C. 158. *Burgoyne v. Showler*, 1 Rob. 5. *Smith v. Smith*, L. R. 1 P. & D. 143. *Doe v. Davies*, 9 Q. B. 648. *Leech v. Bates*, 1 Rob. 714. The presumption applies even where the attestation clause is incom-

plete. *Vinnicombe v. Butler*, 3 Sw. & Tr. 580. In the *Goods of Rees*, 34 L. J., P. & M. 56. The maxim *omnia præsumuntur rite esse acta* is an expression in a short form of a reasonable probability and of the propriety in point of law of acting on such probability. Thus in the case of a lost will, where it was proved that a document purporting to be the will of the deceased was signed by him, that two names of deceased friends of his were written underneath, that one of the names was a genuine signature, and there was no evidence about the other name the Court drew the inference that the signature as to which there was no evidence was a genuine signature, and that all was done properly, although there was no attestation clause to say so. *Harris v. Knight*, 15 P. D. 170. For a case where the Court refused to make such presumption, see: In the *Goods of Swinford*, L. R. 1 P. & D. 630.

(o) In the *Goods of Hare*, 3 Curt. 45. In the *Goods of Attridge*, 6 Notes of Cas. 597. *Daintree v. Fasulo*, 13 P. D. 67.

one swears that they attested the will in the presence of the testator, and the other that it was attested in another room; or where one of three attesting witnesses swears that the testator signed in their presence, and the two others swear that he did not), the court is not thereupon bound to pronounce against the validity of the will; <sup>36</sup> but may either examine other witnesses (who were present at the execution though they did not subscribe the will) in order to arrive at the truth (*p*), or may, upon the mere circumstances, give credence to the affirmative rather

than to the negative testimony (*q*). And even where both the attesting witnesses profess to remember the transaction, and state facts which show that the will was not

duly executed, (as that the testator did not make or acknowledge his signature in their joint presence, or the like), not only may this negative evidence be rebutted by the testimony of other witnesses, or by the proof of circumstances showing that the attesting witnesses are not to be credited (*r*); but in this case also the court may justly come to a conclusion from the facts and circumstances which the attesting witnesses themselves state, \*that their memory fails them; and so the will may be admitted to probate, notwithstanding their testimony (*s*). Thus, in *Cooper v. Bockett* (*t*), a will was held by Sir H. Jenner Fust, upon the circumstances of the case, to have been signed before the witnesses subscribed, although one witness deposed that the testator signed *after* he and his fellow witness had subscribed, and the other witness deposed that the part of the will where the signature of the testator was written was blank when she, the witness, subscribed: And this decision was affirmed in the Privy Council (*u*). Where, how-

36. Where the witnesses to a will differ in their testimony as to the mode of its execution, and one of the witnesses is the lawyer who drew the will and attended to its execution, his evidence will have greater weight than that of the other witness, who is unfamiliar with the execution of wills. *Neiheisel v. Toerge*, 4 Redf. 328.

Where one of the subscribing witnesses to a will testified to the observance of all the requisite formalities in its execution, while the other witness did not remember that the testatrix subscribed in his presence, or that the attestation clause was

read, it was held that due execution was proved. *Taylor v. Brodhead*, 5 Redf. 624.

(*p*) *Young v. Richards*, 2 Curt. 371.

(*q*) *Chambers v. The Queen's Proctor*, 2 Curt. 433. *Gove v. Gawen*, 3 Curt. 151. *Wright v. Rogers*, L. R. 1 P. & D. 678.

(*r*) See *Accord*. *Austen v. Willes*, Bull. N. P. 264. *Pike v. Badmering*, cited 2 Stra. 1096, in *Rice v. Oatfield*, *post*, Pt. I. Bk. IV. Ch. III. § V.

(*s*) *Cooper v. Bockett*, 3 Curt. 663. See also *Baylis v. Sayer*, 3 Notes of Cas. 22. *Shield v. Shield*, 4 Notes of Cas. 647.

(*t*) 3 Curt. 648.

(*u*) 4 Moo. P. C. 419

ever, the attesting witnesses state facts (not contradicted by other testimony) which demonstrate that the will was not duly executed, and there are no circumstances on which the court can found an inference that the recollection of the witnesses is infirm on the subject, the will must be pronounced against, notwithstanding it should be all in the handwriting of the deceased, and be signed by him and profess to be duly attested (x).<sup>37</sup>

Finally, it must be borne in mind that a testamentary paper is not entitled to probate, unless the court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature (y).

Court must be satisfied that witnesses' names were subscribed to will for purpose of attesting testator's signature

### SECTION III.

#### *The Form of a Will.*

"There is nothing that requires so little solemnity," said Lord Hardwicke (z), "as the making of a will of personal estate, according to the Ecclesiastical laws of this realm; \*for there is scarcely any paper writing which they will not admit as such."<sup>38</sup> Although much greater strictness seems to have prevailed in earlier times,

Testamentary form not necessary:

(x) *Pennant v. Kingscote*, 3 Curt. 642. *Beach v. Clarke*, 7 Notes of Cas. 120. *Croft v. Croft*, 34 L. J. P. M. & A. 44. *Blake v. Blake*, 7 P. D. 102.

37. And recitals of an attestation clause do not outweigh the positive statements—not the want of recollection—of a subscribing witness, in opposition thereto. *Burke v. Nolan*, 1 Dem. 436, 442; *Lewis v. Lewis*, 11 N. Y. 220, 224; *Orser v. Orser*, 24 Id. 51; *Wilson v. Hetterick*, 2 Bradf. 427. But to the contrary effect. *Will of Cottrell*, 95 N. Y. 329. But such recitals throw the burden of proof upon the opponents. *Tappen v. Davidson*, 12 C. E. Gr. 459; *Patton v. Hope*, 10 Stew. (N. J.) 522.

(y) In the Goods of *Wilson*, L. R. 1 P. & D. 269. In the Goods of *Braddock*, 1 P. D. 433. In the Goods of *Sharman*,

L. R. 1 P. & D. 661. *Griffiths v. Griffiths*, L. R. 2 P. & D. 300. In the Goods of *Streatley* [1891] P. 172. And see *ante*, p. \*86. note (a).

(z) In *Ross v. Ewer*, 3 Atk. 163.

38. But if a will be holographic a date is essential to give it validity, *Estate of Martin*, 58 Cal. 530; and a recital that the testator is sixty years of age will not constitute a date. *Id.* And the date must be *written*, if it be partially printed this will invalidate the will. *Estate of Billings*, 64 Cal. 427. But the date may follow the signature. *Succession of Fuqua*, 27 La. Ann. 271. And a holographic will beginning "I, A. B.," but without any signature, is sufficiently executed. *Estate of Johnson*, *Myrick's Prob.* 5.

If a holographic will be written in an account book, it is not error to refuse to

but it must be  
intention of  
deceased that  
paper shall  
operate after his  
death.

it has been decided in a great variety of modern instances, that it is not necessary that an instrument should be of a testamentary form, in order to operate as a will :<sup>39</sup> In-

deed it may be considered as a settled point, that the *form* of a paper does not affect its title to probate, provided it is the intention of the deceased that it should operate after his death (a),<sup>40</sup>

allow testimony tending to show that several leaves of the book are missing. *Chaney v. Bryan*, 16 Lea 63.

However an autograph will is of no validity except as authorized by statute, therefore such a will by a testator who died before holographic wills were authorized by law is a nullity. *Estate of McCloud*, *Myrick's Prob.* 23. But a holographic will is not invalid because made before § 1277 of the Code went into effect, if testator did not die until after that section became operative. *Estate of Learned*, 70 Cal. 141.

Nor is a holographic will invalidated because there are attesting witnesses thereto, *Succession of Roth*, 31 La. Ann. 315; or one attesting witness. *Harrison v. Burgess*, 1 Hawks 384; *Brown v. Beaver*, 3 Jones L. 516. However, if there be one witness to the will, and evidence that the testator intended to procure another witness, and execute and publish the will before witnesses, the will will be invalid, but if there were no such intention it will be a good holographic will although attested by a witness. *Douglas v. Harkender*, 3 Baxt. 114.

And the appending of the word "attest" or of a full attestation clause will not annul a will as a holograph. *Allen v. Jeter*, 6 Lea 672; *Perkins v. Jones*, 84 Va. 358.

In expounding such a will the court will make the amplest allowance for the unskillfulness and negligence of the testator; technical informalities will be disregarded, and most perplexing complications of words and phrases will be carefully unfolded. *French v. French*, 14 W. Va. 458.

Where a letter written by a soldier at the front was offered as his holographic will, and the envelope in which it was claimed that it had been sent to the custodian was also offered, it was held that there must be direct and positive proof to connect the will with the envelope. *McCutchen v. Ochmig*, 1 Baxt. 390.

But in Illinois, a will, or a document with testamentary intent, wholly written by the testator, and found with his valuable papers after his death, but unattested, cannot be taken to be a will. *Highland v. Highland*, 109 Ill. 366.

And a will wholly written and signed by the testator is valid although he might have thought differently through a mistake in the law. *Toebbe v. Williams*, 80 Ky. 661.

39. The form is of smallest moment in determining whether the instrument is a will or not, the object is to arrive at the intention of the maker, and if the document has been executed with the formalities required by the statute for the execution of a will and it is to operate only subsequently to the death of the maker it is a will. *Lautenshlager v. Lautenshlager*, 80 Mich. 285. The form of the paper "stands for but little," *Sharp v. Hall*, 86 Ala. 110.

(a) By Sir John Nicholl, in *Masterman v. Maberly*, 2 Hagg. 248. *Doe v. Cross*, 8 Q. B. 714. *Cock v. Cooke*, 1 P. & D. 241. *Robertson v. Smith*, 2 P. & D. 43. In the *Goods of Coles*, 2 P. & D. 362.

40. In *Cowley v. Knapp*, 13 Vroom 297, an instrument in the form of a letter was held to be a valid will. So too, a letter, accompanied with a deed, making

and the paper is duly attested in accordance with the Wills Act, 1 Vict. c. 26 (b).

provision for a sister of decedent after his death, was admitted to probate as a will. *Estate of Skerrett*, 67 Cal. 585. So too, a draft or notes may be established as a will, *McBride v. McBride*, 26 Gratt. 476; and the transfer of certain certificates of stock with provision for the grantor during his life was held to be testamentary. *Arnold v. Arnold*, 62 Ga. 627. An unattested writing in the following words:—"Dear old Nance: I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon"—was held to be testamentary and admitted to probate. *Clarke v. Ransom*, 50 Cal. 595. "Mrs. Sophie Loper is my heiress. G. Ehrenberg"—was held to be a will. *Succession of Ehrenberg*, 21 La. Ann. 280. In North Carolina an unattested writing in these words:—"It is my wish and desire that my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description. David Outlaw"—was declared to be a will. *Outlaw v. Hurdle*, 1 Jones L. 150. And a writing in the following language is a valid will, "March the 4. Will my Properti to my wief my Death John Sullivan." *Re Sullivan*, 130 Pa. St. 342. And it has been said that a life policy for the benefit of the family of the person procuring it is in the nature of a will and as far as possible should be so construed. *Duvall v. Goodson*, 79 Ky. 224. And a writing in the following language was held to be a good holographic will "And *Ann*, after

my death you are to have \$40,000., this you are to have, will or no will, take care of this until my death. *Ann*, keep this to yourself J. Henry Hoppe"

To Eliza Ann Byers."

In passing upon this paper the court said that the *animus testandi* was as plainly shown as if the writer had said "I hereby will and bequeath." *Byers v. Hoppe*, 61 Md. 206. So also, this was held to be a valid will, it being wholly written and signed by the testatrix "For sundry reasons and bad treatment, it is my will and wish that B. T. shant have any of my property, and T. M. only through a responsible trustee in the way of clothes and something to keep him from suffering." *Tabor v. McIntire*, 79 Ky. 505.

But a promissory note payable "one day after my death" with interest &c. is not a testamentary disposition. *Price v. Jones*, 105 Ind. 543. While an instrument which in form assigns and transfers the property to the maker's daughter, to have and to hold after his death, is a will. *Robinson v. Brewster*, 30 N. E. Rep. 683. A document reading, "Md. September 4, 1884 "At my death, my estate or my executor pay to J. A. C. Three thousand Dollars

"Witness C. C. D. E. of P. (seal)" is testamentary and cannot be enforced as a money obligation, notwithstanding that it cannot take effect as a will on account of imperfect attestation. *Cover v. Stem*, 67 Md. 449.

In connection with giving validity to

(b) In the *Goods of Colyer*, 14 P. D. 48, where a paper executed in the form of a deed, but bearing the attestation of two witnesses, was held entitled to probate. And in the case of *Milnes v. Foden*, 15 P. D. 105, two deed polls were held entitled to probate. Thus in *In the Goods*

of *Slinn*, 15 P. D. 156, probate was granted of a deed poll duly executed and attested by two witnesses but containing no reference to the death of the testatrix, and extrinsic evidence was admitted to shew that she intended it to operate as a will.

[In the former editions of this work there were cited a large number of cases as to the effect as wills of deeds, bonds, and other documents not testamentary in form, but it has been thought advisable, having regard to the improbability of such documents complying with the requirements of the Wills Acts in respect of attestation and otherwise, and to the lapse of time since the passing of that act, to omit these authorities from the present edition.]

So if a man intends by will to execute and purports to execute a power, and it turns out that the power is not well created, or does not exist, yet if he has a right to dispose of the fund, the will may operate, and ought to be admitted to probate; for in a will no particular words are necessary to pass the property, and his authority to give it shall come in aid of his intended disposition of it (*bb*).

The supposed exercise of a power may operate as mere will.

And it must be further observed, that it is not necessary for the validity of a testamentary instrument, that the testator should intend to perform, or be aware that he had performed \*a testamentary act (*c*); for it is settled law, that if the paper contains a disposition of the property to be made *after death*, though it were meant to operate as a settlement or a deed of gift,<sup>41</sup> or a bond; though such paper were not in-

Principles on which instruments not purporting to be testamentary may be admitted to probate:

papers of this kind as testamentary, it is necessary to establish the intention to dispose of property, not *inter vivos*, but after death. *McBride v. McBride, ubi supra*. And under § 2163 of the Code, in Tennessee, all that is necessary to constitute "a paper writing purporting to be the will of a deceased person" such will, is that such writing should be a disposition of the property of the maker which disposition is to take effect *after death*. *Reagan v. Stanley*, 11 Lea 316.

And it is necessary to consider together all papers of a testamentary character for the purpose of ascertaining the intention of the testator. *Murphy v. Black*, 44 Iowa 176; *Cumming v. Reid*, 64 Ga. 105. And it is competent to show by parol what papers constitute the will offered. *Burge v. Hamilton*, 72 Ga. 568. And a written instrument denominated a will, and sched-

ules attached, and mentioned in it, will be considered as one instrument and as together constituting the will. *Ford v. Ford*, 70 Wis. 19.

(*bb*) *Southall v. Jones*, 1 Sw. & Tr. 298.

(*c*) *Bartholomew v. Henley*, 3 Phillim. 318.

41. A deed or conveyance of land takes effect from delivery or not at all. In this respect it differs entirely from a will, which takes effect only on the death of the testator. *Roth v. Michalis*, 125 Ill. 325.

And an instrument may be a contract in one part, concerning one piece of property and in another part may be testamentary in relation to other and distinct property. If it passes a present interest, although the right to possession and enjoyment may not accrue until some future



tended to be a will or other testamentary instrument, but an instrument of a different shape, yet if it cannot operate in the latter, it may nevertheless operate, if duly executed, in the former character (*d*).<sup>42</sup>

But no case has gone the length of deciding, that because an instrument cannot operate in the form given to it, it *must* operate as a will.<sup>43</sup> The true principle to be deduced from the authorities appears to be, that, if there is proof, either in the paper itself, or from clear evidence *dehors* (*e*), first that it was the intention of the writer of the paper to

time it is a contract, but if it pass interest or right only on death of the maker it is testamentary in its nature. *Reed v. Hazleton*, 37 Kans. 321.

(*d*) By Sir John Nicholl in *Masterman v. Maberly*, 2 Hagg. 247. In the *Goods of Morgan*, L. R. 1 P. & D. 214. In these cases the instrument was intended by the deceased to be operative, though not in a testamentary way. But a will, though formally executed as a will, will not be valid if there were no *animus testandi*; and therefore it may be shown in evidence that it was written in jest, or without any intention of making an operative will: *Nicholls v. Nicholls*, 2 Phillim. 180. *Lister v. Smith*, 3 Sw. & Tr. 282. *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109. See also, as to the necessity of there being an *animus testandi*: *Shep. Touch.* 404. *Swinb. Pt. 1, s. 3, pl. 23*. *Taylor v. D'Egville*, 3 Hagg. 206. But if an instrument, upon the face of it, is manifestly executed as a will, the Court

of Probate cannot look at its effect; it must have legal operation, without regard to the intention as to effect: *King's Proctor v. Daines*, 3 Hagg. 231. *Philips v. Thornton*, 3 Hagg. 752.

42. In *Lautenshlager v. Lautenshlager*, 80 Mich. 285, a deed which was to become operative after death was held to be equivalent to a will. And in *Armstrong v. Armstrong*, 4 Baxt. 357, an instrument which was in form a deed was construed to be a will; so too in *Jordan v. Jordan*, 65 Ala. 301.

But such an instrument cannot be probated as a will without evidence of a testamentary intent. *Estate of Skerrett*, 67 Cal. 585; *Sharp v. Hall*, 86 Ala. 110; *Simon v. Wildt*, 84 Ky. 158.

And the unnecessary addition of a seal will not give to the instrument the character of a deed. *Wuesthoff v. Germania L. I. Co.*, 107 N. Y. 580. But in Georgia a deed is not rendered testamentary because it reserves a life estate in the grantor

43. However in *Trawick v. Davis*, 85 Ala. 342, where the instrument was properly executed as either a will or a deed and it could not operate as a deed, it was held that it must operate as a will. So too, in a doubtful case, an instrument will be pronounced a will, when it cannot operate as a deed. *Crocker v. Smith*, 10 So. Rep. 258.

(*e*) If the instrument be equivocal or silent, it may be proved by extrinsic circumstances to have been intended to operate as a testamentary disposition:

*King's Proctor v. Daines*, 3 Hagg. 221. *Jones v. Nicholay*, 2 Robert. 292, where Sir H. Jenner Fust said, "Evidence to show *quo intuitu* has always been received in a Court of Probate." In the *Goods of English*, 3 Sw. & Tr. 586. *Cock v. Cooke*, L. R. 1 P. & D. 241. *Robertson v. Smith*, L. R. 2 P. & D. 43. In the *Goods of Slinn*, 15 P. D. 156. See also *post*, Pt. I. Bk. IV. Ch. II. § V. for other cases as to the reception of parol evidence respecting the testator's intention.

convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, that death was the event that was to give effect to it; then whatever may be its form, it \*may, assuming that there is execution in compliance with the Wills Act, be admitted to probate as testamentary (f).<sup>44</sup> And there seems to be this distinction

and is attested by three witnesses. *Williams v. Tolbert*, 66 Ga. 127. But, on the other hand, an instrument in form a deed, but sounding as a will, not delivered, but left with the witness with directions to hold for the grantees until after death of grantor was taken to be a will, not a deed. *Nichols v. Chandler*, 55 Ga. 369.

So too when the instrument is in general form a deed but not intended to pass any estate until the death of the maker it will be construed as testamentary. *Sperber v. Balster*, 66 Ga. 317; *Carlton v. Cameron*, 54 Tex. 72; *Reish v. Commonwealth*, 106 Pa. St. 521; *Johnson v. Sormans*, 69 Ga. 617; *Cunningham v. Davis*, 62 Miss. 366. But it is otherwise held in *Bunch v. Nicks*, 50 Ark. 367.

In one case a deed of trust executed

the same day as the will, before the same witnesses and naming one of the executors as the trustee was admitted to probate with the will as a part thereof. *Matthews v. McDade*, 72 Ala. 377.

But a deed conveying to a trustee for grantor's grand children after his death and reserving both grantor's possession for life and power of revocation, was held to be a deed and not a will. *Hall v. Burkham*, 59 Ala. 349. While a deed of money with the contingency "if I do not live to be twenty-one" was held to be a will. *Daniel v. Hill*, 52 Ala. 430. And a deed to become effective "on and after one day from my death" is equivalent to a will. *Miller v. Holt*, 68 Mo. 584. And an instrument in form a bill of sale executed by the grantor just before his de-

(f) *King's Proctor v. Daines*, 3 Hagg. 221. *Jones v. Nicholay*, 2 Robert. 288. In the *Goods of Robinson*, L. R. 1 P. & D. 384. *Milnes v. Foden*, 15 P. D. 105, 107. It would seem that it is not an objection to probate that it is asked in respect only of part of a document: *Doe d. Cross v. Cross*, 8 Q. B. 714. But see In the *Goods of Robinson*, *ubi sup.*: from which case it would seem that no part of an instrument which is wholly irrevocable can be treated as testamentary. A duly executed paper in these terms, "I wish my sister to have my bank-book for her own use," was held to be testamentary, the Court being satisfied on the evidence that the deceased at the time of its execution intended it to take effect after her death, and not as a present deed of gift. *Cock v. Cooke*, L. R. 1 P. & D. 241. In the *Goods of Coles*, L. R. 2 P. & D. 362.

44. The circumstances attending the execution of the document are to be considered in determining the character thereof; so an instrument which, in the light of surrounding circumstances, was not intended to operate until the death of the maker, and was revocable during his life, is testamentary in character and can operate only as a will. *Jordan v. Jordan*, 65 Ala. 301; *Reed v. Hazleton*, 37 Kans. 321. But an absolute conveyance reserving an interest in favor of the grantor and his wife for life or widowhood, with disposition of the remainder after the death or marriage of the widow, passes an estate which vested at once and is not a testamentary document. *Swyney v. Swyney*, 14 Lea 316.

A provision in a deed that "this deed do not take effect until after my death," and directions that the beneficiary shall

in the consideration of papers which are in their terms dispositive, and those which are of an equivocal character ; that the first will be entitled to probate, unless they are proved not to have been written *animo testandi* ; whilst, in the latter, the *animus* must be proved by the party claiming under them (g).<sup>45</sup>

parture on a journey and reciting that it was made because of the danger of death while on the journey, was held to be testamentary and was admitted to probate as a will. *Kelleher v. Kernan*, 60 Md. 440.

And a deed which conveyed "unto H., his heirs and assigns at our death free from any claim whatever of our other children" certain real estate and also personal property to the same grantee, provided that possession should be postponed until death, was held to be testamentary *as to the real estate*. *Blackstock v. Mitchell*, 67 Ga. 768.

And a document beginning "Know all men by these presents" &c. and directing executor or administrator to give \$75,000 to R. &c., was held to be a will. *Frew v. Clarke*, 80 Pa. St. 170.

But the testamentary characteristics of an instrument cannot be overthrown by the fact that it was acknowledged as a deed and recorded as such ; if testamentary and intended to operate as a will it will not cease to be a will. *Hawes v. Nicholas*, 72 Tex. 481.

However if the instrument convey a *present* title to the grantee and the grantor reserves to himself the right of

possession during his life, this is a deed and not a will, *Beebe v. McKenzie*, 19 Oreg. 296 ; *Griffith v. Marsh*, 86 Ala. 302. On the contrary a conveyance to take effect at grantor's death passes no title, it is revocable at will. *Bigley v. Souvey*, 45 Mich. 370.

(g) *King's Proctor v. Daines*, 3 Hagg. 221. *Griffin v. Ferrard*, 1 Curt. 199. *Coventry v. Williams*, 3 Curt. 790, 791. *Thorncroft v. Lashmar*, 2 Sw. & Tr. 479.

45. But in determining whether a will is in conformity with the statute, courts will not consider the intention of the testator, but that of the legislature. In *re Conway*, 124 N. Y. 455.

But a will must devise or bequeath something, therefore an instrument which, although in form a will, simply excludes a son because he has received his share, but contains no other matter, is not a will and the party making it dies intestate. *Coffman v. Coffman*, 85 Va. 459. And the excluded son is entitled to participate in the estate. *Id.* And an item of a will containing no testamentary disposition, and casting an unwarranted slur upon an innocent child, may be refused probate. In *re T. B.* 27 Abb. N. C., 425.

pay the debts of the maker and have only the remaining property, shows the testamentary character of the deed. *Cunningham v. Davis*, *ubi supra*.

But where one conveys in trust, to provide for the grantor during life, out of the rents, issues and profits of the land conveyed, with provision that at the death of the grantor the fee shall revert to the grantee, the grantee takes a present

estate in trust, the instrument operates both as a deed and a will, being properly attested as a will. *Kyle v. Perdue*, 87 Ala. 423. But in *Roth v. Michalis*, 125 Ill. 325, it was held that a deed could not operate as a declaration of trust because it was clearly intended as a testamentary disposition, nor could it take effect as a will because it was not properly attested.

It should be observed that if a document, although in the form of a will, bears upon its face the positive assertion by the person executing it that it is not meant to operate as a legal will, it will not be held to be a valid testamentary document (*h*).

If a testator by a subsequent paper say, he has bequeathed by a former instrument that which he has not bequeathed, the subsequent paper would, it would seem, be admitted to probate, as being a declaration of his will at the time he made it, to dispose by the will (*i*).

But it is essentially requisite that the instrument should be made to *depend upon the event of death*, as necessary to *\*consummate it*; <sup>46</sup> for where a paper directs a benefit to be conferred *inter vivos*, without reference, expressly or impliedly, to the death of the party conferring it, it cannot be established as testamentary (*k*).

they must depend on the death of the maker for consummation.

Several instruments of different natures may constitute altogether a will.

The court does not confine the testamentary disposition to a single instrument: but will consider several, of different natures and forms, as constituting altogether the will of the deceased (*l*).

(*h*) *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109.

(*i*) *Druce v. Denison*, 6 Ves. 397, in the judgment of Lord Eldon, C. *Bibin v. Walker*, Ambl. 661. *Godolph. Pt. 3*, ch. 3, s. 3. *Jordan v. Fortescue*, 10 Beav. 259. *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19. But see *Frederick v. Hall*, 1 Ves. 396.

46. But an instrument in any form is testamentary, if the obvious purpose of the party making it is that it shall not take effect until after his death. *Frew v. Clarke*, 80 Pa. St. 170; *Crocker v. Smith*, 10 So. Rep. 258. And the determination as to whether a writing is a contract or a will must be from the character of its contents, rather than from any formal words. *Cawley's Estate*, 136 Pa. St. 628; *Reed v. Hazleton*, 37 Kans. 321. However, an instrument promising to pay certain moneys one year after death is not testamentary, but is only evidence of a contract. *De Wald's Estate*, 13 Phila. 251.

So too a paper under seal and reciting a consideration of moneys advanced and "other good causes and considerations" which directs the executor or administrator to pay to a person named a specified sum of money is not testamentary; it is merely an evidence of debt, *In re Holt's Estate*, 22 Pitts L. J. N. S. 335; to same effect, *Kirkpatrick v. Pyle*, 6 Hous. 569.

But where the instrument does not operate as a deed, this is strong evidence of the intention of the grantor that it shall operate as a will. *Sharp v. Hall*, 86 Ala. 110.

(*k*) *Glynn v. Oglander*, 2 Hagg. 428. *King's Proctor v. Daines*, 3 Hagg. 218. *Shingler v. Pemberton*, 4 Hagg. 359. And see *In the Goods of Robinson*, L. R. 1 P. & D. 384.

(*l*) See *post* p. \*138, as to the admission of probate of two or more instruments of different date as together containing the will of the deceased. Where probate is granted of two or more testa-

## SECTION IV.

*The Language of a Will.*

The rules of the court are not more scrupulous with respect to the language, than the nature, of instruments which it allows to operate as testamentary.<sup>47</sup> It is not held necessary that the directions contained in them, how property should be disposed of in the event of death, should be in direct and imperative terms : wishes and requests have been deemed sufficient (*m*).<sup>48</sup>

Language of a  
testamentary  
paper.

"Wishes" and  
"requests"  
deemed suffi-  
cient

mentary papers, as together containing the last will of the deceased, it is the practice to make the grant to all the executors named in the several papers. In the Goods of Morgan, L. R. 1 P. & D. 323. In the Goods of Harris, L. R. 2 P. & D. 83.

47. In regard to the use of words in a testamentary document, it may be remarked, that the same words in different parts of a will have the same signification, unless clearly something else is meant. *McMurray v. Stanley*, 69 Tex. 227. And it is presumed that a testator used words in their strict primary signification unless it be discovered, from the context, that he has used them in some other way. *Cole v. Covington*, 86 N. C. 295; *Ellis v. Meadows*, 84 Id. 92.

And the use of the words "I give, devise and bequeath" will pass an estate of inheritance. *Estate of Kane*, 11 Phila. 72. But a clear devise will not be affected by subsequent words unless the subsequent words are as clear and decisive as the words of the devise. *Hochstedler v. Hochstedler*, 108 Ind. 506.

The failure to use appropriate technical language in a will, or misapplication of legal terms will not defeat the

intention of the testator, clearly manifested and sufficiently disclosed by an examination of the whole will. *Bliven v. Seymour*, 88 N. Y. 469. Irrelevant recitals will not vitiate a will. *Conoly v. Gayle*, 61 Ala. 116. So where the testator, H. C., was described in the attestation clause as H. C. C., the validity of the will was not affected by such erroneous recital in the attestation clause. *Crossman v. Crossman*, 30 Hun 385.

Punctuation is not necessary in a will and an instrument wholly devoid of punctuation has been admitted to probate. *Canedy v. Jones*, 19 S. C. 297. However the Court may insert punctuation in support of the more plausible reading of a will in connection with its other provisions, in case it is ambiguous for want of punctuation. *Lycan v. Miller*, 20S. W. Rep. 36.

(*m*) *Passmore v. Passmore*, 1 Phillim. 218, in Sir J. Nicholl's judgment. Generally speaking when property is given absolutely to any person, and the same person is by the giver "recommended," or "entreated," or "requested," or "wished" to dispose of that property in favour of another, the recommendation, request, or wish, is held imperative and

48. But the general rule is that a precatory trust will not be inferred from ex-

pressions of confidence, desire, hope, trust or expectation, unless it fully, freely

\*It is immaterial in what language a will is written,<sup>49</sup> whether in Latin, French, or any other tongue (n). If the testator be a domiciled Englishman, the effect of the foreign

Language of will immaterial.

to create a trust. (See the cases cited, in *Knight v. Knight*, 3 Beav. 148, and *Knight v. Broughton*, 11 Cl. & Fin. 513.) But this rule does not apply, where it appears clearly from the context that the first taker is intended to have a discretionary power to withdraw any part of the fund from the object of the wish or request, or that he is in any way to have an option to control or defeat the desire expressed: *Eaton v. Watts*, L. R. 4 Eq. 151. *Lambe v. Eames*, L. R. 6 Ch. 597. *Stead v. Mellor*, 5 C. D. 225. *Re Hutchinson and Tenant*, 8 C. D. 540. *Parnall v. Parnall*, 9 C. D. 96. *Re Adams and Kensington Vestry*, 24 C. D. 199, 27 C. D. 394. *Mussoorie Bank v. Raynor*, 7 App. Cas. 521. For the older authorities on this subject, see former editions of this work. The older authorities went much further than the modern in holding that trusts were created by precatory words. And in the case of *Lambe v. Eames*, *ubi sup.*: Lord Justice James said "In hearing case after case cited, I cannot help feeling that the officious kindness of the Court of Chancery in interposing trusts, where in many cases the father of the family never meant to create trusts, must

have been a very cruel kindness indeed," and Lord Justice Cotton in *Re Adams and Kensington Vestry*, *ubi sup.* said, "I have no hesitation in saying myself that I think some of the older authorities went a great deal too far in holding that some particular words in a will were sufficient to create a trust . . . Having regard to the late decisions, we must not extend the old cases in any way or rely on the mere use of any particular words, but considering all the words that are used we have to see what is their true effect, and what was the intention of the testator as expressed in his will." See also *Re Diggles*, 39 C. D. 253.

49. It has been held that a will may be valid although written in a language not understood by the testator. *Walter's Will*, 64 Wis. 487. But this is not so in case of attesting witnesses, if one of the requisite witnesses does not understand the language the will is invalid. *Succession of Dauterive*, 39 La. Ann. 1092.

(n) *Swinb.* Pt. 4, s. 25, pl. 3. See as to a will in a foreign language, *Foubert v. Cresseron*, *Show. P. C.* 194.

and evidently appear from the will that the testator contemplated and intended to create such a trust. *Corby v. Corby*, 85 Mo. 371. And after an unqualified devise by the testator of his property, no precatory words to his devisee can defeat the estate previously granted, *Hopkins v. Glunt*, 111 Pa. St. 287; *McIntyre v. McIntyre*, 123 Id. 329; *Burt v. Herron*, 66 Id. 400; *Van Gorder v. Smith*, 99 Ind. 404; *Bowlby v. Thunder*, 105 Pa. St. 173; nor can a fee estate be taken away by words of doubtful meaning in a subsequent sentence. *Gillmer v. Daix*,

141 Pa. St. 505. But a wish of a testator, clearly expressed in his will is equivalent to a positive direction or command. *McCartney v. Osburn*, 118 Ill. 403.

The word "desire" has been held to raise a trust, *Van Dyck v. Van Beuren*, 1 Caines R. 84; *Erickson v. Willard*, 1 N. H. 217; *Burt v. Herron*, 66 Pa. St. 400; *Oyster v. Knoll*, 137 Id. 448; so too, "it is my will that," *Whiting v. Whiting*, 4 Gray 240; so too, "wish and desire," *Brasher v. Marsh*, 15 Ohio St. 103; see also *Cook v. Ellington*, 6 Jones Eq. 371; but see, *contra*, *Lines v.*

tongue employed can only be looked at in order to ascertain what are the equivalent expressions in English (o).

(o) *Reynolds v. Kortright*, 18 Beav. 417.

Darden, 5 Fla. 51, where it was declared to be the "wish and desire" of the testator that each grandchild should receive "a portion;" and also *Brunson v. King*, 2 Hill (S. C.) Ch. 483, 490, where it is said that the court will not "do violence to the general intent" in order to create a trust where the words used were "it is my wish;" so too, "wish and will," *McRee's Adm'r v. Means*, 34 Ga. 349; so too, "in the full confidence that," *Warner v. Bates*, 98 Mass. 274; "with full confidence that," *Bull v. Bull*, 8 Conn. 47; "having the utmost confidence that," *Ingram v. Fraley*, 29 Ga. 553; "having implicit confidence." *Steele v. Levisay*, 11 Gratt. 454. But where the gift is absolute to the wife, followed by a request that she dispose of the same among children and grand-children, as she shall deem good, no trust will arise, *Foose v. Whitmore*, 82 N. Y. 405; and again where the gift to the wife was followed by these words: "Having full confidence that my said wife will make proper and suitable provision for our son" followed by a request that the property devised to her be devoted not only to the support and education of the son, but also to his establishment in business, it was held that it was not the intention to limit the power of disposal of the property either by will or deed, *Salomon v. Lawrence*, 52 N. Y. Super. 154; and as to the construction of "having full confidence that" see *Coates' Appeal*, 2 Pa. St. 129; *McKonkey's Appeal*, 13 Id. 253; *Pennock's Estate*, 20 Id. 268; *Wells v. Hawes*, 122 Mass. 97; and where a testator says "I devise all my estate to my beloved wife, feeling entire confidence that she will," &c., the estate in fee vests in the wife without trust or

limitation over. *Lesesne v. Witte*, 5 S. C. 450.

So any words of recommendation or suggestion to the wife will not limit the estate, where, from the whole will, there is a clear intent to give the fee to the wife. *Hoxsey v. Hoxsey*, 10 Stew. (N. J.) 21; *Biles v. Biles*, 80 Iowa. 269. But where the testator devised lands to his wife expressing a wish that she should not devise any of the estate out of the testator's family, it was held that the words "I wish" are as mandatory as the words "I will." *Fox's Appeal*, 99 Pa. St. 332. And where a testator gave largely to charitable uses, it was held that the word "recommend" was equal to a positive direction. *Webster v. Morris*, 66 Wis. 366. And a bequest "in full faith" that husband will provide for children &c., raises a trust. *Noe v. Kern*, 93 Mo. 367.

So, the words, "in the belief that," were held to raise a trust in *Van Amee v. Jackson*, 35 Vt. 176; and the word "recommending," *Gilbert v. Chapin*, 19 Conn. 342; and even the word "allow," *Hunter v. Stembridge*, 12 Ga. 192; but see, *contra*, *Ellis v. Ellis*, 15 Id. 296. But a gift of \$100,000—"relying upon" legatees to dispose of it to charitable uses, will not charge the legacy with any trust, *Willets v. Willets*, 35 Hun 401; S. C. 20 Abb. N. C. 471; so the words "I would rather prefer" are in no way binding. *Warner's Estate*, 130 Pa. St. 359.

On the other hand, "desire and hope" have been held insufficient to raise a trust, *Hess v. Singler*, 114 Mass. 56; so too, "wish and desire," *Negroes Chase v. Plummer*, 17 Md. 165; so too, "hoping and believing," *Van Duyne v. Van Duyne*, 2 McCart. 503, reversing 1 McCart. 397;

## SECTION V.

*Of the Materials with which a Will may be Written, and of the Person who may be the Writer: and herewith of a Will prepared by a Legatee.*

There are scarcely any restrictions in the Ecclesiastical Law, with respect to the materials on which, or by which, a testamentary document may be executed (*p*). Thus a will or codicil, or any part thereof, may be made or altered in

Pencil will, or alterations in will.

(*p*) Swinb. Pt. 4, s. 25, pl. 2.

and it is held that the children of a deceased daughter take no interest in land under a will dividing testator's estate equally between a living son and daughter "believing that they will do what is just and right by their deceased sister's children," *Rowan v. Warner*, 13 Lea. 550; and a legacy to A. with an "earnest request and desire" to procure masses &c. will create no trust, *Dougherty's Estate*, 12 Phila. 70; nor will there be any trust in favor of the children where the testator left the land to his wife "enjoining" upon her to divide it among them at her death, *Gibbins v. Shepard*, 125 Mass. 541; see also *Bamforth v. Bamforth*, 123 Id. 280; nor is there any precatory trust where the testator "recommends" to his wife the care of his parents and "requests" her to provide for his daughters, *Colton v. Colton*, 21 Fed. Rep. 594. See also *Kinter v. Jacobs*, 43 Pa. St. 445; *Paisley's Appeal*, 70 Id. 153; *Biddle's Appeal*, 80 Id. 258; *Thompson v. McKisick*, 3 Humph. 631; *Reid v. Blackstone*, 14 Gratt. 363; *Rhett v. Mason*, 18 Id. 541; *Story Eq. Jur.*, § 1068, *et seq.*; *Hill on Trustees* 73; *Perry on Trustees*, § 112, *et seq.*; 2 Redf. on Wills 415; 1 Jarman on Wills (5th Am. ed.) 680, and notes.

The tendency of modern authorities is

not to raise a trust from terms merely expressive of wish, entreaty, confidence or recommendation, *Lesesne v. Witte*, 5 S. C. 450; and it is proper to observe that no commendatory terms of a will expressing a wish, will, desire, request, entreaty, hope or expectation are sufficient to create a trust unless there be certainty as to the parties to take and what they are to take. *Lines v. Darden*, 5 Fla. 51; *Schmucker v. Reel*, 61 Mo. 592; *Mills v. Newberry*, 112 Ill. 123; *Blanchard v. Chapman*, 22 Ill. App. 341; *Handley v. Wrightson*, 60 Md. 198; *Knox v. Knox*, 59 Wis. 172; *Gilbert v. Chapin*, 19 Conn. 342; *Harrison v. Harrison*, 2 Gratt. 1.

If so definite as to be capable of execution by a court they will either create a trust or impose a charge. *Phillips v. Phillips*, 112 N. Y. 197. In one case in addition to the above requirements it was added "If the words, on the whole, are sufficiently imperative." *Mills v. Newberry*, *ubi supra*. But if any discretion be left with the devisee or trustee, whether to act or not, no trust will be created. *Gilbert v. Chapin*, *ubi supra*.

However in many cases words giving discretionary power have been held to impose a trust. Thus a gift to A "for the support of herself and her nephews and nieces \* \* \* and such other



pencil as well as in ink (q).<sup>50</sup> But when the question was, as \*before the Wills Act it often used to be, whether the testator intended the paper as a final declaration of his mind, and as testamentary, or whether it was merely preparatory to a more formal disposition, the material

(q) *Rymes v. Clarkson*, 1 Phillim. 35.

50. Wills may be partially printed, engraved, or lithographed, the blanks being filled in either in ink or with a pencil. *Temple v. Mead*, 4 Vt. 535; *Henshaw v. Foster*, 9 Pick. 312. So too a will may be wholly printed, engraved or lithographed. And it has been, at least in one instance, expressly decided that a will wholly written with a pencil is "in writing" within the intent of the statute, *Myers v. Vanderbilt*, 84 Pa. St. 510;

so too, whether the signature alone or the entire will be in pencil. *Tomlinson's Estate*, 133 Pa. St. 245. On the other hand a writing on a slate, although intended for a will, is not admissible. *Reed v. Woodward*, 11 Phila. 541. But a holographic will cannot be made on a blank partially printed for the purpose of a will. *Estate of Rand*, 61 Cal. 468. And if a part of the date be printed it will not be valid. *Estate of Billings*, 64 Id. 427.

persons as she from time to time may wish and request to be members of her family," *Harper v. Phelps*, 21 Conn. 257, (which was, however, held to be too uncertain to be executed;) or "in trust for and to be divided among his children in such manner and at such times as he thinks best," *Freedley's Appeal*, 60 Pa. St. 344; or "to be disposed of in such manner as she may think proper for the benefit of the family \* \* \* as near equal as can be," *Ward v. Peloubet*, 2 Stockt. 304; *Little v. Bennett*, 5 Jones Eq. 156; or "to be disposed of by her and divided among my children at her discretion," *Collins v. Carlisle*, 7 B. Mon. 14; or "to her discretion do I intrust the education and maintenance of my children," they to be maintained after her death out of the profits of the estate given. *Lucas v. Lockhart*, 10 Sm. & M. 466.

In a case where the testator directed by his will that his grandson should be brought up and educated at the expense of the estate, the words "wish and desire" were held to be imperative and to create an express trust. *Cockrill v. Armstrong*, 31 Ark. 580.

But a devise to the widow in fee with

a request, as a request, raises no trust, but the widow takes an absolute estate in the land. *Sale v. Thornberry*, 86 Ky. 266. But where a testator gave the residue to A. & B. "as their absolute property" with request to use to further the Woman's Rights Cause, but neither of them is under any legal responsibility to any one or any court to do so, this raises no trust. *Bacon v. Ransom*, 139 Mass. 117. See *Jackson v. Philips*, 96 Mass. 539.

But in a case where a testator said "I enjoin upon her to make such provision for said grandchild, out of my residuary estate, in such manner, at such times and in such amounts as she may judge to be expedient and conducive to the welfare of such grandchild," it was held that the word "enjoin" as used neither raised a trust nor imposed a charge upon the residuary estate, *Lawrence v. Cooke*, 104 N. Y. 632, 638, reversing *Lawrence v. Cooke*, 32 Hun 126. And where a testator desired that "while any of my daughters live single they have a home and residence in my house," this gives a daughter only a place of abode without maintenance. *Kennedy's Appeal*, 81 Pa. St. 163.

And in a case where a testatrix gave one-third of her residuary estate to her

**Presumption**  
that pencil alter-  
ations are delib-  
erative and ink  
alterations are  
final.

with which it was written became a most important circumstance. And it has been held that the general presumption and probability are, that where alterations in pencil only are made, they are deliberative; <sup>51</sup> where in

51. An immaterial interlineation in pencil, in the handwriting of the executor, will not affect the execution of the will. *Mairs v. Freeman*, 3 Redf. 181, 197; *Tonnele's Will*, 5 Leg. Abr. 254. And where immaterial additions are made to a will by a stranger, such as appending a seal, or adding the words "his mark," such alterations will not affect the validity of the will, *Grubbs v. McDonald*, 91 Pa. St. 236; nor the changing of a date from 1875 to 1873, where it appeared that the testator died before 1875. *Martin v. King*, 72 Ala. 354.

Unattested and unexplained alterations, appearing upon the face of a will, are presumed to have been made after execution. *Wetmore v. Carryl*, 5 Redf. 544. But where there are interlineations or erasures, which are fair upon its face

and entirely unexplained, there is no presumption, in absence of special circumstances, that they were *fraudulently made* after the execution of the paper. *Matter of Wood*, 32 N. Y. St. Rep. 286; *Matter of Voorhees*, 6 Dem. 162; *Crossman v. Crossman*, 95 N. Y. 145. And the onus is on the contestant to show that such alterations were made after the execution. *Matter of Wood*, *ubi supra*.

And where the bottom of the first page of a will is cut off, but not so as to destroy its continuity, and it appears that at its execution it was so folded that the witnesses could not see whether the document was so cut at that time, no presumption will arise that it was mutilated after its execution. *Matter of Homes*, 32 N. Y. St. Rep. 902. And in case of alterations, if it appears that they

daughter L. absolutely, and by a codical said "I desire that one-half of the share of the property inherited from me by my daughter L. shall be placed in trust, the C. Trust Co. acting as trustee," it was held that it was intended that L. should be the *cestui que trust* of the half of the property thus given to her and that she should take the other half in fee. *Wood v. Camden Safe Deposit and T. Co.* 17 Stew. (N. J.) 460.

Where a testatrix expressed a desire that her husband be supported out of the property left to their children, the husband does not obtain such an interest in the property that a creditor can reach it by a bill in equity, *Baker v. Brown*, 146 Mass. 369; but where property is devised to the wife "*upon condition*" that she raise, support and educate testator's children, she takes an estate which is liable to sale under execution against

her, as she did not take as trustee for the children, *Zimmer v. Sennott*, 134 Ill. 505; if the expression had been a wish, expectation, hope, desire or request that the children should have been provided for out of the rents and profits of the estate it would have been different, *Id.*; again, where there is a devise to J. S. "in consideration" of testator being taken care of and well treated by J. S. for the remainder of the life of testator, it is not a devise on condition and the failure of the consideration will not defeat the will. *Martin v. Martin*, 131 Mass. 547. And where a person made a devise in trust and by a subsequent clause provided that none of the sums should be paid to any of the beneficiaries "as long as their health and strength continue and they are able to do anything for themselves for their support, to be held until any one of them becomes sick and

ink, they are final and absolute<sup>(r)</sup>. And the same presumption prevails when the question arises as it occasionally does in respect of wills made since the Wills Act<sup>(rr)</sup>.

were made before execution then the paper writing as it reads after such alteration is the will; but if made after execution, and do not invalidate the will, the jury should, by a special verdict, establish the will as it read before such alteration. *Haynes v. Haynes*, 33 Ohio St. 598.

But generally now the old distinctions between alterations in pencil and in ink has been abandoned, the courts holding that no presumption arises that alterations were deliberative rather than final because made in pencil. *Tomlinson's Estate*, 133 Pa. St. 245.

And in a case where, in writing the

will, the scrivener wrote the first name of the testator at the conclusion of the will, and the testator appended his surname only, and two days afterwards called in other witnesses, erased his surname and signed the will again and these latter witnesses attested, it was held that the erasure of the name was immaterial and no presumption of an intention to revoke would arise therefrom. *Frear v. Williams*, 7 Baxt. 550.

And in a case where the testator made certain alterations in pencil in the presence of his brother saying that it would be a good enough will if he did not prepare another before he died, the will as

wholly unable to support himself," this clause is deemed advisory and not mandatory. *Ilseley v. Ilseley*, 80 Me. 23.

Where land was devised to one "for the benefit of his children, *if he so elect*," it was held that a trust estate for his children was created, the words "if he so elect" related only to the acceptance of the office of trustee and not to the subject matter of the devise. *Barnard v. Crossman*, 54 Hun 53.

Where a legacy is given to A, with request that upon his death he leave it to B. C. and D., the request is imperative, and creates a trust in favor of B. C. and D., which is not defeated by the death of A. before that of the testator. *Eddy v. Hartshorne*, 7 Stew. (N. J.) 419. But where one gives a legacy with the recommendation that the legatee leave it to his son and if he should have none, then to Harvard University, the recommendation is not obligatory and no trust results for Harvard *Estate of Whitcomb*, 86 Cal. 265. On the other hand where a testator gave, devised and bequeathed to H. G. B., and *desired* him to use and

appropriate the property for such religious and charitable objects as he may think most conducive to promote the cause of Christ, this language is just as effectual to create a trust as if the words "in trust" had been used. *Maught v. Getzendanner*, 65 Md. 527.

"If she find it always convenient to give to my brother \$700 per annum" means if the devisee be financially able, not if she be inclined so to do. *Phillips v. Phillips*, 112 N. Y. 197.

Where a testator left lands to his son, to go to testator's widow, upon the death of the son without issue, with the request that at her death she should give the lands to be equally divided between his relatives and hers, and she died intestate, the son having died without issue, it was held that a trust was created by the will. *Handley v. Wrightson*, 60 Md. 198.

<sup>(r)</sup> *Hawkes v. Hawkes*, 1 Hagg. 322. *Parkin v. Bainbridge*, 3 Phil. 321.

<sup>(rr)</sup> In the Goods of Hall, L. R. 2 P. & D. 256. In the Goods of Adams, L. R. 2 P. & D. 367.

By the civil law, if a person wrote a will in his own favour, the instrument was rendered void (s). That rule has not been adopted in its fullest extent by the law of England, which only holds that where the person who prepares the instrument or conducts its execution, is himself benefited by its dispositions, this circumstance creates a presumption against the act, and renders necessary very clear proof of volition and capacity as well as of a knowledge by the testator of the contents of the instrument (t). Nor does the law of this realm determine that the act is absolutely void, even though the person making the will in his own favour is the \*agent and attorney of

Where a will is written or prepared by a party in his own favour :

when he is the agent and attorney of the testator.

altered was admitted to probate. Will of Fuguet, 11 Phila. 75.

And where there are several alterations made in the same will, it may be shown that some were made with the intent to revoke the clauses so altered, while others were intended not to revoke but to modify the provisions of the clause in which they occur. Linnard's Appeal, 93 Pa. St. 313.

But it is not permissible by obliteration or other alteration to change a life estate into a fee; nor can any alteration or obliteration make a different disposition of the property than that made by the will as originally drawn; a change intended to alter the disposition of property must be authenticated in the manner prescribed by statute. Eschbach v. Collins, 61 Md. 478. In Louisiana, erasures not approved by the testator are considered as not made. If not so obliterated as to make it impossible to identify them and the judge considers them material words, he will decree the will a nullity, otherwise not. Succession of Müh, 35 La. Ann. 394.

When a clause or clauses in a will have been erased, the will may stand, nevertheless; in such case the property covered by the erased portion passes to and becomes part of the residue. Bigelow v. Gillott, 123 Mass. 102. In such event the will is to be proved without the

erased clause. Estate of Chinmack, Myrick's Prob. 128.

If a will be found in a receptacle for valuable papers of the testator, erasures and interlineations in it are presumed to have been made by him. Estate of Glasen, 16 Phila. 219.

Extrinsic evidence is admissible to show the time and circumstances of the alteration, interlineation or erasure, especially as to whether it were done before or after the execution of a codicil amounting to a republication of the will. Burge v. Hamilton, 72 Ga. 568; Jacoby's Estate, 17 Phila. 430; Tucker v. Whitehead, 59 Miss. 594. As to proof of altered will, which has been destroyed, and a new will drawn, but not executed, see Wilbourn v. Shell, 59 Miss. 205.

(s) Dig. lib. 48, t. 10, s. 15, and lib. 34, s. 8.

(t) Paske v. Ollat, 2 Phillim. 324. Ingram v. Wyatt, 1 Hagg. 391. But it must not be understood that the rule is that *direct* evidence that the testator knew the contents is necessary; circumstantial evidence may be sufficient for this purpose: Raworth v. Marriott, 1 M. & K. 643. And knowledge will, as in other cases *prima facie* be presumed on proof of capacity and execution: Barry v. Butlin, 2 Moo. P. C. 480. And even where there is affirmative evidence of knowledge by

the testator; but the suspicion is thereby, for obvious reasons, greatly increased (u).<sup>52</sup>

This doctrine was fully considered by the Lords of the Judicial Committee of the Privy Council, in the case of *Barry v.*

*Butlin* (x). And it should seem that the terms, in which Rule in *Barry v. Butlin*.

the rule above stated has been laid down, require some qualification. In delivering the judgment of their Lordships in that case, Parke, B., made the following observations: "The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present

reason of the will having been read over to a testator, competent in mind, before execution, there is no unyielding rule of law (especially where the ingredient of fraud enters into the case) shutting out all further inquiry. *Fulton v. Andrews*, L. R. 7 H. L. 465, *per Cairns*, L. C. Undue influence if suggested must be supported by affirmative proof. *Parfitt v. Lawless*, L. R. 2 P. & D. 462.

(u) *Ingram v. Wyatt*, 1 Hagg. 391. *Dufaur v. Croft*, 3 Moore, P. C. C. 136. *Parfitt v. Lawless*, L. R. 2 P. & D. 462. In some cases the conduct of a professional man who prepared a will has been held fraudulent, and the will inoperative, by reason of his allowing the testator to remain in ignorance, which influenced the will in favour of himself. See *Segrave v. Kirwan*, 1 Beat. 157. *Hindson v. Wetherill*, 1 Sm. & G. 609. 5 De G., M. & G. 301. *Walker v. Smith*, 29 Beav. 394. See also *Bulkeley v. Wilford*, 2 Cl. & F. 102. *Walkers v. Thorn*, 22 Beav. 547. *Post*, Pt. I. Bk. VI. Ch. I.

52. Nor has this rule been adopted in the United States; however it is said in *Delafield v. Parish*, 25 N. Y. 9, 36, that it may well be questioned whether it was wise to have departed from its just and rational provisions in this respect. It being only within the demands of propriety and decency that a person who is to take an interest under a will should

not conduct the transaction. But the position is taken in this case, as in the majority of decisions in the United States, that the fact that the party who writes the will or procures it to be written takes a benefit under it at once raises the suspicion of the Court; which suspicion will vary in intensity according to the relation in which the party stands to the testator, the amount of the benefit and the immediately attendant circumstances of the execution of the will.

The presumption is strong against the validity of such provisions. *Lyons v. Campbell*, 88 Ala. 462, 469; *Tomkins v. Tomkins*, 1 Bailey 92, 96.

Especially does the Court look with quick suspicion where the relation is that of legal adviser and client, and one that has been maintained for many years, *Post v. Mason*, 26 Hun 187; *Dufield v. Morris*, 2 Harr. (Del.) 375, 384; *Newhouse v. Godwin*, 17 Barb. 236; principal and agent, *Lyons v. Campbell*, *ubi supra*; physician and patient, *Crispell v. Dubois*, 4 Barb. 393; guardian and ward, *Breed v. Pratt*, 18 Pick. 115, 117. See *ante* pp. 59 and 67, notes 40, 49, 50 and 51, and cases there cited.

(x) 2 Moo., P. C. 480. *Fulton v. Andrew*, L. R. 7 H. L. 448. *Goodacre v. Smith*, 1 P. & D. 359.

i. *Onus probandi* on party propounding will.

ii. The court should be vigilant in cases where the party writing or preparing the will takes a benefit thereunder.

appeal, and have been acquiesced in on both sides. These rules are two; the first is, that the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator; the second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased.<sup>53</sup> These principles, to the extent that I have stated, are well established: The former is undisputed; the latter is laid down by Sir John Nicholl, in substance, in *Paske v. Ollat*; *Ingram v. Wyatt*; and *Billinghurst v. Vickers*; and is stated by that very learned and experienced judge to have been \*handed down to him by his predecessors; and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker v. Batt* (y). Their Lordships are fully sensible of the wisdom of this rule, and of the importance of its practical application on all occasions. At the same time they think it fit to observe, especially as there has been some discussion upon this point towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl, in

53. This rule of Baron Parke has been extensively adopted. *Drake's Appeal*, 45 Conn. 9; *Beall v. Mann*, 5 Ga. 456; *Hughes v. Meredith*, 24 Id. 325; *Simpler v. Lord*, 28 Id. 52; *Lee v. Dill*, 11 Abb. Pr. 218; *Leaycraft v. Simmons*, 3 Bradf. 35; *In re Welch*, 5 Bradf. 244; *Langton's Will*, Tuck. 301; *Tyler v. Gardiner*, 35 N. Y. 594; *Delafield v. Parish*, 25 Id. 9.

This doctrine has also been extended to the case where the legacy is in favor of the children of the draftsman; but the degree of proof required in such case is less than in a case where the bequest is directly to the draftsman. And in one case where it was clearly proved that the testatrix persisted in having a provision made for the children of the scrivener it

was held that no other proof was necessary as to her knowledge of the contents. *Burk's Will*, 2 Redf. 239. But yet it is a suspicious circumstance if such children take any considerable benefit under a will, and in such event the court should scrutinize, and be satisfied that the will was in accordance with the intention of the testator. *McMechen v. McMechen*, 17 W. Va. 683. And where the interest of the draftsman was such as arose from his appointment by the will to be guardian of the residuary legatee, it was held that this was a sufficient benefit to bring him within the rule. *Tomkins v. Tomkins*, 1 Bailey 92.

(y) 2 Moore, P. C. C. 317. See also *Hitchings v. Wood*, *ibid.* 355, 436.

laying down this doctrine, appear to them to be somewhat equivocal, and capable of leading into error in the investigation and decision of questions of this nature. It is said that, where the party benefited prepares the will, 'the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper : ' and that, 'where the capacity is doubtful, there must be proof of instructions or reading over.' If by these expressions the learned judge meant merely to say, that there are cases of wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them extending to clear proof of actual knowledge of the contents by the supposed testator, and that the instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the proposition so understood.<sup>54</sup> In all probability, the learned judge intended no more than this. But if the words used are to be construed strictly : if it is intended to be stated, as a rule of law, that in every case in which the party preparing the will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is thereupon required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect. The strict Meaning of term *onus probandi*. meaning of the term '*onus probandi*' is this ; that if no evidence is given by the party on whom the burthen is cast, the issue must be found against \*him. In all cases, this *onus* is imposed on the party propounding a will ; it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are presumed : and it cannot be, that the simple fact of the party who prepared the will being himself a legatee, is, in every case and under all circumstances, to create a contrary presumption ; and to call upon the court to pronounce against the will, unless additional evidence is produced to prove knowledge of its contents by the deceased.<sup>55</sup> A single instance, of not unfrequent

54. In cases where the party preparing the will is a large beneficiary, the proof of knowledge, by the testator, of the contents of the will must be very strong. *Harris v. Harris*, 53 Ga. 678. And where the person who drew the will took a benefit under the will this is so suspicious

a circumstance as to have particular weight as against the testimony of such beneficiary. *Will of Hollingsworth*, 58 Iowa 526, 528.

55. As a general proposition if the relation existing between the testator and the beneficiary who prepared the will be

occurrence, will test the truth of this proposition :—A man of acknowledged competence and habits of business, worth 100,000*l.*, leaves the bulk of that property to his family, and a legacy of 10*l.* or 50*l.* to his confidential attorney, who prepared his will : Would this fact throw the burden of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so, that, if such proof were not supplied, the will would be pronounced against ? The answer is obvious—it would not.<sup>56</sup> All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each particular case ; in some of no weight at all, as in the case suggested ; varying according to the circumstances, for instance the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies ; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.<sup>57</sup>

one of confidence, such as attorney and client, guardian and ward, principal and agent, physician and patient or priest and parishioner, the *onus* is on the beneficiary. Thus where such a relationship had existed through life, continuing up to the time of death, the beneficiary being the agent of the testator, the presumption being that the legacy was obtained by improper acts or circumvention, the testator being by such means induced to bestow the gift or legacy contrary to his desire and free will, the burden of proof is cast upon the legatee to show that the will was the result of his own volition and not improperly procured. *Lyons v. Campbell*, 88 Ala. 462, 469 ; *Daniel v. Hill*, 52 Id. 430, 437 ; *Hill v. Barge*, 12 Id. 687 ; *Carr v. McCasum*, 1 Dev. & B. 276. More especially is this so in the case of attorney and client, owing to the ascendancy which this relationship, long continued, is apt to give to the attorney. *Newhouse v. Godwin*, 17 Barb. 236 ; *Duffield v. Morris*, 2 Harr. (Del.) 375. And in *Hill v. Barge*, 12 Ala. 687,

it is said that if there be *any confidential relationship* between the parties the *onus* is greatly increased. But the preference of one person, or set of persons, to another may be explained by the circumstances of the case. *Coffin v. Coffin*, 23 N. Y. 9.

56. But obviously the contrary is true when he becomes a large beneficiary under the will, as where he is made the residuary legatee ; in such case the *onus probandi* is clearly upon such beneficiary and he will be required to show affirmatively that the testator knew the value of the property thus disposed of and also to prove that the gift was his free and intelligent act. *Yardley v. Cuthbertson*, 15 Phila. 77.

57. Generally the burden of proof is upon the proponent where confidential relations existed between himself and the testator, whether he wrote the will or not ; the case being much stronger against the proponent where he also prepared the will. *Daniel v. Hill*, 52 Ala. 430.



Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for or reading over the instrument; they form, no doubt, the most satisfactory, but they are not the only satisfactory, \*description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The court would naturally look for such evidence; in some cases it might be impossible to establish a will without it; but it has no right in every case to require it. I have said thus much upon the rules of law applicable to this case, with the concurrence of all their Lordships who heard the argument, not particularly with a view to the decision of this case, but in order to prevent any misconception upon a subject of so great practical importance. At the same time their Lordships wish it to be distinctly understood, that, entirely acquiescing in the propriety of the rule so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation."

In the subsequent case of *Durling v. Loveland* (z), Sir H. Jenner Fust, referring to these passages in the judgment of Mr. Baron Parke, observed that he acceded to every one of the doctrines and principles there laid down, but that he was not aware that the Prerogative Court had ever acted on any other or different (a).

Rule in *Barry v. Butlin* approved in subsequent cases.

(z) 2 Curt. 225, 227.

and acted on in many subsequent cases.

(a) The doctrine laid down as above, See the cases collected in the 8th ed. of *in Barry v. Butlin*, has been recognized . this work, p. 117, note (z).

## SECTION VI.

*Of Nuncupative Wills and Codicils.*

A nuncupative testament is when the testator, without any writing,

All nuncupative wills (made on and after Jan. 1, 1838) are invalid:

doth declare his will before a sufficient number of witnesses (b).<sup>58</sup> Before the Statute of Frauds it was of as great force and efficacy (except for lands, tenements, and

(b). Swinb. Pt. 1, s. 12, pl. 1. Godolph. Pt. 1, c. 4, s. 6. It is called Nuncupative, says Swinburn, *a nuncupando*, *i. e. nominando*, of naming; because when a man maketh a nuncupative testament, he must name his executor and declare his whole mind before witnesses: *ibid.* pl. 2. According to the civil law, the appointment of an executor was the essence of a will; and if he were appointed by word of mouth, although many legacies were made and written in a will, and many things were expressed to be done, it was considered a nuncupative will only: Swinb. Pt. 1, s. 12, pl. 6. Godolph. Pt. 1, c. 4, s. 7.

58. It is essential to the establishment of a nuncupative will, that it shall clearly appear, that at the time of uttering the words relied on, the testator had a present consistent intention that the words uttered should constitute his will, and that the witnesses so understood his language, *Male's Case*, 4 Dick. 266; and that the testator shall, by his own language, before pronouncing the will, have indicated to those about him, or some of them, that they were to witness that the very words he presently uttered were to constitute his last will. *Male's Case*, 4 Dick. 266, 277; *Dorsey v. Sheppard*, 12 Gill & J. 192; *Yarnall's Will*, 4 Rawle 46; *Woods v. Ridley*, 27 Miss. 119. And any disagreement, as to declarations of the testator, between the requisite witnesses to the nuncupation will vitiate the will. *Morgan v. Stevens*, 78 Ill. 287.

The power of revoking wills by nuncupation neither has nor ought to have any wider range than that of making nuncupative wills. *Shaw v. Shaw*, 1 Dem. 21, 28.

But the executor of a nuncupative will is not competent as a witness. *Watts v. Holland*, 56 Tex. 54.

No fixed form of speech is required for the *rogatio testium*, *Male's Case*, *ubi supra*; but that there should be a *rogatio testium* is most essential, *Yarnall's Will*, 4 Rawle 46; *Taylor's Appeal*, 47 Pa. St. 31; and it must be a direct request in some form to the witnesses, *Baker v. Dobson*, 4 Humph. 342; *Given v. Wright*, 8 Id. 639; and it must be something said, *Parsons v. Parsons*, 2 Greenl. 298; a look is not a sufficient substitute for words. *Will of Meisenhelter*, 15 Phila. 651.

Where a testator upon his death bed several times expressed a desire that certain persons should have his property, specifying them as his brother's children, such persons are sufficiently designated and take as by a nuncupative will. *Muligan v. Leonard*, 46 Iowa 692.

Under the statute of Illinois no formal request of the testator to the witnesses is required. *Harrington v. Stees*, 82 Ill. 50. But statements of desire by a sick person, in the presence of two witnesses, cannot be admitted as a nuncupative will if the decedent did not mention her will, nor call upon any one to notice her language. *Broach v. Sing*, 57 Miss. 115.

Real estate cannot be devised by a nuncupative will. *Moffett v. Moffett*, 67 Tex.

hereditaments) as a written testament (c). But as wills of this description are liable to great impositions, and may occasion many perjuries, that statute (29 Car. II. c. 3) laid them under several restrictions; 59 except when made by "any soldier being in actual military service, or

642; *Sadler v. Sadler*, 60 Miss. 251; *Watts v. Holland*, 56 Tex. 54; *Lewis v. Aylott*, 45 Id. 190; *Wooldridge v. Hancock*, 70 Id. 18. But § 4862 of the Revised Statutes of Texas apparently makes no distinction between personal property and real estate. *Moffett v. Moffett*, *ubi supra*.

A document drawn in pursuance of instructions by an intending testator, for the purpose of being executed as a written will, but unexecuted solely because death unexpectedly intervened, cannot be established as a nuncupative will in New Jersey. *Male's Case*, 4 Dick. 266.

In Ohio a verbal will must be attested by two witnesses, competent and disinterested at the time of attestation; and disqualification as a witness by reason of interest under the will cannot be removed by renunciation at the time of probate, *Vrooman v. Powers*, 47 Ohio St. 191; and in North Carolina such a will must be established by the *oath* of two witnesses present at the *factum*. *Bundrick v. Haygood*, 106 N. C. 468.

It seems that § 5925 of the Revised Statutes of Ohio is not applicable to verbal wills. *Vrooman v. Powers*, *ubi supra*.

In order to give validity to a nuncupative will all the requirements of the statute must be strictly complied with. *Bundrick v. Haygood*, 106 N. C. 468; *Ex parte Turner*, 24 S. C. 211; *Morgan v. Stevens*, 78 Ill. 287; *Warns v. Palmer*, 21 Pa. St. 300; *Will of Meisenhelter*, 15 Phila. 651.

As to the whole subject of nuncupative wills in Louisiana, see *ante* p. 117, *n.* 15, and for an epitome of the statutes on nuncupation throughout the United States, see *ante* p. 95, *n.* 3.

(c) *Swinb. Pt. 1, s. 12, pl. 3. Godolph. Pt. 1, c. 4, s. 6.*

59. Although at common law, it was not essential for the making of a nuncupative will that the testator should even be sick, *Harrington v. Stees*, 82 Ill. 50, yet it came to be held that such a will must be made by one *in extremis*, and the rule was laid down by Chancellor Kent, in *Prince v. Hazelton*, 20 Johns. 501, that the will must be made under such circumstances, or when the testator was overtaken by sudden and violent illness; but this doctrine was rejected in *Johnson v. Glasscock*, 2 Ala. (N. S.) 242, and the rule laid down that if the testator be ill, from which sickness he subsequently dies, and, being so sick, is *impressed with the probability of approaching death*, and thereupon makes a nuncupative will in conformity with the statute, it will not be invalid because, in point of fact, he had time and opportunity to reduce it to writing.

In *Boyer v. Frick*, 4 Watts & S. 360, it is said that nuncupation is a matter of special indulgence rather than a matter of right; and again in *Warns v. Palmer*, 21 Pa. St. 300, it is said that a nuncupative will is a practical substitute for a written will in cases of necessity, on which account it is essential to its validity that there must be no departure from those requirements on the compliance with which this privilege is accorded.

The law allows a disposition of property by nuncupation only on account of the exigency of the case and therefore such a disposal must be by one *in extremis*. Hence where a decedent lived nine days after the making of a nuncupative will, during which time he possessed capacity to make a written will, it was held that

any mariner or seamen being at sea" (d). And now by the Statute of Wills (1 Vict. c. 26), applying to all wills made on or after 1 Jan., 1838, nuncupative wills (or other testamentary dispositions) are altogether rendered invalid (e).<sup>60</sup> The exception, however, in favour of soldiers and mariners has been continued by the 11th section of the latter statute, which provides

except those  
made by soldiers  
or mariners.

the nuncupative will could not be sustained, *Carroll v. Bonham*, 15 Stew. (N. J.) 625; so in a case where the testator lived six days. *Morgan v. Stevens*, 78 Ill. 287. But in Mississippi, the court raises the query whether the words must be spoken so shortly before death as to afford no convenient time to write them. *Sadler v. Sadler*, *ubi supra*.

The endeavor to dispose of real estate by a nuncupative will is considered evidence that the testator did not intend to nuncupate, as it is not lawful to devise real estate by such a will. *Male's Case*, 4 Dick. 266, 282; *Porter's Appeal*, 10 Pa. St. 254; *Smith v. Thurman*, 2 Heisk. 110; *Sadler v. Sadler*, 60 Miss. 251. But, in Iowa, it is held that the fact that both real and personal property in excess of the statutory limit were included in the verbal or nuncupative will does not invalidate the will, except as to such excess. *Mulligan v. Leonard*, 46 Iowa 692.

As it is almost universally held now that such a will must be made in the last sickness of the testator it is not inappropriate to inquire what is to be understood by "last sickness." In Mississippi it is said that it seems that it would not cover a lingering illness which did not incapacitate. *Sadler v. Sadler*, 60 Miss. 251. While in Illinois it is held to be the sickness from which death results, and no question is

raised whether the testator had opportunity to make a written will. *Harrington v. Stees*, 82 Ill. 50. And in *Johnson v. Glasscock*, 2 Ala. (N. S.) 242, it is held to be "the sickness of which he subsequently dies." But in *Yarnall's Will*, 4 Rawle 45, 65, it is held that "last sickness" as used in acts concerning nuncupation cannot include lingering pulmonary disease, although death result from that cause. And where one is weak and indisposed on the day of the nuncupation and dies on the following day from a rupture of the lungs, the indisposition preceding such rupture cannot be considered his "last sickness." *Werkheiser v. Werkheiser*, 6 Watts & S. 184, 189.

And see the remarks of Rogers, J., in *Rouse v. Morris*, 17 Serg. & R. 328, 330, for a discussion of what will be considered to be the "last illness" of a person.

(d) It appears from the Preface to the Life of Sir Leoline Jenkins, that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English army the full benefit of the testamentary privilege of the Roman army: 3 Curt. 531.

(e) Section 9. As to the law prior to the above date relating to nuncupative wills, see the former editions of this work, Pt. I. Bk. II. Ch. II. § VI.

60. But it has been held in some states that where wills have been written according to instructions, but have not been executed because of the intervention of death before the completion of the execution of the testament such wills may

be sustained as nuncupative. *Mason v. Dunman*, 1 Munf. 456; *Offutt v. Offutt*, 3 B. Mon. 162; *Phoebe v. Boggess*, 1 Gratt. 129. But as a general rule such instructions cannot be probated as a nuncupative will. *Porter's Appeal*, 10 Pa. St. 254; In

and enacts that "any soldier being in actual military service, or any mariner or seaman being at sea,<sup>61</sup> may dispose of his personal estate as he might have done before the making of this Act."

This privilege, as it respects soldiers, has been held to be confined, by the insertion of the words "actual military service," to those who are *on an expedition*: And consequently it has been decided, that the will of a soldier made while he was quartered in barracks, either at home (*f*) or in the colonies (*g*) is not privileged. The same was held as to the will of a soldier made at Bangalore, in the East Indies, whilst in command of the Mysore division of the army there stationed, and who died whilst on a tour of \*inspection of the troops under his command (*h*). But where the deceased was on his way from one regiment to another, both of which were in actual military service, it was held that his will was privileged (*i*). (The term "soldier" extended to persons in the military service of the East India Company (*k*).)

So, in the case of *The Earl of Euston v. Seymour* (*l*), the testator, Lord Hugh Seymour, was commander-in-chief of the naval force at Jamaica, but lived on shore at the official residence with his family: And it was held by Sir Wm. Wynne, that

61. Where a mariner made a nuncupative will on the Mississippi opposite Vicksburg it was held that he was not "at sea," and the will was rejected, *Will of Givin*, Tuck. 44. The limits laid down by the statute will not be enlarged by construction. *Id*.

(*f*) *Drummond v. Parish*, 3 Curt. 522.

(*g*) *White v. Repton*, 3 Curt. 818. See *In the Goods of Phipps*, 2 Curt. 368. *In the Goods of Johnson*, 2 Curt. 341.

(*h*) *In the Goods of Hill*, 1 Robert. 276.

(*i*) *Herbert v. Herbert*, Dea. & Sw. 10.

See also *S. P. In the Goods of Thorne*, 29 Jur. 569. *S. C. 24 L. J. (N. S.) P. M. & A. 131*, where an officer went with his regiment to Africa, for the purpose of joining a military expedition into the interior, and his will was made before the expedition left the British settlement. The affidavit on which the application for probate is made must be explicit: *Ibid*.

(*k*) *In the Goods of Donaldson*, 2 Curt. 386.

(*l*) Cited *per curiam*, 2 Curt. 339. 3 Curt. 530.

re *Hebden's Will*, 5 C. E. Gr. 473; *Male's Case*, 4 Dick. 266, 282; *Dockum v. Robinson*, 26 N. H. 372.

But while courts have gone very far in admitting unfinished and incomplete papers as good wills of personal property, it is not proper, in a case where a testa-

tor, while dictating his will, lost his mental powers, to admit that part of the instrument which was dictated while the testator was in possession of his mental powers as his will. *Tabler v. Tabler*, 62 Md. 601.

the testator did not come within the exception; for that he was not "*at sea*" within the meaning of that expression in the act; and consequently that a nuncupative will made by him on shore was invalid. But in a case on motion (*m*), the unattested will of a seaman, who, while on board a vessel lying in the harbour of Buenos Ayres, on the 4th of November, 1839, obtained leave to go on shore, where he met with an accident, and was thereby so severely injured, that he died on shore on the 9th, was admitted to probate as being within the exception; and the court distinguished the case from that of Lord Hugh Seymour, who was living on shore at Jamaica, only occasionally going on board his ship; but this was to be regarded as the will of \*a seaman "*at sea*," although the deceased was not actually on board ship at the time the will was made. So where an admiral, though not actually at sea, was in a river on a naval expedition, it was held that his case fell within the spirit of the exception in the act (*n*).<sup>62</sup>

As to the construction of the words "*mariner or seaman*," in the exception; it has been held that the purser of a man-of-war is within this description, and it should seem that it includes the whole service, applying equally to superior officers up to the commander-in-chief, as to a common seaman, being at sea (*o*). And it has also been held to apply to *merchant* seamen (*p*).

Construction of words "*mariner or seaman*."

It was held by Sir H. Jenner Fust, on motion (*q*), that, notwithstanding the general provisions of the act, a minor may make his will if he falls within the exception as being "*in actual military service, &c.*;" the words of the clause being "*any soldier, &c.*"

Persons within the exception may make their wills though under age.

With respect to the making and probate of the wills of petty officers

(*m*) In the Goods of Lay, 2 Curt. 375. So also a will made by a mariner serving on board H.M.S. "*Excellent*" whilst she was permanently stationed in Portsmouth Harbour, was held to be the will of a "*mariner or seaman being at sea*" within Section 11 of the Wills Act: In the Goods of McMurdo, L. R. 1 P. & D. 540. See also In the Goods of Saunders, L. R. 1 P. & D. 16.

(*n*) In the Goods of Austen, 2 Robert. 611.

62. Waters within the ebb and flow of the tide are considered "*the sea*." Will

of Givin, Tuck. 45; Thackeray v. The Farmer, Gilpin 524, 526.

(*o*) In the Goods of Hayes, 2 Curt. 338. A surgeon in the Navy is a "*mariner or seaman*" within the section: In the Goods of Saunders, L. R. 1 P. & D. 16. As to the meaning of the term "*seaman and mariner*" in sect. 2 of stat. 28 & 29 Vict. c. 72: see *post*, Pt. I. Bk. IV. ch. III.

(*p*) Morrell v. Morrell, 1 Hagg. 51. In the Goods of Milligan, 2 Robert. 108. In the Goods of Parker, 2 Sw. & Tr. 375.

(*q*) In the Goods of Farquhar, 4 Notes of Cas. 651, 652.

and seamen in the Queen's service, and the non-commissioned officers of marines, and marines serving on board a ship in the Queen's service, several statutes have been passed containing regulations calculated to counteract the frauds and impositions to which they are liable. These, however, have been repealed, and other provisions for the same purpose substituted, by the statute 28 & 29 Vict. c. 72, which will be pointed out, when the subject of the probate of wills occurs (*r*).

Provisions of  
stat. 28 & 29 Vict.  
c. 72, as to wills  
of seamen.

(*r*) See *post*, Pt. I. Bk. IV. Ch. IV.

## \*CHAPTER THE THIRD.

### OF THE REVOCATION OF WILLS OF PERSONALTY.

There has already been occasion to observe that a will is in all cases whatever a revocable instrument.<sup>1</sup> For though a man make his testament and last will irrevocable in the strongest and most express terms, yet he may revoke it; because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable (a). A will is, therefore, said to be *ambulatory* until the death of the testator (b).

**Ambulatory and revocable nature of a will.**

It has already been stated that a mutual and conjoint will is unknown to the testamentary law of this country (c). One ground of objection to such an instrument as testamentary, is its irrevocability. However, such a will may, it should

**Mutual will: whether ever irrevocable in equity.**

1. Revocation is a question of intention, and the acts, conduct and declarations of the maker of a will are admissible for the purpose of ascertaining whether it was revoked. *Smiley v. Gambill*, 2 Head 164; *Ford v. Ford*, 7 Humph. 92, 104; *Boudinot v. Bradford*, 2 Yeates 170; *Godbold v. Vance*, 14 S. C. 458. The fact of revocation may be established by circumstantial evidence as well as by positive proof. *Smiley v. Gambill*, *ubi supra*. What amounts to revocation is a question of law. *Id.* Where the *animus revocandi* is doubtful, the *onus* is upon the party who alleges it. *Means v. Moore*, 3 McCord 282; *Haselwood v. Webster*, 82 Ky. 409.

The expressed intention to make a change in a will in one particular negatives by implication the intention to alter it in any other respect. *Redfield v. Redfield*, 126 N. Y. 466; *Wetmore v. Parker*, 52 Id. 450; *Brant v. Wilson*, 8 Cow. 56. But a declaration of an intent to make a will at a future time, although

embodied in a formal recital in a deed, will not revoke a previous testamentary disposition. *Rife's Appeal*, 110 Pa. St. 232.

It is most generally held, as said by Lord Alvanley, in *Ex parte Earl of Chester*, 7 Ves. Jr. 374, "that an instrument imperfect to the point to which it is directed, shall not operate as a revocation of a will duly executed." *Godbold v. Vance*, 14 S. C. 458, 475.

A paper in order to be testamentary must be ambulatory and revocable, therefore where there is a document that is a contract *inter vivos*, it cannot be revoked by the subsequent will of one of the parties. *Book v. Book*, 104 Pa. St. 240.

(a) *Vynior's case*, 8 Co. 82, a. *Swinb. Pt. 7*, s. 14, pl. 2.

(b) The making of a will is but the inception of it, and it doth not take effect till the death of the testator: for *omne testamentum morte consummatum est, et voluntas est ambulatoria usque ad extremum Vitæ exitum*. Then it would be against

(c) *Ante*, p. \*8.



seem, in some cases, be enforced in equity as a compact.<sup>2</sup> In *Dufour v. Pereira* (*d*), Mrs. Camilla Rancer, the wife of Mr. Rancer, being entitled to a legacy under the will of her aunt, she and her husband agreed to make a mutual will, which they did, and both executed it; the husband died; the wife proved his will, and afterwards made another will. And the question was, whether it was in the power of the wife to revoke the mutual will. Lord Camden, C. "This question arises on a mutual will of the \*husband and wife; the will is jointly executed by them; what the wife disposes of, is the residue of her aunt's estate, given to her by her will. I do not find the cases go so far, as to consider a legacy to a wife, as excluding the husband by implication: but there is no occasion to determine that question: the question is, as the husband by the mutual will assents to his wife's

the nature of a will to be so absolute, that he who makes it cannot countermand it: Forse and Hembling's case, 4 Co. 61 b.

2. It is said that there can be no such thing as a joint will, to take effect upon the death of the survivor. And the reason assigned is because the will must take effect at the death of the testator, and it is impossible to postpone the time at which it shall take effect to some day still in the future, *Hershy v. Clark*, 35 Ark. 17; and in Iowa the court questions whether or not a joint will is valid, *Murphy v. Black*, 44 Iowa 176; and in Ohio it is said that joint wills are not valid, *Walker v. Walker*, 14 Ohio St. 157; while the contrary is maintained in New York. *Ex parte Day*, 1 Bradf. 476.

But it appears that the fact that at the time of the execution of a will by a husband, his wife made her will, leaving all her property to him, does not of itself make the wills mutual wills. In order to make a mutual will, the instrument, or instruments, must be executed by both parties under an agreement to make such disposition of the property of each, that the survivor will be entitled to the property of the one dying first, or the disposition of the property must be in one instrument executed by both of the par-

ties. *Dischler v. Van Den Henden*, 49 N. Y. Super. Ct. 508.

It is held, in Indiana, that where there are owners in common, they may dispose of the common property by a joint will, and upon the death of both, leaving the will unrevoked, it can be admitted to probate. *Black v. Richards*, 95 Ind. 184.

And it seems that where husband and wife make a will, joint in form, but which disposes of property solely belonging to him, and he thereafter dies solely seized thereof, such will is the several will of the husband, and the joinder of the wife has no effect upon the legal and disposing power of the husband, and all her acts and declarations are to be rejected as surplusage. *Allen v. Allen*, 28 Kans. 18; *Chaney v. Home F. & F. Miss. Soc.*, 28 Ill. App. 621.

Joint and mutual wills may be made by husband and wife, in Texas, and no separate acknowledgment by the wife is necessary. *March v. Huyter*, 50 Tex. 243.

As to the distinction between *double* wills and *joint* wills, see *Cawley's Estate*, 136 Pa. St. 628.

Conjunction or unity of confection in making wills is positively prohibited in Louisiana by Art. 1572, R. C. C.

See *ante* p. 9, n. 8.

(d) 1 Dick. 419.

right, and makes it separate, whether the second will by the wife is to be considered as void. It struck me at first, more from the novelty of the thing than its difficulty. The case must be decided by the laws of this country. The will was made here; the parties lived here; and the funds are here. Consider how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor, is not a confirmation of it. I am of opinion it is. It might have been revoked by both jointly, it might have been revoked separately, provided the party who intended it had given notice to the other of such revocation. But I cannot be of opinion, that either of them could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will. It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the court afterwards permit the other to break the contract? Certainly not. The defendant, Camilla Rancer, hath taken the benefit of the bequest in her favour by the mutual will, and hath proved it as such; she hath thereby certainly confirmed it; and therefore I am of opinion, the last will of the wife, so far as it breaks in upon the mutual will is void.<sup>3</sup> And I declare, that Mrs. Camilla Rancer, having proved the mutual will, after her husband's death, and having possessed all his personal estate, and enjoyed the interest thereof during her life, hath by those acts bound her assets to make good all her bequests in the said mutual will; and therefore let the necessary accounts be taken" (e).

\*This case was succeeded by that of *Walpole v. Lord Orford* (f), where the will of George, Earl of Orford, made in 1756, and Horace Lord Walpole's codicil of the same date, made in concert, constituted, in effect, a mutual will. Horace Lord Walpole died in 1757, without

3. Where wills were made by husband and wife pursuant to a mutual agreement, and the husband died leaving his will unrevoked, and the wife accepted the provisions in her favor there has been such a performance as to take the matter out of the statute of frauds, and equity will decree performance on the part of the wife, or take such steps as will pre-

vent her from violating her part of the agreement to the injury of the rights of others. *Carmichael v. Carmichael*, 72 Mich. 76.

Where a man made his will, bequeathing his property to his wife, upon the same day she by will devised all her property to her husband, while at the same time both joined in execution of an

(e) See this judgment also reported in 2 Hargr. Jurid. Arg. 272. 2 Hargr. Jurid. Exerc. 101.

(f) 3 Ves. 402.

revoking his part of the mutual will, namely the codicil of 1756, George Earl of Orford died in 1791; when it appeared that he had made a codicil in 1776; and this by reason of a reference to his last will, bearing date in 1752, was construed a revocation of his part of the mutual will, namely, the will of 1756. A case was then raised in equity, that the mutual will of 1756 became irrevocable on the death of Lord Walpole in 1757, though it was admitted to have been revocable by either during the joint lives of Lord Walpole and Lord Orford, with notice to the other. And the judgment of Lord Camden in *Dufour v. Pereira*, was mainly relied on in support of that position.<sup>4</sup> Lord Loughborough, however, refused to enforce the compact of the mutual will; but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness, of the compact; so that it leaves the principle of Lord Camden's decision in *Dufour v. Pereira* wholly unshaken (g).

And here it may be right to mention that although a will is always revocable notwithstanding a contract not to revoke it, yet such a contract is not illegal and enforceable if made <sup>Of contracts not to revoke.</sup> for good consideration and in such form as to comply with the Statute of Frauds (h). But a mere representation of an intention as distinguished from a contract cannot be enforced, although such representation may have been intended to be acted on and in fact have been acted on (i).<sup>5</sup>

instrument for the disposition of the property after the decease of both; the wife died first, and her separate will was admitted to probate, it was held that the joint will should be admitted to probate, but without the appointment of executors; the judge remarking that it is not the duty of the court of probate to determine the legal effect of this instrument, that can only be done when the interests of the legatees are assigned. *Murphy v. Black*, 41 Iowa 488.

4. It is held in Pennsylvania, that where one makes a joint will, he may revoke it after the death of the other testator. *Cawley's Estate*, 136 Pa. St. 628.

And in Kentucky it is said that a joint

will of two persons is not invalid, as being irrevocable, as it may be revoked by either so far as his interest is concerned, even after the death of the other. *Hill v. Harding*, 13 Ky. L. Rep. 380, 17 S. W. 199.

(g) See 1 Add. 278, note by the learned Reporter to *Hobson v. Blackburn*, and also Mr. Hargrave's remarks on the case of *Walpole v. Lord Orford*, in 2 Jurid. Arg. 272. 2 Jurid. Ex. 101. See also *Chester v. Urwick*, 23 Beav. 407.

(h) *Hammersley v. De Biel*, 12 Cl. & F. 45. *Robinson v. Ommanney*, 23 C. D. 285.

(i) *Maddison v. Alderson*, 8 A. C. 467, disapproving *Loffus v. Maw*, 3 Giff. 592,

5. However, in Michigan it is held that a promise of a father to his daughter,

in consideration of her remaining with him after her majority, to make her a

\*By stat. 1 Vict. c. 26, s. 20, it is enacted, "that no Will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, [*i. e.* by marriage under sect. 18,] or by another Will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same (*k*) and executed in the manner in which a Will is

1 Vict. c. 26, s. 20.  
No will to be re-  
voked but by  
another will or  
codicil, or by a  
writing executed  
like a will, or by  
destruction:

in which case Stuart, V.-C. held that, where a testator had induced his niece to continue her services on the faith that he would leave her certain property, and took her to his solicitor's office to see a codicil to that effect, the niece was entitled to have the trusts in her favour, thereby declared, performed, notwithstanding the fact that the testator had by a subsequent codicil revoked the codicil in her favour.

(*k*) Where a testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words signed by himself and attested by two witnesses, "we are witnesses of the erasure of the above," it was held that the codicil was revoked for the words were "a writing declaring an intention to revoke" it within this section. In the Goods of Gosling, 11 P. D. 79.

provision in his will, is not enforceable. *Savings Bank v. McLean*, 84 Mich. 625.

But where a stepson gave up his home and moved from Ohio to Michigan and took charge of his step-father's real estate and managed his farm for thirty years on an agreement that the real estate should be devised to him and his step-father made a will to that tenor and effect, but subsequently, in his lifetime, conveyed a part of the real estate to nephews, the conveyances were set aside and it was held that the will could not be revoked. *Leonardson v. Hulin*, 64 Mich. 1.

Yet, in *Bird v. Pope*, 73 Mich. 483, it was held to be entirely competent for a person to make a valid agreement to dispose of his property, in a particular manner, by his last will and testament.

So too in Indiana it is well established that a man may validly bind himself, or his estate, by contract, to make any particular disposition (if it is itself lawful) by his own will. *Bell v. Hewitt*, 24 Ind. 280; *Caviness v. Rushton*, 101 Id. 500.

And in Alabama a promise to make a will, in consideration of a deed, pres-

ently executed by the promisee to the promisor, is supported by a valuable consideration and is valid and binding, *Manning v. Pippen*, 86 Ala. 357; and an agreement to make a will (and the will, in pursuance thereof, executed) in consideration of past and future care, will be enforced and such will cannot be revoked by a later will. *Bolman v. Overall*, 80 Ala. 451.

But in a case where a father gave his son, at marriage, the use of a farm, with the understanding that it was to be devised to him; afterwards that son died and a second son was put in possession and the income of the amount of the first son's share in his father's then estate was paid to his widow and the farm was devised to the second son; it was held that the agreement to devise to the first son, could not be enforced by his widow. *Snyder v. Snyder*, 77 Wis. 95.

But it is held, in New York, that there is no power in the Surrogate's Court to enforce an agreement to make an irrevocable will. *Re Gloucester*, 31 N. Y. St. Rep. 901.

hereinbefore required to be executed (*l*), or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." 6

(*l*) There seems to be some doubt as to whether a writing which only revokes the will to which it is attached ought to be admitted to probate: In the Goods of Fraser, L. R. 2 P. & D. 40. See In the Goods of Hicks, L. R. 1 P. & D. 683. In the Goods of Hubbard, L. R. 1 P. & D. 53.

6. Mere declarations, unaccompanied by some unequivocal act of revocation (as burning, tearing or cancellation), will not amount to a revocation. Written instructions even to destroy the will are not of themselves sufficient. *Johnson v. Brown*, 51 Tex. 65; *Tynan v. Paschal*, 27 Id. 303; *Waterman v. Whitney*, 11 N. Y. 160; *Slaughter v. Stephens*, 81 Ala. 418; *Hoitt v. Hoitt*, 63 N. H. 475; *Shaw v. Shaw*, 1 Dem. 21; *Provis v. Reed*, 5 Bing. 435; *Neiheisel v. Toerge*, 4 Redf. 332; *Cudney v. Cudney*, 68 N. Y. 148; *Sisson v. Conger*, 1 T. & C. 569; *Griffith v. Diffenderfer*, 5 Md. 480; *Haynes v. West*, 37 Ind. 24; *Dickie v. Carter*, 42 Ill. 376, 388; *Marr v. Marr*, 2 Head 303; *Perjue v. Perjue*, 4 Iowa 520; *Boylan ads. Meeker*, 4 Dutch. 274; *Lewis v. Lewis*, 2 Watts & S. 455; *Boudinot v. Bradford*, 2 Yeates 170; *Dan v. Brown*, 4 Cowen 483; *Hylton v. Hylton*, 1 Gratt. 161; *Jackson v. Kniffen*, 2 Johns. 31; *Stevens v. Vancleve*, 3 Wash. C. C. 465; *Comstock v. Hadlyme*, 8 Conn. 263; *Wittman v. Goodhand*, 26 Md. 95.

Where a statute provides the manner in which wills may be revoked, that manner must be pursued. *Gay v. Gay*, 60 Iowa 415, 418; *Wright v. Wright*, 5 Ind. 391; *Runkle v. Gates*, 11 Id. 95; *Blanchard v. Blanchard*, 32 Vt. 62; *Gains v. Gains*, 2 A. K. Marsh. 190; *Clingan v. Mitcheltree*, 31 Pa. St. 25.

And § 2296 Code of Alabama provides that verbal declaration by the testator of a present revocation, or an intention to revoke in the future is insufficient. *Slaughter v. Stephens*, 81 Ala. 418. In New York, it is held that under 2 R. S. 64 § 42 there can be no implied revocation by means other than such as are defined in the statute. *Ordish v. McDermott*, 2 Redf. 460.

No valid written will can be revoked, in Texas, except in one of the modes pointed out by statute. *Morgan v. Davenport*, 60 Tex. 230.

A will properly executed can be revoked only in the manner pointed out by statute, and the law is well settled, upon the highest authority, that it cannot be changed, revoked or annulled, or in any way affected by the subsequent verbal declarations of the testator. *Noyes' Will*, 61 Vt. 14; *Jackson v. Kniffen*, 2 Johns. 31; *Dan v. Brown*, 4 Cow. 483; *Jackson v. Betts*, 6 Id. 377; *Waterman v. Whitney*, 11 N. Y. 157; *Marx v. McGlyn*, 88 N. Y. 357, 374; *Sandford v. Ellithorp*, 95 N. Y. 48, 54; *Hargraves v. Read*, 43 Ga. 142; *Boylan v. Meeker*, 4 Dutch. 274; *Comstock v. Hadlyme*, 8 Conn. 254; *Moritz v. Brough*, 19 Serg. & R. 403; *Will of Ladd*, 60 Wis. 187.

The statute should have a strict construction. *Dunlop v. Dunlop*, 10 Watts 153; *Cavett's Appeal*, 8 Watts & S. 26; *Greenough v. Greenough*, 1 Jones (Penna.) 496; *Lewis v. Lewis*, 2 Watts & S. 455.

The statutory provisions in the United States are as follows: In *Alabama* it was required as early as 1806 (*Toulm. Dig.* 883, § 6,) that a revoking will must be in writing, and now, by the code (1852, § 1613; 1876, § 2296,) revocation must

And by sect. 21, it is further enacted, "that no obliteration, inter-

1 Vict. c. 26, s. 21.  
No alteration in  
a will shall have  
any effect unless  
executed as a  
will.

lineation, or other alteration made in any Will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration

be made as in section 20 of the act of 1 Vict., c. 26, the revoking will to be executed as other wills in Alabama, and the act of cancellation, if performed by another for the testator, to be proved by two witnesses. In *Arkansas* there can be no revocation of a written will except by other will in writing, executed according to *Arkansas* laws, or by burning, tearing or other destruction, as in the statute of *Victoria*, to be proved by two witnesses, if performed for testator by another (1815, Comp. T. L. 556, § 3; 1847, R. S., c. 170, § 6; 1873, R. S., § 5765.) In *California* revocation can only be by will executed under *California* laws, or by cancellation as above, and this since 1872 must be proved by two competent witnesses (1850, P. L. 178, c. 72, § 10; 1872, Code, §§ 6292-3.) But a later will is no revocation of an earlier will, unless it be inconsistent with it (1872, Code, § 6296.) In *Colorado* there can be no verbal revocation of a will but only by cancellation or writing executed like a will (1861, P. L. 403, § 16; 1867, R. S., c. 90, § 4; 1877, G. L., § 2791.) So in the *District of Columbia* (1816, Code, p. 78, § 76; 1857, Rev. Code, c. 52, § 12.) So in *Connecticut* (1821, Rev. 209, § 6; 1854, Stats. 483, § 6; 1866, G. S. 401, § 6; 1875, G. S. 368, § 5.) In *Delaware* a will may be revoked by cancellation or writing executed like a will, as in section 20 (1753, 1 St. L. 342, § 2; 1852, Rev. Code 272, § 10; ed. 1874, p. 508, § 1652.) So in *Florida* (1822, P. L. 52, § 3; 1823, P. L. 101, § 2; 1828, P. L. 141, § 52); but a will of personal property may be revoked by parol if reduced to writing and read to, and approved by, the testa-

tor, and proved by three witnesses (1872, Bush Dig. 76, § 6.) In *Georgia*, as in *Delaware* (1858, Code, §§ 2436-7; 1873, Id., §§ 2472-3.) In *Idaho*, by a written will or codicil or other writing executed like a will, or by burning, tearing, cancelling, obliterating or destroying (R. S. 1887, §§ 5731, 5732.) So in *Illinois* (1829, Code 196, § 14; 1833, P. L. 616; 1845, R. S. 539, § 15; 1872, R. S., c. 148, § 17,) the act prohibiting all "verbal" revocation of written wills. In *Indiana* a written will of personal property might formerly be revoked by parol, if such revocation were reduced to writing before testator's death and approved by him, and proved by two witnesses (1824, R. L., c. 45, § 16; 1831, P. L. 274, § 19; 1838, Rev. 315, § 19,) and not otherwise. Revocation by cancellation or by will, executed as other wills are executed, is provided for, and a will cannot be otherwise revoked (1818, R. L. 1824, c. 45, § 6; 1831, P. L. 272, § 14; 1838, Rev. 315, § 14; 1852, R. S. 314, § 19; 1876, R. S. 576, § 19.) In *Iowa* there could be no parol revocation of a written will (1839, T. L. 476, § 15,) for which was substituted in 1843 (P. L. 668, § 9,) a provision for revocation by change of circumstances, itself omitted in the code (1873, § 2329.) Revocation may be by cancellation or will executed according to *Iowa* law, and since the code such cancellation must be witnessed by two witnesses (1839, T. L. 476, § 15; 1843, P. L. 668, § 9; 1873, Code, §§ 2329-30.) In *Kansas* revocation must be by cancellation, as in the statute of *Victoria* or will executed according to *Kansas* law (1855, T. L., c. 164, § 5; 1859, P. L., c. 131, §§ 12, 13; 1865, P.

shall be executed in like manner as hereinbefore is required for the execution of the Will; but the Will, with such alteration as part

L., c. 86, § 39; 1868, G. S., c. 117, § 37; ed. 1878, § 6149.) In *Kentucky* revocation of a will may be either by destruction, as in section 20, *supra*, or by a revoking will executed in accordance with the Kentucky statute, or by a writing "declaring an intention to revoke," and executed as a will (1785 and 1797, 1 Litt. Stats. 611, § 3; 1851, R. S., c. 106, § 10; 1873, G. S., c. 113, § 10.) Under the original act a will of personal property could only be revoked in writing (1 Litt., *supra*, § 7.) In *Louisiana* the same formalities are required for revocation as for execution of a will (1825, Code, § 1685; ed. 1870, § 1692.) So in *Maine*, unless by destruction, as in section 20, *supra*, or by change of circumstances (1821, P. L. 137, § 2; 1871, R. S. 563, § 3.) In *Maryland* a written will of personal property can be revoked by parol, if reduced to writing and approved by the testator before his death and proved by three witnesses (1810, P. L., c. 34, § 3; 1860, Code, art. 93, § 303; 1878, Rev. Code 419, § 6.) Other wills can only be revoked as in section 20, *supra* (1860, Code, art. 93, § 302; 1798, c. 101, sub. c. 1, § 4; 1878, Rev. Code 419, § 5.) In *Massachusetts* a written will of personal property could formerly be revoked by parol, if such revocation were reduced to writing and approved by testator, and proved by three witnesses (1692, Acts, &c., Mass. Bay, vol. I., p. 47; 1784, 1 Laws 109, § 6.) But now wills can only be revoked as in section 20, *supra* (1692, Acts, &c., Mass. Bay, vol. I., p. 46; 1859, G. S., c. 92, § 11); or by change of circumstances. In *Michigan* no will can be revoked except by cancellation, as in section 20, or revoking will executed according to Michigan statute (1809, 2 T. L. 13, § 1; 1811, 1 T. L. 160, § 2; 1857,

Comp. L., c. 92, § 4330; 1871, Comp. L., c. 154, § 9); or by change of circumstances. Formerly a written will of personal property could be revoked by a parol will reduced to writing and approved by the testator and proved by three witnesses (1809, 2 T. L. 13, § 5.) In *Minnesota* a will can only be revoked as in section 20 (1851, R. S., c. 53, § 10; 1866, G. S., c. 47, § 9); or by change of circumstances. In *Mississippi*, only as in section 20 (1821, Hutch. Code 647, § 15; 1871, Rev. Code, § 2389.) In *Missouri* likewise (1808, 1 T. L. 140, §§ 20, 21; 1814, Id. 405, § 27; 1821, Id. 786, § 3; 1825, R. L. 790, § 3; 1835, R. S. 617, § 5; 1845, R. S. 1078, § 6; 1855, R. S., c. 167, § 5; 1865, G. S., c. 131, § 4; 1879, R. S., § 3963.) In *Montana* by a writing executed as a will must be, or it may be burnt, torn, cancelled, obliterated or destroyed (1887, C. S. 2d div., c. 16, §§ 450-452.) In *Nebraska* likewise, or since 1860 by change of circumstances (1855, P. L. 63, § 52; 1856, P. L. 95, § 15; 1860, P. L. 77, § 10; 1866, R. S., c. 14, § 132; 1873, G. S., c. 17, § 132,) but if the destruction of the will be done for the testator by another, such act must formerly have been attested by witnesses like a will (1856, P. L. 95, § 19; and see 1855, P. L. 63, § 53.) In *Nevada* revocation may be as in section 20, *supra*, or by change of circumstances (1862, P. L., c. 61, § 8.) So in *New Hampshire* (1822, P. L. 10, § 7; 1878, G. L., c. 193, § 14.) By the former of these acts a nuncupative will might be revoked by parol, if the words were reduced to writing and read to the testator in the presence of three witnesses, and approved by him. In *New Jersey* wills may be revoked only as in section 20 (1795, Pat. Rev. 190, § 2; 1851, P. L. 218, § 2; 1877, Rev. 1243, § 2, and 1248, § 23.)

thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or

By the act of 1795, *supra*, which was applicable only to devises of an estate or interest in land, three witnesses were necessary to the execution of a revoking will. This was reduced to two by the act of 1851, *supra*, but the act of 1795 was re-enacted as a revised act in its original form, and now stands with the act of 1851. A written will of personal property may be revoked by parol, if the revoking words are reduced to writing and read to and approved by the testator in the presence of three witnesses (1795, Pat. Rev. 190, § 17; 1877, Rev. 1246, § 14.) In *New York* the revocation of a will in writing must be executed like a will (1787, 1 Greenl. 386, § 3; 1829, 2 R. S. 56, § 42.) Prior to the Revised Statutes of 1829 a will of personal property might have been revoked by words, if they were reduced to writing and read to and approved by the testator in the presence of three witnesses (1787, 1 Greenl. 391, § 18.) The provision for destruction or cancellation of a will, and for revocation by another will, are the same as those of the English statute (1787, 1 Greenl. 387, § 3; 1829, 2 R. S. 64; 6th ed., vol. III., p. 63, § 40.) In *North Carolina* all devises of real property, and by the revised code, all written wills can only be revoked as in section 20, *supra*, or by a holograph will proved by three witnesses (1819, P. L., c. 1004, §§ 1, 2; Rev. Code, c. 119, § 22; 1873, Batt. Rev., c. 119, § 41.) By the act of 1784 (c. 204, § 13,) a written will of personal property might have been revoked by parol, if the revoking words were reduced to writing, and read to and approved by the testator, and proved by two witnesses. In *North Dakota*, revocation must be by a written will executed with due formality, or by being burnt, torn, cancelled, obliterated or destroyed,

with intent (Dak. C. L. 1887, § 3324). In *Ohio*, since 1808, a will may be revoked by cancellation as in section 20, or by a will or writing executed as wills are required to be executed in Ohio (1808, 6 L. 64, § 3; 1840, 38 L. 120, § 41; 1852, 50 L. 297, § 39; 1878, 75 L. 838, § 41; 1880, Rev., § 5953.) So in *Oregon* (1850, G. S. 274, § 6; 1855, P. L. 384, § 6); and *Pennsylvania* (1833, P. L. 249, § 13; Purd. Dig. 1872, p. 1474, § 16); and *Rhode Island* (1857, R. S. 356, § 5; 1872, G. S. 374, § 6); and *South Carolina*, as regards real property (1789, 5 Stats. at Large 109, § 3; 1873, R. S. 442, § 7.) By the act of 1789 (§ 6) a nuncupative will might be revoked by parol, if the words were reduced to writing, and read to and approved by the testator and proved by three witnesses. In *South Dakota* the provisions are the same as in *North Dakota*. In *Tennessee* this latter provision, copied from the act of 29 Car. II., has been in force since 1784 (P. L., c. 22, § 13; 1871, Comp. S., § 2167.) In *Texas* a will may be revoked by cancellation as in section 20, or by a subsequent will or writing executed according to the statutory requirements for wills (1840, P. L. 167, § 3; 1879, R. S., § 4861,) and this applies to wills of personal property as well (1840, *supra*, § 8.) In *Vermont* likewise (1797, Dig. L. 119, §§ 1, 5; 1851, Comp. S. 327, § 7; 1862, G. S., c. 49, § 7.) And in *Virginia*, and since 1873, the revoking will must express the intention to revoke (1748, 5 Stats. at Large 456, § 8; 1785, 12 Id., c. 61, § 3; 1792, 1 Id. (N. S.) 88, § 3; 1819, Rev. Code 376; 1873, Code 910, § 8.) The statute of 1748 (5 Stats. at Large 457, § 12,) also contained a provision for revoking written wills of personal property by parol, if reduced to writing and read to and approved by the



on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will.”<sup>7</sup>

\*It may here be observed that, by reason of the above enactment contained in the 20th section, a testator cannot delegate his power of revoking the will, by inserting in it a clause conferring on another an authority to destroy it after his death (m).

A testator cannot authorize a will to be destroyed after his death.

testator, and proved by two witnesses. This was done away in 1785 (*supra*, § 7,) and in 1840 (P. L. 50) the distinction between execution of wills of realty and of personalty was abolished. In *Washington* a will may be revoked by a subsequent will in writing, or by burning, cancelling, tearing or obliterating (1 Hill's Stats. & Codes §§ 1461—1464.) In *West Virginia* the law as to forms of revocation is the same as that of Virginia (1868, Code, c. 77, §§ 6, 7.) In *Wisconsin* a devise of land can be revoked only as in section 20 (1838, T. L. 112, § 22; 1849, R. S., c. 66, § 10; 1878, R. S., § 2290.) By the act of 1838 (T. L. 302, § 27,) a written will of personal property could only be revoked by parol, if the words were reduced to writing and read to and approved by the testator in the presence of three witnesses. In *Wyoming* the law is the same as in Washington, (1887, R. S. § 2238; S. L. 1882, c. 107 § 5).

7. The cancellation, obliteration or destruction of a will with intent to revoke the same refers to the whole will and not to a particular provision thereof; therefore when testator, after the execution of his will, makes erasures and interlineations therein, without intending to revoke and without re-executing the same, the will will be admitted to probate as originally executed. *Matter of Prescott*, 4 Redf. 178.

So where the will consisted of six

pages, four of which were marked across as having been stricken out at some time after its execution, with a marginal note on each of the four pages, in the handwriting of the testator, “I pronounce this void,” this is not a sufficient revocation within the statute of New York and the whole will will be admitted to probate. *Gugel v. Vollmer*, 1 Dem. 484.

An erasure in a will, after its execution, does not work such revocation as to avoid the will *in toto*. *Smith v. Fenner*, 1 Gall. C. C. 170; *Kirkpatrick's Will*, 7 C. E. Gr. 463; *Clark v. Smith*, 34 Barb. 140; *Cogbill v. Cogbill*, 4 Hen. & Munf. 467; *Bigelow v. Gillott*, 123 Mass. 102; *Wolf v. Bollinger*, 62 Ill. 368; *McPherson v. Clark*, 3 Bradf. 92; *Warner v. Warner*, 37 Vt. 356.

But a careful interlineation in a will is not an obliteration. *Means v. Moore*, 3 McCord 282; *Wheeler v. Bent*, 7 Pick. 61; *Jackson v. Holloway*, 7 Johns. 395; *Doane v. Hadlock*, 42 Me. 72; *Dixon's Appeal*, 55 Pa. St. 424.

And as to the changing of executors in a duly executed will, see *Wells v. Wells*, 4 Mon. 152.

But it seems that the word “obsolete,” written on the margin of the first page only, and opposite one clause of the will, applies to the whole will, and not merely to the clause against which the word is written. *Lewis v. Lewis*, 2 Watts & S. 455.

(m) *Stockwell v. Ritherdon*, 1 Robert. 661, per Sir H. Jenner Fust.

## SECTION I.

*Revocation by Destruction, Burning, Tearing, Cancellation, or Obliteration.*

It will be observed, that the 20th section of the Wills Act confines the modes of total revocation by means of any act done to the instrument itself, to "burning, tearing, or otherwise *destroying*." <sup>8</sup>

1 Vict. c. 26, s. 20:

It is obvious, also, that a part only of a will may be revoked in the manner here described; for the statute says that "no Will, or *any part thereof*, shall be revoked otherwise than, &c., or by the burning, tearing, or otherwise destroying the same," &c. (n).

And as to partial revocation, it is further enacted by sect. 21, that no obliteration, interlineation, or *other alteration*, made after the execution, shall be valid or have any effect, (except so far as the words or effect of the will before such alteration shall not be apparent) unless *such alteration* shall be executed in like manner as is required for the execution of the will.

s. 21:

The cancellation, obliteration and destruction of the signature of a will must be considered as a revocation of the whole instrument. Will of Clark, Tuck. 445, 454; Smock v. Smock, 3 Stock. 156; Baptist Church v. Robbarts, 2 Pa. St. 110; Case of Evans, 58 Id. 238; Bethell v. Moore, 2 Dev. & Batt. 316; Cook's Will, 5 Clark 1.

And in such case the contestant will not be required to account for the mutilation. Clark's Will, *ubi supra*.

8. Kennedy v. Upshaw, 64 Tex. 411; Toebe v. Williams, 80 Ky. 661; Brown v. Thorndike, 15 Pick. 388; Hise v. Fincher, 10 Ired. 139; Sumner v. Sumner, 7 Harr. & J. 388; Hollingshead v. Sturgis, 21 La. Ann. 450; Belt v. Belt, 1 Harr. & McH. 409; Spoonemore v. Cables, 66 Mo. 579; Smith v. Dolby, 4 Harr. (Del.) 350; White v. Casten, 1 Jones L. 197; Barker v. Bell, 46 Ala.

216; Timon v. Claffey, 45 Barb. 438; Burns v. Burns, 4 Serg. & R. 295; Clingan v. Mitcheltree, 31 Pa. St. 25; Marr v. Marr, 2 Head 303; Boylan *ads*. Meeker, 4 Dutch. 274; Mundy v. Mundy, 2 McCart. 290; Wright v. Wright, 5 Ind. 389; Gains v. Gains, 2 A. K. Marsh. 190; Overall v. Overall, Lit. Sel. Cas. 513; Smith v. Clark, 34 Barb. 140; Johnson v. Brailsford, 2 Nott & McC. 272; Means v. Moore, 3 McCord 282.

The cancellation, obliteration or destruction of a will with intent to revoke the same declared by the statute, in New York, (3 R. S. 63 [6 ed.] § 40) to constitute a revocation of the same refers to the whole will and not to a particular portion thereof. Matter of Prescott, 4 Redf. 178.

(n) Clarke v. Scripps, 2 Robert. 563, 567, by Sir J. Dodson.

By the sixth section of the Statute of Frauds, with respect to devises of lands, revocations of this nature were confined to "burning, cancelling, tearing, or obliterating the same." Statute of Frauds, s. 6.

This section, however, did not extend to wills of personal \*property; but with respect to them it was merely provided, by sect. 22, that no will concerning any goods or chattels or personal estate should be repealed or altered "by any words." s. 22.

The 34th section of the Wills Act enacts, that "this Act shall not extend to any Will made before the 1st day of January, 1838;" but the interpretation of the act, which has been adopted by the Prerogative Court, and approved by the Privy Council, is, that the operation of the act was meant only to be suspended with respect to the execution of such wills as were already made at the passing of the act and those made between the passing of the act and the 1st of January, 1838, and that a will made before the statute came into operation is not exempted from the necessity of complying with the provisions of the new law *with respect to any act done to it after that period* (o).

As to the question whether in a case where unattested alterations appear on the face of a will, and no information can be given, and there are no circumstances, one way or the other, to show when the alterations were made, the presumption is, that they were made before or after the execution of the will, it has been established by the judgment of the judicial committee of the Privy Council, in *Cooper v. Bockett* (p),

To what cases the Wills Act extends:

every act done to a will after Jan. 1, 1838, must be in compliance with the statute though the will be made before that date.

Presumption as to when alterations, &c., shall be presumed to have been made.

9. All wills are of equal grade or solemnity to the extent of their valid provisions, after probate; therefore a later informal will, neither signed nor witnessed, set up as to personalty, will, to that extent, revoke a previous holographic will. *Reagan v. Stanley*, 11 Lea 316.

But it is quite generally held that no written will can be revoked by a nuncupative will. In Wisconsin the statute prohibits the revocation *pro tanto* of a written will by a nuncupative codicil.

*Brook v. Chappell*, 34 Wis. 405. And by statute in Ohio no nuncupative will can avail to revoke, either wholly or in part, a duly-executed written will, *McCune v. House*, 8 Ohio 144; but under certain conditions it may in Tennessee. Code 1858, tit. III., ch. 1, § 2167.

(o) *Hobbs v. Knight*, 1 Curt. 768. *Crocker v. Lord Hertford*, 4 Moo. P. C. 339, 356.

(p) 4 Notes of Cas. 685. S. C. 4 Moo. P. C. 419

(which has been confirmed by several subsequent cases) (*q*), that the presumption in such a case is that the alterations were made *after* the \*execution (*r*).<sup>10</sup> So where a will and codicil were in the testator's custody, and the will is found mutilated after his death, in the absence of evidence, the presumption is that it was mutilated by the testator, after the

**Presumption in absence of evidence where will found mutilated after testator's death.**

(*q*) *Gann v. Gregory*, 3 De G. M. & G. 780, by Lord Cranworth. *Doe v. Palmer*, 16 Q. B. 747. In the Goods of James, 1 Sw. & Tr. 238. In the Goods of White, 30 L. J., P. & M. 55. But in *Williams v. Ashton*, 1 Johns. & H. 115, 118, Wood, V. C., said he did not think it was quite a correct mode of stating the law, to say that alterations in a will are presumed to have been made at one time or at another; but that the correct view is that the *onus* is cast on the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed.

(*r*) In order to rebut this presumption, declarations of the testator, before the execution of his will, that he intended to provide by his will for a person who would be unprovided for without the alteration in question, are admissible evidence; but not declarations, after the execution, that the alteration had been made previously: *Doe v. Palmer*, 16 Q. B. 747. *Dench v. Dench*, 2 P. D. 60. See *post*, Pt. I. Bk. IV. Ch. III. § V. But where the deceased executed a will and codicil, the latter referring to the former by its date, the name of the executor appointed by the will being written on an erasure, the court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor: In the Goods of Sykes, L. R. 3 P. & D. 26. The fact that a date is affixed to the alteration is not evidence to rebut the presumption: In the Goods of

Adamson, L. R. 3 P. & D. 253. It is not sufficient to prove that the testator told the witnesses at the time of attestation, that he had made some alterations in his will, but did not allow them to see what the alterations were: *Williams v. Ashton*, 1 Johns. & H. 115. But when a will has been prepared in the first instance with the amounts of the legacies in blank, and the amounts, involving, for want of space, some interlineations and alterations, have been afterwards filled in by the testator himself, the Court will presume that they were filled in previous to execution: for it cannot be supposed that the execution was prior to the insertion of the legacies: *Birch v. Birch*, 1 Robert. 675. In the Goods of Cadge, L. R. 1 P. & D. 543. And the mere circumstance of the amount of a legacy, or name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, "or other alteration" within the meaning of the statute; nor does any presumption arise against the will having been duly executed as it appears: *Greville v. Tylee*, 7 Moo. P. C. 320. See also, In the Goods of Swindin, 2 Robert. 192. Where some trifling alterations and interlineations appeared on the face of a holograph will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert that, in his opinion, they were written at the same time as the rest of the will, on that evidence the Court admitted them to probate: In the Goods of Hindmarch, L. R. 1 P. & D. 307.

10. And the presumption of revocation

execution of \*the codicil(s). Consequently, if the will is dated on or after Jan. 1st, 1838, it is obvious that the alterations also must be taken to have been made after the new act came into operation. It has also been held, that this presumption is not at all varied or altered by the circumstance of a codicil to the will having been duly executed: 11 The presumption of law must still be that the alterations were made after the execution of the codicil (t); unless there be proof or internal evidence to the contrary, in which case the codicil, being a republication of the will, would republish the will with the alterations (tt).

Presumption as to alterations in will dated on or after 1 Jan., 1838.

Presumption not altered by fact that codicil has been duly executed.

But if the will is dated *before* the 1st of Jan., 1838, the point does not appear to be yet settled, whether the presumption is that they were made before or after the act came into operation; for though they must be taken to have been made after the execution of the will, it does not follow that they were on or after Jan. 1st, 1838 (u). It may be observed that in the instance of an unattested will without date, where the case is bare of circumstances from which the time when it was made may be inferred, it has been held that the presumption is that it was made before the act came into operation (v).

No presumption as to alterations where will is dated before 1 Jan. 1838.

Presumption in absence of evidence in case of unattested undated will.

With respect to what shall amount to an act of destruction, if done before January 1, 1838, sufficient to operate as a total revocation, see the former Editions of this Work, Pt. I., Bk. II., ch. 3, § 1.

Act of Revocation before 1 Jan. 1838.

arising from the spoliation of a will is greatly strengthened by proof of declarations by the testator to the effect that he had destroyed his will. *Behrens v. Behrens*, 47 Ohio St. 323.

(s) *Christmas v. Whinyates*, 3 Sw. & Tr. 81.

11. But parol evidence of the Acts and declarations of the testator may be admitted to determine whether the will, found torn or cut, was mutilated by the testator and with the intention in that manner to revoke it. *Patterson v. Hickey*, 32 Ga. 156; *Lawyer v. Smith*, 8 Mich. 411; *Dan v. Brown*, 4 Cowen 483; Col-

*lagan v. Burns*, 57 Me. 449; *Harring v. Allen*, 25 Mich. 505.

(t) *Lushington v. Onslow*, 6 Notes of Cas. 183. In the Goods of *Bradley*, 5 Notes of Cas. 186.

(tt) In the Goods of *Sykes*, L. R. 3 P. & D. 26. *Tyler v. Merchant Taylors Co.*, 15 P. D. 216.

(u) See In the Goods of *Pennington*, 1 Notes of Cas. 399. *Wynn v. Heveringham*, 1 Coll. 630.

(v) *Pechell v. Jenkinson*, 2 Curt. 273, *ante*, p. \*64. And on the authority of this case, and of In the Goods of *Pennington*, *ante*, note (u), Sir C. Cresswell

\*With respect to the acts of destruction or cancellation done after the Wills Act came into operation: It will be observed, that the words "cancelling" and "obliterating," which occur in the Statute of Frauds, are omitted in the 20th section of the Wills Act, and that the words "otherwise destroying," are substituted. It has been considered that these latter words mean modes of destruction *ejusdem generis*, as cutting, throwing into water, or the like, and, therefore, exclude cancelling (*w*). And it has been argued, that a still narrower construction ought to prevail, *viz.* that a revocation of a will under the new law, by any mode short of actual destruction or annihilation, can only be by burning or tearing. In *Hobbs v. Knight* (*x*), Sir Herbert Jenner Fust held, that the excision of the name of the testator amounted to a revocation of the will under the terms "otherwise destroying" (*y*); and that it was not necessary, in order to operate a revocation, that the whole instrument should be destroyed; it was sufficient if the entirety or essence of the thing were destroyed: In the present case, the name of the testator, an essential part of the will, had been removed: 12 And the learned judge proceeded to state that the inclination of his opinion was, upon the same principle, that a testator might revoke his will by obliterating his signature to it, if the obliteration amounted to a destruction; if the testator had so carefully obliterated it that it was perfectly illegible: And further, by parity of reasoning, that if the names of the attesting

held, *hæsitans*. that the presumption is the same as to alterations: In the *Goods of Streaker*, 28 L. J., P. M. & A. 50. See also *Benson v. Benson*, L. R. 2 P. & D. 172. As to presumptions in the case of alterations in a will of an officer in actual service, see In the *Goods of Tweedale*, L. R. 3 P. & D. 204.

(*w*) Sugden's Essay, p. 46. Cancellation by striking through with a pen is not a revocation under the Wills Act: *Stephens v. Tapprell*, 2 Curt. 458. Even though the striking through be done *animo revocandi*: In the *Goods of Rose*, 4 Not. of Cas. 101. In the *Goods of Brewster*, 29 L. J. P. & M. 69. A symbolical burning, tearing, or destruction will not do: there must be the act as well as the in-

tention. All the destroying in the world without intention will not revoke a will: nor all the intention in the world without destroying: there must be the two: *Per James, L. J., Cheese v. Lovejoy*, 2 P. D. 251-253.

(*x*) 1 Curt. 768.

(*y*) It is sufficient revocation within the section if the signature of the testator is scratched out as with a knife. In the *Goods of Morton*, 12 T. D. 141.

12. Under § 19 of the Indiana act (2 R. S. 1876, p. 570) the erasure, by the testator, of his signature, designedly and deliberately made, with the intention to revoke, is a sufficient revocation of the entire will. *Woodfill v. Patton*, 76 Ind. 575.

witnesses were taken away by the testator *animo revocandi*, it would be a good destruction of the will under the act: The learned judge likewise observed, that if the signature had been burnt or torn out, that would be clearly sufficient to revoke: and that if it were necessary to determine the point, he thought it would not be difficult to hold, that cutting is equivalent to tearing. This decision was cited by Sir John Dodson in *Clarke v. Scripps* (z); And that learned judge said, that he quite agreed with Sir H. J. Fust, that cutting and tearing are equivalent acts (zz).

It was held, in the construction of the Statute of Frauds, that in order to operate a revocation of a will, it was not necessary that the instrument itself should be consumed or torn to pieces (a).

It was decided, however, that there must be an actual burning of the will to some extent, in order to effect a revocation of this nature; and that an intention and attempt to burn was insufficient (b).<sup>13</sup>

Actual burning necessary: intention and attempt to burn insufficient.

(z) 2 Rob. 563, 570, 575.

(zz) Where, however, the will was found with the testator's original signature erased, but another signature appeared at a short distance beneath, Dr. Lushington held, on the facts and circumstances deposed to, that the original signature had not been erased *animo revocandi* as required by the new Wills Act, and that in the probate the original signature must be restored, and the second omitted: In the Goods of King, 2 Robert. 403. See also In the Goods of Coleman, 2 Sw. & Tr. 314. But where on the death of the deceased a will was found the signature to which had been cut out but gummed to its former place, it was held that the presumption of revocation was not rebutted although there was evidence of declarations by the deceased of intention to benefit his wife by will: *Bell v. Fothergill*, L. R. 2 P. & D. 148.

(a) *Bibb v. Thomas*, 2 W. Black. 1043.

(b) *Doe v. Harris*, 6 A. & E. 209. S. C. 2 Nev. & P. 615.

13. In order that there should be a valid revocation of a will, there must be the concurrence of the intention to revoke, and an act manifesting the intention. Therefore where an attempt is made to destroy a will it is essential that there should be some physical change in the will to substantiate such testimony as might be offered to show the intention of the testator to destroy his will. *Woodfill v. Patton*, 76 Ind. 575; *Gains v. Gains*, 2 A. K. Marsh. 190; *Clark v. Smith*, 34 Barb. 140; *DeLafield v. Parrish*, 25 N. Y. 9; *Mundy v. Mundy*, 2 McCart. 290; *Kent v. Mahaffey*, 10 Ohio St. 204; *Malone v. Hobbs*, 1 Rob. (Va.) 346; *Clingan v. Mitcheltree*, 31 Pa. St. 25. Hence where a testator directs his will to be burned, and the person so directed burns, in the presence of the testator, another paper, which the testator believes to be his will, the will not having been destroyed, there is no revocation. *Clingan v. Mitcheltree*, *ubi supra*; *Hise v. Fincher*, 10 Ired. L. 139. And this is the rule although the testator be blind. *Boyd v. Cook*, 3 Leigh 32.

There seems to be no reason why these decisions should not be applied to the Wills Act. But assuming them to be adopted as authorities in its construction, it is difficult to state any precise rule with respect to the extent to which the burning or tearing of the will must go, in order to \*effect a revocation: In giving judgment, in *Doe v. Harris*, Lord Denman observed, that doubt might be entertained now, whether the proof given in *Bibb v. Thomas* would be sufficient as to the acts of burning and tearing: Patteson, J., said, "There must be, at all events, a partial burning of the instrument itself: I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the Will is:" Williams, J., said, "The Will must be torn or burnt, and the question will always be whether that was done with intention to cancel; how much should be burnt, or whether the Will should be torn into more or fewer pieces, it is not necessary to lay down:" Coleridge, J., said, "The question is put,

The burning must be such as to destroy the entirety of the will.

whether the Will must be destroyed wholly, or to what extent? It is hardly necessary to say; but there must be such an injury with intent to revoke *as destroys the entirety of the Will*: because it may then be said, that the

instrument no longer exists as it was:" And Sir Herbert Jenner Fust, in giving judgment in *Hobbs v. Knight(c)*, cited and adopted the view of the question thus taken by Mr. Justice Coleridge as applicable to the construction of the new statute.

The same view has been taken by the courts in several subsequent cases; as in *Price v. Powell(d)*, where the Barons of the Exchequer regarded the tearing off the seal of a will *animo revocandi* as amounting to a revocation of it by reason of its being a destruction of its entirety. So in *Williams v.*

But before the act of 1821, in Connecticut, the rule seems to have been different. *Card v. Grinman*, 5 Conn. 164.

Nor will the declaration of the testator that his will has been destroyed amount to a revocation. *Boylan ads. Meeker*, 4 Dutch. 274.

Nor are declarations by the testator that he understood that a will by him made was revoked competent evidence to

show intent. *Hoitt v. Hoitt*, 63 N. H. 475.

In Texas no will, except a nuncupative will, can be revoked by mere written or verbal declarations of the testator, unless, in case of written declarations they be attested with all the solemnities required for the execution of a will, (R. S. §§ 4859-61) *Kennedy v. Upshaw*, 64 Tex. 411.

(c) *Ante*, p. \*115.

(d) 3 H. & N. 341.



Tyley (*e*), where there was the usual statement in the witnessing clause at the end of a will that the testator had set his hand to the preceding pages, Wood, V. C., held, that the testator had thereby made the signatures on those pages a part of his will, and that the whole will was revoked by tearing them off, *animo revocandi*; and his Honour relied on the above-mentioned case of Price v. Powell, and approved of the principle on which it had been decided. Again, In the Goods of Harris (*f*), where a testatrix, having executed \*her will by signing her name at the foot of each sheet, cut off the signatures on the first five sheets, and cancelled her own signature at the end of the last sheet, writing underneath that she had cancelled the will on a certain day: The last sentence in her will in effect referred to the signatures she had cut off as giving validity to the will: And it was thereupon considered by Sir J. P. Wilde that the will was destroyed in its entirety, and could not be admitted to probate. So In the Goods of Lewis (*g*), the will was held by Sir C. Cresswell to be revoked by tearing off the signatures and attestation. And in another case, before the same judge, In the Goods of Gullan (*h*), where the testator had subscribed each of the several sheets of which his will consisted at the foot of each sheet in the presence of the attesting witnesses, who thereupon also subscribed each sheet in his presence, and on his death two of the middle sheets of the will only could be found; it was held that the signatures at the end of the will, being the only ones made in compliance of the statute, having been destroyed, the whole will was revoked, and the sheets that had been found, though duly attested, could not be admitted to probate.

It must be here observed, that if the act of destruction or cancellation be inchoate and incomplete, it will not amount to a revocation. Thus in Doe v. Perkes (*i*), it appeared that the testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it, and of accomplishing that object by tearing: Having torn it twice through, his arms were arrested by a bystander,

Nor will the mere dying declarations, or requests, of a testator operate as a revocation of his will. Fox v. Fox, 88 Pa. St. 19. Nor will a verbal declaration of a present revocation. Slaughter v. Stephens, 81 Ala. 418

(*e*) Johns. 529.

(*f*) 3 Sw. & Tr. 485.

(*g*) 1 Sw. & Tr. 31.

(*h*) *Ibid.* 125.

(*i*) 3 B. & A. 489. See *Accord.* In the Goods of Colberg, 2 Curt. 832. Giles v. Warren, L. R. 2 P. & D. 401.

and his anger mitigated by the submission of the party who had provoked him: He then proceeded no further, and after having fitted the pieces together, and found that no particular word had been obliterated, he said, "It is a good job it is no worse." Upon this evidence, it was left to the jury to say whether the testator \*had done all he intended, or whether he was prevented from completing the act of destruction he intended: They found that he was so prevented, and the Court of King's Bench held, that their verdict was right, and that there was no revocation of the will (*k*).

\*In accordance with this authority, the case of *Elms v. Elms* (*l*) was

(*k*) Mr. Justice Holroyd, before whom this case was tried, in summing up the evidence to the jury, observed that the sixth section of the Statute of Frauds does not make a tearing *merely* and *of itself* a revocation. "A tearing," said the learned judge, "is not a revocation since the statute, if the same effect could not be ascribed to it before the statute passed. In the case of *Hyde v. Hyde*, (see *post*, p. \*127,) there was a tearing of the will; but it was held not to amount to a revocation, because there could not, from the circumstances of that case, be any inference of an intention to revoke. So the act of tearing may be intentional, and yet not amount to a revocation; if, as was the case in *Onions v. Tyrer*, (*post*, p. \*126,) the tearing be ascribed to mistake. This, however, does not seem to be a case of mistake; for the tearing was in some degree, at least for some period of time, with the intention of destroying the effect of the will; and if the destruction was complete, the subsequent declarations of the testator would be of no avail since the will could not be again set up, except by a codicil or republication of it, in the presence of three witnesses. One question will therefore be, whether there has been such a complete destruction of the will as to amount to a revocation; and that is purely a question of fact. If the testator intended by his acts wholly to revoke, the revocation will

be complete; but the question which arises upon the evidence, and which question alone renders the subsequent declarations of the testator admissible, is, whether he had proceeded as far as he intended in the destruction of the will. If, after he had torn the will in the manner in which it appears from the evidence that he did, he had thrown it upon the ground, that might have been a circumstance from which to have inferred that the act of destruction was complete. A case may be put of a person throwing his will on the fire, with the intention of burning it, and in consequence of some observation made by a bystander snatching it off again before it be burnt; there, although the will be scorched, I do not apprehend that it would amount to a revocation, since the act of destruction by the testator would not in such a case have been completed. The question of intention, however, is purely a question of fact; and therefore, exclusively within the province of the jury to decide. If the jury think that what the testator intended at the time he tore the will was completed, the heir at law is entitled to recover; but if they think that his intention at that time was not completed, the question of law then arises; and I am of opinion that it will not in point of law amount to a revocation." Gow. 186.

(*l*) 1 Sw. & Tr. 155.

decided. In that case the testator tore the will almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before making another: Sir Cresswell Cresswell laid down the law to be, that in order to revoke a will by tearing it, it is not necessary to rend the will into more pieces than it originally consisted of, but that it is sufficient if the testator intended the tearing actually done of itself to work a revocation without any further act—in other words, if when he ceased tearing, he had done all that he contemplated doing for the purpose of revoking: But the learned judge, having regard to all the evidence in the case, was not satisfied that the testator did so intend, and therefore held that the will was not revoked.

It should be borne in mind that to operate a revocation, the act of “burning, tearing, or otherwise destroying,” is required by the 20th section to be done by the testator or by some person *in his presence*, and *by his direction* (m).<sup>14</sup> Therefore, in a case where a codicil had been burnt by the testator’s order with intent to revoke, *but not in his presence*, probate was decreed of a draft copy of the codicil (n). And where the will of a testatrix was destroyed in her presence, but *without her consent or authority*,<sup>15</sup> by a relative, and subsequently the testatrix, though pressed to do so, refused to make a new will (saying that she could not bring her mind to it, and that it must remain as it was), it

Act of revocation must take place in testator’s presence :

and by his direction.

(m) See *ante*, p. \*110.

14. The burning of a will out of the presence of the testator is not a revocation. *Dower v. Seeds*, 28 W. Va. 113.

But a letter from a testator to his attorney, directing the attorney to destroy the testator’s will, does not, *ipso facto*, work an immediate revocation. *Tynan v. Paschal*, 27 Tex. 286.

But it is not always necessary to *prove* positively and in terms that the destruction of the will took place in the presence of the deceased, this may be inferred from circumstances, if the intention to revoke and the destruction of the paper be clearly proved. *Beauchamp’s Will*, 4 Mon. 361.

(n) In the Goods of Dadds, Dea. & Sw. 290.

15. The destruction of a will by the maker, during a temporary fit of insanity, is not an act done with his consent, and does not revoke it, *Forbing v. Weber*, 99 Ind. 588; *Estate of Lang*, 65 Cal. 19; *Forman’s Will*, 54 Barb. 274; nor if he be *non compos mentis*. *Smith v. Wait*, 4 Barb. 28; *Rhodes v. Vinson*, 9 Gill 169; *Ford v. Ford*, 7 Humph. 92.

Nor under the Indiana statute (R. S. 1881, § 2609) will this prevent its proof and establishment. *Forbing v. Weber*, *ubi supra*.

And so even where a testator makes a second will, while he is insane, revoking a will made by him when *compos mentis*, this will not amount to a revocation. *Laughton v. Atkins*, 1 Pick. 535, 547.

See *post*, p. 199, n. 20.

was held, that there was no sufficient evidence of a subsequent ratification of the destruction of the will so as to constitute it an act done *by the direction and by the authority* of the testatrix (o).

\*It has already been pointed out, that under the 20th section of the Wills Act, a part only of a will may be revoked in the manner described (p). Accordingly, it has been held that if the testator after the execution of the will destroy part only of it, by tearing or cutting away, or cutting out portions of it, *animo revocandi* as to the parts so removed, this will amount to a revocation *pro tanto* (q). But with respect to the destruction of a part, it should seem that the intention with which the act is done must govern the extent of operation to be attributed to the act, and determine whether it shall effect the revocation of the whole instrument, or only of some and what portion of it (r). And the intention to revoke wholly, or only in part, may be evidenced either by proof of the expressed declaration of the testator of his intention in doing the act, or by proof of circumstances from which it may be inferred, or by the state and condition to which the instrument has been reduced by the act itself (s).<sup>16</sup> Accordingly, in *Clarke v. Scripps* (t), where a tes-

Effect (under the Wills Act, s. 20) of mutilating part of the will.

Intention of testator governs extent of the operation.

Evidence of intention to revoke wholly or only in part.

(o) *Mills v. Millward*, 15 P. D. 20. *Quære*, however, whether where a will has been destroyed not only without the authority of the testatrix, but against her wish, any subsequent ratification of the act of destruction will make it a revocation within sect. 20 of the Wills Act (Ib).

(p) *Ante*, p. \*111.

(q) In the Goods of Lambert, 1 Notes of Cas. 131. In the Goods of Cooke, 5 Notes of Cas. 390. *Clarke v. Scripps*, 2 Robert. 563, 572.

(r) *Clarke v. Scripps*, 2 Robert. 567. In the Goods of Woodward, L. R. 2 P. & D. 206.

(s) *Clarke v. Scripps*, 2 Robert. 568. *Williams v. Jones*, 7 Notes of Cas. 106. In the Goods of Maley, 12 P. D. 134.

16. If a will have a seal attached, though not required to give validity to it, yet if a testator, who presumed such seal

to be necessary, should tear off the seal *animo revocandi*, that act would operate as a revocation. *Avery v. Pixley*, 4 Mass. 460.

In general, if the destruction be as complete as was in the power of the testator, it will operate as a revocation. *Sweet v. Sweet*, 1 Redf. 451; *Johnson v. Brailsford*, 2 Nott & McC. 272.

But the cutting out of a portion of the will will not work a revocation of the whole will, especially if the act be accompanied by declarations of the testator that the intention was to annul only what was so cut out. *Brown's Will*, 1 B. Mon. 56. Neither the striking out of the name of a devisee, nor the changing of executors is a revocation of a will. *Wells v. Wells*, 4 Mon. 152; *Overall v. Overall*, 6 Litt. 502; *Tudor v. Tudor*, 17 B. Mon. 383, 389.

(t) 2 Robert. 563 But see *Treloar v. Lean*, 14 P. D. 49.

tator executed his will in 1843, and it remained in his custody until his death, when it was found in a mutilated state, torn and cut, but with the signatures of the testator and of the attesting witnesses remaining at the end of the will, it was held by Sir J. Dodson, (after a full and able review of all the cases, and a statement of the principles to be derived from them), that in the absence of extrinsic evidence, it ought to be considered, from the peculiar manner in which the mutilations were effected, that the testator (who died suddenly) did not intend to revoke the whole will, but to revoke it in part only; and that the papers, as altered, were intended for a draft of a new will, and which should itself operate as his \*will, should he die without completing his object of making a formal one. Accordingly, in *Christmas v. Whinyates* (*u*), where part of the top of the second sheet of a will with a codicil had been cut off, including the signature of the testatrix on the upper part of the second side, Sir Cresswell Cresswell, judging from the manner in which the will and codicil had been cut, care having been taken to avoid cutting off the names of the attesting witnesses on the sheet that had been mutilated, and the signature and attestation of the codicil being left untouched, that the intention of the testatrix was only to revoke as much of the will as had been cut off, and to preserve the codicil and so much of the will as remained; and probate was accordingly decreed of the will as it then stood and the codicil (*x*). In a late case, where a testator after duly executing his will (which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses,) took out three sheets and substituted three new ones, which he signed, but which were not attested, and did not alter the date of the will nor resign it, nor was the will re-attested; it was held, that the will was not entitled to probate (*y*).

As to partial revocation by cancellation or obliteration<sup>17</sup> prior to the Wills Act, see the former Editions of this Work, Pt. I., Bk. II., Ch. 3, § 1, and the case of *Swinton v. Bailey* (*z*).

Partial revocation by obliteration, destruction, interlineation or other alteration under the old law.

The cancelling of a legacy by obliteration revokes that legacy but the balance of the will must stand. Will of Kirkpatrick, 7 C. E. Gr. 463, 465.

(*u*) 3 Sw. & Tr. 81.

(*x*) See also In the Goods of Woodward, L. R. 2 P. & D. 206, that the mere

cutting off three lines from the beginning of the will does not, without other circumstances, show an intention to revoke the whole will.

(*y*) Treloar v. Lean, 14 P. D. 49.

17. In New York the obliteration of a clause in a will is ineffectual as a revoca-

(*z*) 1 Ex. D. 110, 4 App. Cas. 70.

Under Wills Act,  
s. 21;

formalities  
necessary for  
obliterations and  
other alterations:

With respect to alterations and obliterations made since the Wills Act came into operation (1st Jan., 1838), it is required (sect. 21), in order to give effect to any obliteration, interlineation, or other alteration, that such alteration shall be executed as is required for the execution of the will,<sup>18</sup> with this difference, that the signature of the testator and the subscription of the witnesses (a) need not be at the foot \*or end of the will, but may be made in the margin or some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will (b).<sup>19</sup>

tion, even of the clause itself, *Lovell v. Quitman*, 88 N. Y. 377; overruling *McPherson v. Clark*, 3 Bradf. 96, and sustaining *Quinn v. Quinn*, 1 T. & C. 437, and *Matter of Prescott*, 4 Redf. 178; so also in Alabama. *Law v. Law*, 83 Ala. 432.

Where the name of a single legatee is obliterated, declarations of the testator are admissible to show whether he intended thereby to revoke the whole will; if the erasure or obliteration were made with that intent it would be effectual for that purpose; if only to revoke the will *pro tanto*, so as to expunge the name of the legatee it is inoperative, Code 1886, § 1968 having re-enacted the former provisions in that behalf. *Law v. Law*, 83 Ala. 432.

18. Any alteration of a will which would have the effect to change the dispositions made by the will, or any of them, must be authenticated by the solemnities required by statute to make a will. *Gardner v. Gardner*, 65 N. H. 230; *Law v. Law*, 83 Ala. 432.

(a) The initials of a testatrix and the attesting witnesses in the margin of a will opposite interlineations are sufficient to render the interlineations valid. In the *Goods of Blewitt*, 5 P. D. 116.

(b) Where a testator at the beginning of his will disposed of certain leasehold houses for the benefit of his children, and

the words describing one of such houses were struck through by a pen, and at the end of the will a clause was interlined bequeathing such house to his wife, and under the signature of the deceased and the witnesses a memorandum duly signed and attested was added, to the effect that the above words had been struck out for the benefit of the testator's wife, *Sir J. Hannen* held, that the memorandum referred to the interlineation as well as to the obliteration. In the *Goods of Treeby*, L. R. 3 P. & D. 242. See further as to the position of the signature of the testator and attesting witnesses, In the *Goods of Wilkinson*, 6 P. D. 100.

19. If an interlineation or erasure in a will is fair upon its face and is wholly unexplained, there being no circumstance to cast suspicion upon it, it would not be proper to hold that the alteration was made after the execution. *Crossman v. Crossman*, 95 N. Y. 145, 153. But if there be any suspicious or doubtful circumstances, such as the mode of alteration, the ink used or that it be in favor of the party holding the instrument, and it is not noted, then these and all other circumstances must be submitted as questions of fact to be determined in deciding whether it was done before execution or not. *Id*

"Generally speaking, if nothing appears to the contrary, the alteration will

The statute (sect. 21) contains an exception in this respect, viz. "except so far as the words and effect of the will before such alteration shall not be apparent." Consequently, if the words are completely obliterated, so that it cannot be made out what they originally were, the obliteration is valid, and probate must then be granted, as if there were blanks in the will (c).

\*The words in this exception "shall not be apparent" seem to mean "apparent on an inspection of the instrument itself;" and not "capable of being made apparent by extrinsic evidence." And consequently it has been held that the court is not at liberty to resort to evidence *aliunde*; e. g. to refer to a draft copy or to the instructions for the will (d). It was the intention of the legislature in this respect, that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose, that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid, as if done according to the stricter forms mentioned in the Act of Parliament (e).

And in the earlier view taken by the Prerogative Court of this clause, it was considered as a consequence of this construction, that in a case where a legacy was given, and the amount was afterwards obliterated by the testator and another sum written by him over the obliteration, by way of

consequences of complete obliteration:

evidence *aliunde* inadmissible:

consequences of complete obliteration with untested substitution.

be presumed to be contemporaneous with the execution of the instrument." 1 Greenl. Ev., § 564. In *Speake v. United States*, 9 Cranch 37, it was said by Story, J.: "The fact that there is an erasure or interlineation apparent on the face of the deed does not, of itself, avoid it. To produce this effect it must be shown to have been made under circumstances that the law does not warrant." And when there is an erasure or interlineation in an instrument under which a party claims title and the adverse party insists that such erasure or alteration, was improperly made, it is a question for the jury whether the instrument is invalidated thereby. *Bailey v. Taylor*, 11 Conn. 531.

Fust ordered, that the erasures in a will should be carefully examined in the Registry, with the help of glasses, by persons accustomed to writing, to ascertain whether they could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank: In the *Goods of Ibbetson*, 2 Curt. 337. See also in the *Goods of Beavan*, 2 Curt 369. In the *Goods of James*, 1 Sw. & Tr. 238. But in a recent case Sir J. Hannen refused to order a piece of paper on which a new bequest was written, and which was pasted over a whole legacy, to be removed, and directed probate to issue in blank as to that legacy. In the *Goods of Horsford*, L. R. 3 P. & D. 211. Generally speak-

(c) In a case on motion, Sir H. Jenner

(d) *Townley v. Watson*, 3 Curt. 761.

(e) *Ib.*

substitution, but without the attestation required by the act, although the alteration would be wholly ineffectual, and the legacy would be pronounced for as originally given, should the will continue legible in this respect (*f*), yet if the obliteration should be such, that it could not be made out upon inspection of the will what was the amount of the sum originally given, the legacy would be lost altogether, because the unattested substitution was not a valid alteration, and the original bequest was revoked by the obliteration which had rendered it illegible (*g*).

It was suggested, in a former edition of this Treatise, that cases of this sort might admit of the application of the doctrine of dependent relative revocations (*h*), and it is now settled, that where a testator entirely erases the original words, intending to revoke a legacy by substituting a different sum from that originally given, and such substituted legacy is not effectually given, the original legacy is not revoked, and evidence *aliunde* is admissible to show what the words were (*i*).

Case when evidence *aliunde* is admissible.

The acts prescribed for revocation must be done *animo revocandi*.

The statute provides (s. 20) that the acts prescribed for the revocation of wills must be done "with the intention of revoking the same." This enactment appears to have been unnecessary, inasmuch as the law was fully established to the same effect at the time of the passing of the act. The act done without the intention to revoke is wholly ineffectual (*k*).

ing, the Court of Probate will not, in the first instance, take upon itself to decide whether the words obliterated can or cannot be made out. If it be asserted in an allegation that they are capable of being distinguished on the face of the will, the Court will refer such an allegation to proof, and then pronounce its judgment according to the testimony which may be offered at the hearing. *Townley v. Watson*, 3 Curt. 739.

(*f*) In the Goods of Beavan, 2 Curt. 369.

(*g*) In the Goods of Rippin, 2 Curt. 332. See also In the Goods of Brooke, *Ibid.* 343. In the Goods of Livock, 1 Curt. 906.

(*h*) See *post*, p. \*126, *et seq.* And see *Brooke v. Kent*, 3 Moo. P. C. 334.

(*i*) *Soar v. Dolman*, 3 Curt. 121. *Townley v. Watson*, *ibid.* 769. See In the Goods of Bedford, 5 Notes of Cas. 188. In the Goods of Harris, 1 Sw. & Tr. 536. In the Goods of Parr, 29 L. J., P. M. & A. 70. In the Goods of Horsford, L. R. 3 P. & D. 211. In the Goods of Greenwood [1892] P. 7. The principle of dependent relative revocation applies to a case where a testator had so entirely erased the name of a legatee that it was no longer apparent, and had substituted another name for it. In the Goods of McCabe, L. R. 3 P. & D. 94.

(*k*) *Clarkson v. Clarkson*, 2 Sw. & Tr. 497. In the Goods of Thornton, 14 P. D. 82, where a testatrix being under an erroneous impression that a codicil had not been duly executed, directed it to be



It is clear that an insane person cannot have any intention.<sup>20</sup> Where there is proof that the will was duly executed by a testator who afterwards became insane, the *onus* of showing that it had been mutilated by the testator when of sound mind is on the party alleging the revocation<sup>21</sup> (l).

Mutilation by testator who has become insane.

All questions of revocation of wills have ever been regarded in the Ecclesiastical Courts as questions, to some degree, of \*intention, and every fact of revocation may in some sort be said to be equivocal (m): But cancelling and obliterating have always been considered peculiarly as equivocal acts, which, in order to operate a revocation, must be done with intention to revoke. The presumption of law, *primâ facie*, is that such acts are done *animo revocandi* (n).

Presumption of law as to acts of cancellation and obliteration.

But this presumption may be repelled by evidence, showing that the *animus* did not exist.—As if a man was to throw ink upon his will instead of sand, though it might be a complete defacing of the instrument, it would be no revocation: or suppose a man, having two wills of different dates by him, should direct the former to be cancelled, and, through mistake, the person directed should

Dependent relative revocations:

torn up and sent to her solicitor to be re-copied, but died before she could re-execute it, it was held that probate of the codicil might be allowed.

20. The destruction of his will by a man who, though generally of sound mind, has become insane cannot work a revocation of the will. To revoke the same degree of mental power is necessary as is requisite to make a will. *Forman's Will*, Tuck. 205, 225; *Smith v. Wait*, 4 Barb. 28; *Rhodes v. Vinson*, 9 Gill 169; *Ford v. Ford*, 7 Humph. 92; *Rich v. Gilkey*, 73 Me. 595; *McIntire v. Worthington*, 68 Md. 203; *Allison v. Allison*, 7 Dana 90, 94.

See *ante*, p. 193, n. 15; also n. 21, *infra*.

21. And where the will is made in a sound state of mind, and is thereafter revoked without any evidence of change of purpose, or any ground therefor, but after the testator has shown signs of mental failure, the revocation may be attributed to delusion. *Miller v. White*, 5 Redf. 320.

A person of unsound mind cannot revoke his will. *Smith v. Wait*, 4 Barb. 28; *Idley v. Bowen*, 11 Wend. 227; *Schultz v. Schultz*, 35 N. Y. 653; *Johnson's Will*, 40 Conn. 587; *Callagan v. Burns*, 57 Me. 449; *Rich v. Gilkey*, 73 Id. 595. See note 20, *supra*.

And the tearing of his name from his will, by a person of unsound mind, is not a revocation. *Estate of Lang*, 65 Cal. 19.

(l) *Harris v. Berrall*, 1 Sw. & Tr. 153. See *ante*, p. \*36. *Sprigge v. Sprigge*, L. R. 1 P. & D. 608. *Benson v. Benson*, L. R. 2 P. & D. 172, 176. Where a person when suffering from *delirium tremens* tore up his will, and on his recovery said that he was mad to do it, the Court held that there was no revocation. *Brunt v. Brunt*, L. R. 3 P. & D. 37.

(m) *Smith v. Cunningham*, 1 Add. 455.

(n) *Rickards v. Mumford*, 2 Phillim. 28. In the Goods of *Lewis*, 27 L. J., P. M. & A. 31.

cancel the latter, such an act would be no revocation of the latter will (o).

This principle, that the effect of the obliteration, cancelling, &c., depends upon the mind with which it is done, having been pursued in all its consequences, has introduced the doctrine of dependent relative revocations, in which the act of cancelling, &c., being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not.

Thus, in *Onions v. Tyrer* (p), a man made a second will, to the use of the same person to whom he had devised the land by the first will, with a variation only in the name of one of the trustees: but which second will was not good, because not duly attested according to the Statute of Frauds: After so executing the second will, he cancelled the first by tearing off the seal: One question was whether the cancelling of the former will was a revocation thereof within the Statute of Frauds and Perjuries: And it was held, that it was not; because there was no self-substituting independent \*act, but done to accompany, or in way of affirmation of the second will: It was done from an opinion that the second will had actually revoked the first, which induced the testator to tear that, as of no use: Therefore, if the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it; for, though a man might, by the Statute of Frauds, as effectually destroy his will by tearing or cancelling it, as by making a second will, yet, when he intended to revoke the first will by the second, and it was insufficient for that purpose, as in the principal case, and the tearing and cancelling the first was only in consequence of his opinion that he thereby made good the second will, the tearing and cancelling should not destroy the first, but it ought to be considered as still subsisting and unrevoked (q). And the principle of this decision was recognized by Lord Mansfield in the case of *Burtenshaw v. Gilbert* (r); by Lord Ellenborough in *Perrot v. Perrot* (s); and by Sir John Nicholl in *Lord John Thynne v. Stanhope* (t). So in the case of

(o) *Onions v. Tyrer*, 1 P. Wms. 345, in Lord Cowper's judgment. *Burtenshaw v. Gilbert*, Cowp. 52, in Lord Mansfield's judgment. 1 Saund. 280, b. c. note to *Duppa v. Mayo*.

(p) 2 Vern. 742.

(q) It would have made no difference  
[\*127]

if the latter will had been in favour of another person from the former: See Sir Wm. Grant's judgment in *Ex parte the Earl of Ilchester*, 7 Ves. 379.

(r) Cowp. 52.

(s) 14 East, 440.

(t) 1 Add. 53.

*Hyde v. Hyde* (*u*), where the testator, having given instructions for some immaterial alterations in a properly executed will, read over a draft of a new will made according to such instructions, and having signed such draft, tore the seals from his old will, under the impression that his new will was completely executed so as to pass lands; this was held to have been done *sine animo cancellandi*, and therefore to be no revocation of the original will.<sup>22</sup>

Again in *Hyde v. Mason* (*x*) the testator duly, according to the Statute of Frauds, made and executed his will in duplicate, and one of the duplicates was delivered to one of the executors.—The testator, about three weeks before his death, made several alterations and obliterations with his \*own hand, in the duplicate remaining in his own custody, making a new devise of his real estate, and a new residuary legatee, and a new executor, entirely striking out the names of the first devisees, residuary legatees, and executors, and altered several of the former legacies, and inserted or interlined new legacies. And soon after he wrote another will with his own hand, agreeable in great measure, but not altogether, to the will or duplicate so altered, with the conclusion in these words: “In witness whereof I the said testator have to each sheet set my hand, and to the top where the sheets are fixed together, my hand and seal, and to the last thereof my hand and seal, and to a duplicate of the same tenor and date this      day of      1730.” But there was no signing or fixing together. The testator soon after began to write another will, word for word with the last, as far as it went, but proceeded no farther than devising his lands. The testator lived six days after, and was in good health, and might have finished and executed both or either of the later wills if he had thought fit. The testator never sent to or called upon the executor for the duplicate of the first will in his hands, though the executor lived in London, where the testator also resided. After the death of the testator all the testamentary papers or schedules were found lying all in loose and separate

(*u*) 1 Eq. Cas. Abr. 409.

22. But it has been held that where a testator deliberately cancels his will without accident or mistake, in whatever way, either by tearing, obliterating, or burning, the will is revoked, although the testator at the time intended to make a new will but omitted to do so. *Banks v.*

*Banks*, 65 Mo. 432; *Brown v. Thorndike*, 15 Pick. 388; *Laughton v. Atkins*, 1 Id. 535; *Semmes v. Semmes*, 7 Harr. & J. 388; *Johnson v. Brailsford*, 2 Nott & McC. 272.

(*x*) Vin. Abr. Devise (R. 2), pl. 17, S. C. *nomine Limbery v. Mason*, Com. Rep. 451.

papers, upon a table in his closet, not signed or executed, and the duplicate of the first will was found on the same table, altered and obliterated (*ut supra*) with his name and seal thereto, whole and uncanceled. In the Prerogative Court sentence was given for the duplicate of the first will in the executor's hands: and upon appeal to the Delegates the sentence was confirmed by Lord Raymond, Mr. Justice Probyn, Dr. Tyndall, and Dr. Brampton. A commission of review was afterwards applied for and obtained: and after further hearing, &c., before the commissioners of review, the former sentence of the Prerogative Court was again affirmed by all the Delegates, except Dr. Pinfold, *viz.*, by Reynolds, C. B., Page, J., and Comyns, B., and two doctors of the civil law, chiefly on the \*reason that the testator did not intend an intestacy; and by the alterations and obliterations in his own duplicate of the first will, he appeared only to design a new will, *which, as he never perfected, the first ought to stand*; and his not calling for the duplicate in the executor's hands strengthened the presumption of his intent, not absolutely to destroy his first will till he perfected another, which he never did.<sup>23</sup>

In the case of *Winsor v. Pratt* (*y*), the testator, in July, 1812, made his will, by which he devised certain real estates to his wife for life, and on her death to her mother, and on the death of his wife and her mother to his executors, in fee upon certain trusts. In November, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was, to confine the first devise to his wife for her widowhood, and to strike out the devise to her mother. The original date was struck out, and day of Nov. 1816, was substituted. The will was never re-signed, republished, or re-attested, but in the following month the testator caused a fair copy to be made, and added one interlineation not affecting his real estate, but the copy was never signed, attested, or published: and in Dec. 1816, the testator died. The Court of Common Pleas were of opinion, that, under such circumstances, the interlineations and obliterations were inoperative, and that

23. Cancellation is *prima facie* a revocation, but if it be made with the intent to execute a new will, and that purpose fails, the cancellation is conditional, and shall have no effect. *Bethell v. Moore*, 2 Dev. & B. L. 311; *Stover v. Kendall*, 1 Coldw. 557; *Barksdale v. Barksdale*,

12 Leigh 535; *Jackson v. Holloway*, 7 Johns. 394; *Means v. Moore*, 3 McCord 282; *Pringle v. McPherson*, 2 Brevard 279; *Hairston v. Hairston*, 30 Miss. 276; *Wolf v. Bollinger*, 62 Ill. 368.

(*y*) 2 Brod. & Bing. 650. S. C. 5 Moore, 484.

there was no revocation of the will as it originally stood : And Dallas, C. J., in giving his judgment, observed : “ The effect of cancelling depends upon the validity of the second Will, and ought to be taken as one act done at the same time ; so that if the second Will is not valid, the cancelling of the first, being dependent thereon, ought to be looked upon as null and inoperative.”

In a case in the Prerogative Court, an executor, having, in pencil, altered a will (by the direction of the testator, who approved of it when so altered), and then cancelled it, only in order that another might be drawn up, the preparation of which was prevented by the death of the testator, Sir John \*Nicholl held, that such cancellation, being preparatory to the deceased making a new will, and conditional only, was not a revocation (z).

Cancellation, under the influence of a mistake in point of law, seems to be equally inoperative to revoke, as if made under a mistake of fact. “ If a man,” said Lord Ellenborough, Cancellation made under a mistake of law. in the case of *Perrott v. Perrott* (a), “ cancel his Will under a mistake in point of fact, that he has completed another, when he really has not, as was the case in *Hyde v. Hyde*, the cancellation is void : and if he cancel it, under a mistake in law, that a second Will (complete as to the execution) operates upon the property contained in the first, when from some clerical rule it really does not ; shall this be deemed a valid cancellation ? ” (b).

The general principle of the above cases was laid down by Lord Alvanley in *Ex parte Lord Ilchester* (c), as completely established, that, where it is evident that the testator, though General principle of the cases. \*using the means of revocation, could not intend it for any other pur-

(z) In the Goods of Applebee, 1 Hagg. 143. See also In the Goods of De Bode, 5 Notes of Cas. 189. *Accord.* In the Goods of Eeles, 2 Sw. & Tr. 600. In these cases the parties interested consented. See also for cases where the revocation was held to be absolute and not dependent, In the Goods of Mitcheson, 32 L. J., P. M. & A. 202. In the Goods of Gentry, L. R. 3 P. & D. 80. *Eckersley v. Platt*, L. R. 1 P. & D. 281. For further cases where the revocation

was held to be dependent, see *Short v. Smith*, 4 East, 419. *Kirke v. Kirke*, 4 Russ. Ch. C. 435. *Locke v. James*, 11 M. & W. 901. In the Goods of Middleton, 3 Sw. & Tr. 583. *Dancer v. Crabb*, L. R. 3 P. & D. 98. *Powell v. Powell*, L. R. 1 P. & D. 209, questioning *Dickinson v. Swatman*, 30 L. J., P. & M. 84.

(a) 14 East, 440.

(b) So in *James v. Shrimpton*, 1 P. D. 431, the testator having duly executed a will subsequently married, and on the

(c) 7 Ves. 372.

pose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation (*d*).

A will is not revoked by a subsequent will made under mistake of fact.

The rule differs when the gift fails by incapacity of the legatee.

When a destruction or mutilation of the will is a revocation of the codicil.

In connection with this principle, it has been established (as will hereafter fully appear) (*e*), that a subsequent will made under the impulse of a mistaken notion of facts will not revoke a former one.

But where the second disposition fails for want of capacity in the legatee to take, it appears to be established (though it has been thought difficult to make a satisfactory distinction) that the revocation would be effectual (*f*).<sup>24</sup>

A codicil is, *primâ facie*, dependent on the will; and the destruction or mutilation of the will is an implied revocation of the codicil (*g*). But Lord Penzance appears to have taken a different view of this subject, and to have held that since the passing of 1 Vict. c. 26, s. 20 (see *ante*, p. \*110), the

day of and after the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will; his wife predeceased him, and on his death the codicil which had been in his possession could not be found; declarations of the testator of a desire to adhere to his will were proved, extending up to the latest period of his life. Sir J. Hannen held that the testator could not have intended by the destruction of the codicil to render his will inoperative, and that the Court would therefore grant probate of the will and of the codicil as contained in a draft from which the original was prepared. See also *Dancer v. Crabb*, L. R. 3 P. & D. 98.

(*d*) See also the same rule laid down by Sir Wm. Grant in the same case, 7 Ves. 279. For other cases illustrating this rule, see *Scott v. Scott*, 1 Sw. & Tr. 258. In the *Goods of Cockayne*, Dea. & Sw. 177. *Dickinson v. Stidolph*, 11 C. B., N. S. 341. *Williams v. Tyley*, Johns. 535, per Wood, V. C. In the

*Goods of Middleton*, 3 Sw. & Tr. 583. *Powell v. Powell*, L. R. 1 P. & D. 209. The rule applies whether the revocation is dependent upon the execution of a will in substitution or upon the erroneous assumption of the validity of a will executed before: *Powell v. Powell*, *ubi sup.*: questioning on this point, *Dickinson v. Swatman*, 30 L. J., P. & M. 84. Compare In the *Goods of Weston*, L. R. 1 P. & D. 633, in which case Lord Penzance refused to hold that the revocation was dependent.

(*e*) *Post*, p. \*146.

(*f*) *Tupper v. Tupper*, 1 Kay & J. 665. *Quinn v. Butler*, L. R. 6 Eq. 225.

24. And a misapprehension, on the part of the testator, as to the legal capacity of a devisee to take, is a mistake of law and not of fact, and will not affect a clause of revocation contained in the will. *Hairston v. Hairston*, 30 Miss. 276; *Price v. Maxwell*, 28 Pa. St. 23.

(*g*) *Coppin v. Dillon*, 4 Hagg. 361. *Grimwood v. Cozens*, 2 Sw. & Tr. 364. In the *Goods of Dutton*, 3 Sw. & Tr. 66.

words of this statute are imperative, and, consequently, that when a testator has once executed a testamentary paper, that paper will remain in force unless revoked in the particular \*manner named in this section (*h*). But it may be doubted whether the view above taken by his Lordship is correct (*i*), and whether the destruction or mutilation of the will is not an implied revocation of the codicil by reason of the very nature of the instrument, just as the mutilation of the part of any duplicate will in the testator's own custody is a revocation of both duplicates. And, independently of the view of Lord Penzance as to the construction of this statute, there have been cases where the codicil has appeared so independent of, and unconnected with the will, that, under the circumstances, the codicil has been established, though the will has been held invalid. It was regarded as a question altogether of intention. Consequently the legal presumption in this case might be repelled, namely, by showing that the testator intended the codicil to operate, notwithstanding the revocation of the will (*k*).

If a will be executed in duplicate,<sup>25</sup> and the testator \*keeps one part himself, and deposits the other with some other person ; and the testator mutilates or destroys the part in his own

Duplicate wills :

In the Goods of Greig, L. R. 1 P. & D. 72.

(*h*) In the Goods of Savage, L. R. 2 P. & D. 78. *Black v. Jobling*, L. R. 1 P. & D. 685. In the Goods of Turner, L. R. 2 P. & D. 403, followed by Butt, J., in *Gardiner v. Courthope*, 12 P. D. 14.

(*i*) *Sugden v. Lord St. Leonards*, 1 P. D. 154, 206 ; but see *Gardiner v. Courthope*, 12 P. D. 14, in which case, however, it was not necessary for the decision that the judge (Butt, J.) should hold that the codicil could not be revoked by the revocation of the will since he seems to have inferred as a fact from the preservation of the codicil that there was no intention to revoke this.

(*k*) *Barrow v. Barrow*, 2 Cas. temp. Lee, 335. *Medlycott v. Assheton*, 2 Add. 231. *Tagart v. Hooper*, 1 Curt. 289. In the Goods of Halliwell, 4 Notes of Cas. 400. *Clogstoun v. Walcott*, 5 Notes of Cas. 623. In the Goods of Ellice, 33 L. J., P. M. & A. 27. Where a will and

codicil had been in existence, and the will is afterwards revoked, it must be shown by the party applying for probate of the codicil alone that it was intended by the deceased that it should operate separately from the will, otherwise it will be presumed that as the will is destroyed the codicil is also revoked : In the Goods of Greig, L. R. 1 P. & D. 72. *Gardiner v. Courthope*, 12 P. D. 14. The question whether the deceased, by revocation of a will, meant to revoke a codicil depends upon intention to be gathered from the circumstances of the case : In the Goods of Bleckley, 8 P. D. 169.

25. Where two papers, identical in form and language, are each, on the same day, signed, witnessed and published as the last will of the testator, the second paper does not effect a revocation of the first : both are one and the same will. *Odenwallder v. Schorr*, 8 Mo. App. 458.

presumption that the destruction or mutilation of one revokes the other :

custody, it is a revocation of both (*l*). The presumption of law in such case, liable of course to be rebutted by evidence, is, that the destruction or mutilation of the one duplicate was done *animo revocandi* as to both (*m*).<sup>26</sup>

Same presumption where both instruments are in testator's possession :

And in *Pemberton v. Pemberton* (*n*), Lord Chancellor Erskine laid down that the same presumption holds, though in a much weaker degree, where both the instruments are in the testator's possession : And further, that in a third case, where the testator, having both duplicates in his possession, alters one, and then destroys that which he has altered, there also the same presumption holds, though weaker still (*o*).

an interlineation and a codicil to the same effect ; by cancelling one, the other is cancelled :

In another case under the old law, where a father, after having made his will, being displeased with his son, by an interlineation of his will, excluded him from all share in his property but one shilling, and also by a codicil made for that purpose, declared his determination to the same effect ; but afterwards being reconciled to his son, the testator \*cancelled the codicil, by drawing his pen across it, but the interlineation was left standing in the will ; it was held by Sir W. Wynne, in the Ecclesiastical Court, and afterwards by Sir W. Grant, M. R., that the cancellation of the codicil had the effect of cancelling the interlineation (*p*).

(*l*) *Bouhey v. Moreton*, 2 Cas. temp. Lee, 532. S. C. 3 Hagg. 191. *Rickards v. Mumford*, 2 Phillim. 23. *Colvin v. Fraser*, 2 Hagg. 266.

(*m*) *Swinburne* seems to have been of opinion that it lay on the party relying on the revocation to prove the *animus*, otherwise the cancellation of one duplicate would not affect the other : See Pt. 7, s. 16, pl. 4 : But the modern authorities, cited in the preceding note, have now settled that the *animus* is to be presumed, till the contrary is proved. As to the presumption, when a testator destroys a duplicate in the possession of his solicitor, and preserves that in his own custody, see *Payne v. Trappes*, 1 Robert. 533, 591.

<sup>26</sup> *Asinari v. Bangs*, 3 Dem. 385 ; *Crossman v. Crossman*, 95 N. Y. 145,

150 ; *O'Neal v. Farr*, 1 Rich. (L.) 80. This presumption is strengthened if it be shown that the undestroyed copy was not at any time after its execution in the hands of the testator. *Asinari v. Bangs*, *ubi supra*. And where there are triplicate wills the proper revocation of two only will operate as a revocation of all. *Biggs v. Angus*, 3 Dem. 93.

(*n*) 13 Ves. 310. And in that case it also appears that Lord Ellenborough and Sir James Mansfield had each, in charging juries, stated the law to this effect.

(*o*) It was urged by counsel in the course of the argument, that in this third case, as soon as one part has been altered, the two parts cease to be duplicates, and the altered one then becomes a new will of the latest date, and revokes all others. See further as to the revoca-

(*p*) *Utterson v. Utterson*, 3 Ves. & Beam. 122.



If a testament was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is to be presumed to have done the act (q);<sup>27</sup> and it has already appeared that the law further presumes that he did it *animo revocandi* (r). So where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he destroyed it himself;<sup>28</sup> it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority; for that would be pre-

Proof of mutilation:

If a will in testator's custody be found mutilated, the presumption is, that he mutilated it *animo revocandi*:

if it cannot be found, the presumption is, that he destroyed it *animo revocandi*:

tion of duplicates, *Roberts v. Round*, 3 Hagg. 548. *Doe v. Strickland*, 8 C. B. 724.

(q) *Swinb. Pt. 7, s. 16, pl. 5. Davies v. Davies*, 1 Cas. temp. Lee, 444. *Lambell v. Lambell*, 3 Hagg. 568. In the Goods of *Lewis*, 1 Sw. & Tr. 31.

27. But the finding of the will among worthless and waste papers does not *per se* raise a presumption that it has been revoked and therefore will not amount to a revocation. *Hoitt v. Hoitt*, 63 N. H. 475, 495; *Fellows v. Allen*, 60 Id. 439.

Where a will was found after the death of the testator, and twenty-five years after it was made, in a barrel among waste paper, and torn or worn into pieces, which were scattered, it was held that the questions whether the injury was done by the testator or by other persons, and if by him, whether accidentally or intentionally, and for the purpose of revocation, were questions of fact for the jury. *Lawyer v. Smith*, 8 Mich. 411.

But where a testator told his executor that he would find a holographic will in a certain valise after his death; the testator being dead, the will was found there, with the signature torn off; the verdict of a jury that it was torn by the testator in his lifetime *animo revocandi*, will not be disturbed, although it be shown that other persons had access to the valise. *King v. Ponton*, 82 Cal. 420. And this presumption is strengthened by

declarations of the testator, during his last illness, to the effect that he had destroyed his will. Id.

(r) *Ante*, p. \*126. 3 Hagg. 568. And the law is not different though the testator appears to have gummed the signature on again in its original place: *Bell v. Fothergill*, L. R. 2 P. & D. 148.

28. It has been held in Vermont, that if a will which has been duly executed and properly published, cannot be found after the death of the testator its absence will amount, *prima facie*, to proof of revocation. But the presumption being one of fact, may be rebutted, and the will may be established by proper proof of its contents. *Minkler v. Minkler*, 14 Vt. 125; *Dudley v. Wardner*, 41 Id. 59. So, too, in absence of all proof as to who destroyed the will, this presumption will prevail. *Appling v. Eades*, 1 Gratt. 286.

This presumption is recognized also in New York. *Hatch v. Sigman*, 1 Dem. 519; *Betts v. Jackson*, 6 Wend. 173; *Schultz v. Schultz*, 35 N. Y. 653; *Will of Claxton*, 2 Bradf. 334; *Will of Florence*, Id. 281; *Idley v. Bowen*, 11 Wend. 227; *Hammersley v. Lockman*, 2 Dem. 524; *Collyer v. Collyer*, 110 N. Y. 486; *Holland v. Ferris*, 2 Bradf. 324; *Bulkley v. Redmond*, Id. 281; *Eighmy v. People*, 79 N. Y. 546. And it appears that the mere concomitance of interest and opportunity to surreptitiously destroy the will of another does not rebut this presump-

suming a crime (s). But this presumption may be rebutted by evidence leading to the conclusion that the testator did not do that which in the absence of evidence to the contrary it is presumed he had done (ss). And this presumption holds with \*respect to duplicate wills: Hence

if a will was executed in duplicate, and the testator has the custody of one part, and it cannot be found after his death; the presumption of law is, that he destroyed it *animo revocandi*; and both parts are consequently to be considered revoked, unless such presumption be rebutted (t).

so where the testator has the custody of one of two duplicate wills.

tion that it was destroyed by testator *animo revocandi*. *Hatch v. Sigman*, 1 Dem. 519, 531.

And this rule prevails in other States. *Johnson's Will*, 40 Conn. 588; *Newell v. Homer*, 120 Mass. 277; *Mercer v. Mackin*, 14 Bush 434; *Foster's Appeal*, 87 Pa. St. 67; *Holcombe v. Holcombe*, 12 Stew. (N. J.) 592; *Durant v. Ashmore*, 2 Rich. 184; *Legare v. Ashe*, 1 Bay 457.

When there is no proof that a will actually executed was in existence, unrevoked, at the death of the testator, but on the contrary it was admittedly lost in his lifetime, and yet, with knowledge thereof for months before his death, the testator declined to reproduce or republish its contents its revocation may fairly be presumed. *Deaves' Estate*, 140 Pa. St. 242.

And the presumption of revocation is not rebutted by declarations of the testator, made seven months before his death, to the effect that he had prepared and executed a will. *Collyer v. Collyer*, 17 Abb. N. C. 328.

(s) *Rickards v. Mumford*, 2 Phil. 23. *Colvin v. Fraser*, 2 Hagg. 266. *Lillie v. Lillie*, 3 Hagg. 184. *Wargent v. Heillings*, 4 Hagg. 245. *Welch v. Phillips*, 1 Moo. P. C. 299. *Brown v. Brown*, 8 E. & B. 882. In the Goods of *Mitcheson*, 32 L. J., P. M. & A. 202.

(ss) Thus this presumption may be re-

butted by showing that he had no opportunity of so doing, or that it has been lost or destroyed without his privity or consent: *Lillie v. Lillie*, 3 Hagg. 184, 185. *Wargent v. Heillings*, 4 Hagg. 245, 249. Or by declarations by the testator of goodwill towards the parties benefited by the will, or of an adherence to the will, and the contents of the will itself: *Patten v. Poulton*, 1 Sw. & Tr. 55. *Saunders v. Saunders*, 6 Not. of Cas. 518. *Johnson v. Lyford*, L. R. 1 P. & D. 546. *Sugden v. Lord St. Leonards*, 1 P. D. 154. Or by a consideration of the contents of the will itself: *ibid.* p. 176. For the purpose of rebutting the presumption, declarations of the testator to various members of his family down to a few days before his death expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, were held to have been properly admitted: *Whiteley v. King*, 17 C. B., N. S., 756. *Sugden v. Lord St. Leonards*, 1 P. D. 154. This presumption does not apply to a case where the testator became insane after the execution and continued insane until his death: *Sprigge v. Sprigge*, L. R. 1 P. & D. 608. See *ante*, p. \*125. Nor does it arise unless the Court is satisfied by unimpeachable evidence that the will was not in existence at the time of the testator's death: *Finch v. Finch*, L. R. 1 P. & D.

(t) *Colvin v. Fraser*, 2 Hagg. 266.

There can be no doubt, that if a will duly executed is destroyed in the lifetime of the testator without his authority, it may be established, upon satisfactory proof being given of its having been so destroyed, and also of its contents (*u*). The law is the same, where a wife, having power to dispose of property by her will, makes her will and afterwards destroys it by the compulsion of her husband (*x*). So where after the death of the testator, his will and codicil were wrongfully torn by his eldest son; 29 the court, by means of some pieces which were saved, and by oral evidence, having arrived at the substance of the instrument, pronounced for them (*y*). So in *Podmore v. Whatton* (*z*), where there was satisfactory evidence that the defendant (the brother of the deceased, who had taken out letters of administration) had \*possessed himself of the will after the death of the testator, and had suppressed or destroyed it; Sir J. P. Wilde granted letters of administration with the draft of the will annexed to the residuary legatee. It should be observed that the same judge, in *Wharram v. Wharram* (*a*), appeared to doubt (but it is submitted, without sufficient reason) (*aa*), whether the courts have been justified in allowing a will to be proved by parol evidence only, where it has been shown to be lost or destroyed, and to doubt the soundness of the doctrine laid down by the Court of Queen's Bench in *Brown v. Brown* (*b*), that parol evidence of the contents of a lost instrument may be received as much when it is a will as any other.<sup>30</sup> This question

An unrevoked will, which has been unduly mutilated or destroyed, may be established:

371. The evidence to rebut the presumption must be clear and satisfactory: *Eckersley v. Platt*, L. R. 1 P. & D. 281. See also *In the Goods of Shaw*, 1 Sw. & Tr. 62. *Harris v. Knight*, 15 P. D. 170.

(*u*) *Trevelyan v. Trevelyan*, 1 Phillim. 149. *Sugden v. Lord St. Leonards*, 1 P. D. 154. *Sly v. Sly*, P. D. 91. See *post*, Pt. I. Bk. IV. Ch. II. § VII.

(*x*) *Williams v. Baker*, Prerog. June 1, 1839.

29. And in a case where it is shown that a will was in existence, unrevoked, at the time of the testator's death and was afterwards lost or destroyed, its contents may be proved by parol, and the will thus reproduced may be admitted to probate. *Fortier's Appeal*, 87 Pa. St.

67; *Deaves' Estate*, 140 Id. 242. And generally the court may admit to probate a lost will. *Dower v. Seeds*, 28 W. Va. 113. But proof of the contents should be very clear, especially when given by interested witnesses. *Deaves' Estate*, *ubi supra*.

(*y*) *Foster v. Foster*, 1 Add. 462. In *the Goods of Leigh* [1892] p. 82.

(*z*) 3 Sw. & Tr. 449.

(*a*) *Ibid.* 301.

(*aa*) This submission of Sir Edward Vaughan Williams was amply justified by the decision in *Sugden v. Lord St. Leonards*, 1 P. D. 154.

(*b*) 8 E. & B. 876. Approved in *Sugden v. Lord St. Leonards*, 1 P. D. 154. *Conf.* *Woodward v. Gouldstone*, 11 App. Cas. 469.

30. In the case of a will fraudulently

will be considered more fully hereafter (*post*, Pt. I. Bk. IV. Chap. II. § VII.), with the subject of the probate of lost wills generally. So if a

So a will mutilated by testator whilst *non compos*, may be established.

will be wholly or partially mutilated or destroyed by the testator whilst of unsound mind, it will be pronounced for as it existed in its integral state, that being ascertainable (c).<sup>31</sup>

The *onus* of showing a cancellation to be the act of the testator lies on those who oppose the will.

It must be borne in mind that the *onus* of making out that the cancellation of a will was the act of the testator himself, lies upon those who oppose the will.<sup>32</sup> Accordingly where a holograph instrument, purporting to be a codicil, was sent anonymously by the post to one of the legatees named therein, it was admitted to probate, though partially burnt and torn across, the handwriting being satisfactorily proved and the confirmatory and adminicular proof being sufficient to satisfy the court that it was a genuine instrument (d)

## \*SECTION II.

### *Revocation by a subsequent Testamentary Disposition.*

“Concerning the making of a latter testament,” says Swinburne (e), “so large and ample is the liberty of making testaments, that a man may, as oft as he will, make a new testament even until his last breath; neither is there any cautel under the sun to prevent this liberty: But no man can die with two testaments, and therefore the last and newest is of force; so that if there were a thousand testaments, the last of all is the best of all, and maketh void the former.”<sup>33</sup>

It is indeed a necessary consequence of the ambulatory nature of a

destroyed it is perfectly permissible to prove and establish such will. *Clark v. Wright*, 3 Pick. 67; *Davis v. Siganney*, 8 Met. 487; *Wallis v. Wallis*, 114 Mass. 510; *Rich v. Gilkey*, 73 Me. 595.

(c) *Scruby v. Fordham*, 1 Add. 74. In the Goods of *Brand*, 3 Hagg. 754. In the Goods of *Shaw*, 1 Curt. 905.

31. *Forbing v. Weber*, 99 Ind. 588.

32. See *post*, p. 214, n. 38.

(d) *Hitchins v. Wood*, 2 Moore, P. C. C. 355-447.

(e) Pt. 7, s. 14, pl. 1.

33. It is held in many of the United States that a later will may revoke a prior will without containing any words of revocation. *Bruden's Estate*, 11 Phila. 130; *Ludlum v. Otis*, 15 Hun 410; *Bonard's Will*, 16 Abb. Pr. (N. S.) 128; *Clarke v. Ransom*, 50 Cal. 595.

will, that the *last* testamentary disposition of property by a testator shall be operative, to the exclusion of any previous contrary or inconsistent one.<sup>34</sup> And this even though the earlier will is contrary to or inconsistent with a later non-appearing will the existence and contents of which are proved by parol evidence. Accordingly in *Helyar v. Helyar* (*i*), Sir G. Lee held that the execution of a second will, with a different executor and residuary legatee, was by law a revocation of the first, though the second did not then appear (*k*). So in *Brown v. Brown* (*l*), a testator, after the Wills Act, executed a will, and afterwards a second one, which he took away with him: After his death the earlier will was found, but the second could not be found: Secondary evidence was given which showed that the second will was inconsistent with the first and revoked it: and it was held that the second will must be presumed to have been destroyed by the testator *animo revocandi* (*m*), and that consequently, the first will \*having been revoked by it, the deceased died intestate. But where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will, not appearing, the evidence ought to be most clear and satisfactory, and if parol evidence alone be relied on, such evidence ought to be stringent and conclusive (*n*).<sup>35</sup>

Last will operative to the exclusion of prior contrary or inconsistent will.

Prior will revoked by subsequent non-appearing will.

Evidence must be most clear and satisfactory.

34. The doctrine that an earlier provision of a will is revoked by a later one or by a codicil repugnant thereto, operates only so far as it is necessary to give to the later provision effect, and so does not apply when the later provision or the codicil is absolutely void. *Austin v. Oakes*, 117 N. Y. 577; *Heartt v. Livingston*, 53 How. Pr. 487.

But if the subsequent will is inconsistent with the former will, it will work a revocation thereof, although it contains no clause of revocation. *Bonard's Will*, 16 Abb. Pr. (N. S.) 128, 201; *Succession of Bobb*, 42 La. Ann. 40. And in no way stated such an intention. *Clarke v. Ransom*, 50 Cal. 595.

But upon the execution of a later will a former will executed by the testator is revoked and becomes invalid and mere

waste paper, and is not competent evidence for any purpose. *State v. Crossley*, 69 Ind. 203.

(*i*) 1 Cas. temp. Lee, 472.

(*k*) See *post*, p. \*152, *et seq.*, as to whether the first will would be revived by the revocation of the second.

(*l*) 8. E. & B. 876.

(*m*) See *ante*, p. \*134.

(*n*) *Cutto v. Gilbert*, 9 Moo. P. C. 131, 140, 141. See also *Hellier v. Hellier*, 9 P. D. 237.

35. But where a contestant claimed that the will had been revoked by a later will, which had been destroyed, and the contestant sought to show that the testator was incompetent to make the second will, the testimony of the physician of the testator and of others, that the testator had expressed a desire that the first

But the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together :<sup>36</sup> for though it be a maxim, as Swinburne says above, that "no man can die with two testaments," yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased (o). And if a subsequent testamentary paper, whether in form a will or a codicil, be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent (p).<sup>37</sup>

A prior testamentary paper not revoked by a subsequent one, unless they be inconsistent:

will should stand is inadmissible, on a question of competency, and cannot sustain a finding that there was a revoking clause in the second will, but that the testator did not understand it. *Wurzell v. Beckman*, 52 Mich. 478.

And in no event is a will revoked by a subsequent instrument intended to confirm it. *Aubert's Appeal*, 109 Pa. St. 447.

But that a subsequent will was made and duly executed and that it contained a revoking clause may be proved by the testimony of a single witness. *Colligan v. M'Kernan*, 2 Dem. 421; *Jackson v. Le Grange*, 19 Johns. 386; *Dan v. Brown*, 4 Cow. 483; *Jackson v. Betts*, 6 Id. 377; *Fetherly v. Waggoner*, 11 Wend. 599; *Graham v. O'Fallan*, 3 Mo. 507; *Dickey v. Malechi*, 6 Id. 177; *Wallis v. Wallis*, 114 Mass. 510; *Legare v. Ashe*, 1 Bay 464; *Havard v. Davis*, 2 Binn. 406; *Baker v. Dobyns*, 4 Dana 220; *Kearns v. Kearns*, 4 Harr. 83; *Harris v. Harris*, 26 N. Y. 433. And in New York this rule is not affected by the provisions of §§ 1865 and 2621 of the Code of Civil Procedure. *Colligan v. M'Kernan*, *ubi supra*.

36. It is a principle as ancient as it is

familiar that no man can have two wills. The last will is of necessity a revocation of all former wills, so far as it is inconsistent with them. *Den v. Vancleve*, 2 South. 589. In New York a will cannot be revoked by a paper intended to operate as a testamentary paper if it be executed in the presence of one witness only. *Barry v. Brown*, 2 Dem. 309.

(o) See a strong instance of this in *Masterman v. Maberly*, 2 Hagg. 235; *Sandford v. Vaughan*, 1 Phil. 39, 128; *Harley v. Bagshaw*, 2 Phil. 48. In the Goods of *Graham*, 3 Sw. & Tr. 69. *Geaves v. Price*, *ibid.* 71. In the Goods of *Budd*, *ibid.* 196. *Birks v. Birks*, 4 Sw. & Tr. 23, in which last case, by a blunder, clauses had been omitted in a subsequent copy made of a will, and the copy and the original will, having both been duly executed, were admitted to probate as together containing the will. In the Goods of *Fenwick*, L. R. 1 P. & D. 319. See also In the Goods of *Nickalls*, 4 Sw. & Tr. 40. In the Goods of *Harris*, L. R. 2 P. & D. 83. In the Goods of *Donaldson*, L. R. 3 P. & D. 45, in which cases one of the papers related to property abroad.

(p) In the Goods of *Petchell*, L. R. 3

37. A codicil revokes *pro tanto*, *Heartt v. Livingston*, 53 How. Pr. 487; *Vaughan*

*v. Bunch*, 53 Miss. 513; and in no event beyond the clear import of its language,

\*Where, however, a testator by a paper purporting to be "his last Will," and in which executors were appointed, disposed of a *part only* of his personal estate, and did not expressly revoke a former testamentary paper, it was held by Sir Herbert Jenner Fust, in *Plenty v. West* (q), that the earlier paper was

or unless the latter be a substantive will *sed quære* :

P. & D. 153, 156. *Lemage v. Goodban*, L. R. 1 P. & D. 57. *Richards v. Queen's Proctor*, 18 Jur. 540. *Stoddart v. Grant*, 1 Macq. H. L. 163. See also *Hellier v. Hellier*, 9 P. D. 237, in which case the second and partially inconsistent will which contained no revocatory clause was not forthcoming nor admitted to probate. In *Robinson v. Clarke*, 2 P. D. 269, it was held, in a suit where the parties have come to an arrangement under the terms of which the Court is applied to grant probate of two testamentary instruments, that the Court will do so, provided the documents are not entirely inconsistent with one another.

(q) 1 Robert. 264. S. C. 4 Notes of Cas. 103. S. C. *Coram* M. R. 16 Beav. 173. But instances may be found where

a paper calling itself a last will and testament has been admitted to probate as an addition to a former will: In the Goods of Luffman, 5 Notes of Cas. 183. In the Goods of Langhorn, 5 Notes of Cas. 512. And see further In the Goods of Holt, 6 Notes of Cas. 93, 96; 2 East, 494, 595, by Lord Ellenborough and Lawrence, J. And on the whole the decision of the Privy Council in *Cutto v. Gilbert*, 9 Moo. P. C. 131, *post*, p. \*143, and of the Lords Justices in *Freeman v. Freeman*, 5 D. G., M. & G. 704, *post*, p. \*142, together with the cases cited above, appear to render the authority of *Plenty v. West* on this point at the least doubtful. Indeed, in *Lemage v. Goodban*, L. R. 1 P. & D. 57, Sir J. P. Wilde regarded *Plenty v. West*, so far as it sup-

*Redfield v. Redfield*, 126 N. Y. 466; and only as far as it is necessary from the clear intent to be gathered from the words used. *Yale College v. Runkle*, 10 Biss. 300. That is to say if a codicil expressly revokes or is in irreconcilable conflict with any clause of the will, that clause must be treated as stricken out and the codicil will stand as the last expression of the testator's intention. *Grimball v. Patton*, 70 Ala. 626.

But where a codicil made by a testatrix one month before her decease makes a bequest to charitable uses, the revocation of the will, being independent and self-supporting, operates without regard to the provisions of the codicil and revokes the former gift to charitable uses and, under the act of 1855, the next of kin or heir-at-law of the testatrix takes as against the trustee of the former devise.

*Appeal of Lutheran Congregation*, 113 Pa. St. 32.

So in New York, it is held that a disposition made by a will is revoked by a subsequently executed testamentary instrument making a disposition inconsistent therewith, although the latter provision is ineffectual in consequence of the inability of the designated beneficiary to take thereunder. *Canfield v. Crandall*, 4 Dem. 111.

But a codicil written three days after a will and annexed to it, declaring that it is to be taken as part thereof, "revoking all wills by me heretofore made, and especially one made in New Orleans in 1860 or 1861" and declaring that the same are by said codicil all cancelled is not a revocation of the will to which it is annexed, but is part and parcel thereof. *Gelbke v. Gelbke*, 88 Ala. 427.

nevertheless revoked by the later, notwithstanding the two were not wholly inconsistent; there being nothing to show that he intended them to be taken conjointly as his will: And it was said by the judge that he knew of no case where the testator called a will "his last Will" in which the court has held former papers to be included.<sup>38</sup>

But as was pointed out by the Judicial Committee of the Privy Council in *Cutto v. Gilbert* (qq), the fact that the testator called the second paper his "last will" was only one circumstance with others on which Sir H. Jenner Fust founded his decision, and not the sole ground of it, as Sir John Dodson in his judgment in *Cutto v. Gilbert*, in the court below, seems to have thought (r).

\*In *Plenty v. West* the judge further remarked that the appoint-

ports the doctrine that the use of the words "last will" in a testamentary paper necessarily imports a revocation of all previous instruments, as overruled by *Cutto v. Gilbert* and *Stoddart v. Grant* (*ubi infra*). See *In the Goods of Petchell*, L. R. 3 P. & D. 153.

38. But if a will makes a complete disposition of all the property of the testator which disposition is entirely incompatible with the existence of any former will it must and will operate as a revocation of all wills previously executed. *Simmons v. Simmons*, 26 Barb. 68; *In re Fisher*, 4 Wis. 254; *Price v. Maxwell*, 28 Pa. St. 23; *Den v. Van Cleve*, 2 South. 589; *Den, Snowhill v. Snowhill*, 3 Zab. 448; *Reese v. Portsmouth Probate Court*, 9 R. I. 434. And such will need not state in terms that it is intended so to operate. *Clarke v. Ransom*, 50 Cal. 595.

And when a later will is relied upon to revoke the will propounded, such later

will must be established by the same evidence as though it were presented for probate itself; and the fact of revocation cannot be shown in any other way. *Noyes' Will*, 61 Vt. 14; *Wallis v. Wallis*, 114 Mass. 510. And the burden is on the contestant to show the due execution of the subsequent will, in order to establish a revocation of the one propounded. *Mairs v. Freeman*, 3 Redf. 181. But if it be lost and its contents cannot be proved so as to admit it to probate, it may be availed of as a revocation. *Wallis v. Wallis*, *ubi supra*.

This practice was established in the English Ecclesiastical Courts before the Declaration of Independence and adopted by courts exercising such jurisdiction in New York and New Jersey. *Nelson v. McGiffert*, 3 Barb. Ch. 158, 164; *Day v. Day*, 2 Gr. Ch. 549.

(qq) 9 Moo. P. C. 131.

(r) See *Dempsey v. Lawson*, 2 P. D. 98.

It should be observed that, between a codicil and a subsequent will, there is this difference of construction; a codicil is a republication and ratification of so much of the prior will as it does not revoke; whereas a new will (if it provides for a full disposition of the testator's

estate) though inconsistent but in part with the former will, and absolutely agreeing in part, revokes the whole prior will, by substituting a new and last disposition for the former one. *Simmons v. Simmons*, 26 Barb. 68, 75.



ment of executors has always been considered to effect a complete disposition. But this, as it has been since held by Sir John Dodson, is by no means conclusive of the testator's intention to constitute a substantive will (*s*). Conversely, where by a testamentary paper, which was executed as a will and not as a codicil, all the testator's property is given to a particular person, without the appointment of any executor, such paper will operate as a total revocation of a prior will, even though an executor may have been appointed by such prior will. For the later paper being, in fact, a will disposing of all the property, although there is no express revocation of the former will or of the appointment of an executor, is *ex necessitate*, a revocation of the former (*t*).

effect of appointment of executors.

A paper disposing of all the estate, without making an executor,

wholly revokes a prior will, though appointing executors.

\*It may here be observed, that a will of a date prior to a will with a revocatory clause, may be admitted to probate, if there is any part of it which the court is satisfied that it was not the intention of the testator to revoke (*u*).

Effect of express revocatory clause in subsequent will.

Upon the same principles it has been decided, in the Courts of Com-

(*s*) *Richards v. Queen's Proctor*, 18 Jur. 540. *Stoddard v. Grant*, 1 Macq. H. & L. 163, 173. And where a second will appoints a fresh executor, if the wills are not inconsistent, probate may be granted to both the executors. In the *Goods of Leese*, 2 Sw. & Tr. 442. In the *Goods of Graham*, 3 Sw. & Tr. 69. *Geaves v. Price*, 3 Sw. & Tr. 71. In the *Goods of Morgan*, L. R. 1 P. & D. 323. A testator executed a will purporting to dispose of, and in fact only disposing of property in Tasmania and appointed thereby executors resident in Tasmania. He subsequently executed another will, disposing of his property in England, and thereby ratified and confirmed his will relating to the property in Tasmania. In this last will he appointed three executors distinct from those named in the earlier will, and the Court ordered probate to issue of both papers as together containing the will of the testator. In the *Goods of Harris*, L. R. 2 P. & D. 83. Where a second will appoints no fresh executors

probate of both wills may be granted to the executor named in the first will. In the *Goods of Griffith*, L. R. 2 P. & D. 457.

(*t*) *Henfrey v. Henfrey*, 2 Curt. 468: affirmed in the Privy Council, 4 Moore, P. C. C. 29. Where a testator made two wills, the first in England according to English law, by which he disposed of all his realty and personalty, and appointed an executor; the second in Italy according to Italian law, by which he appointed his wife "universal heiress;" and this will contained a revocatory clause in the following terms: "I erase, revoke, and annul every other act or last will which I may have made." The Court held that the Italian will revoked the disposition of personalty and the appointment of executor contained in the English will, and that the Italian will alone was entitled to probate. *Cottrell v. Cottrell*, L. R. 2 P. & D. 397.

(*u*) A codicil which absolutely revokes and makes void all bequests and dispositions in a will and nominates executors,

Mere fact of a later will existing will not operate a revocation, at least in the Common Law Courts:

mon Law, that a subsequent will is no revocation, unless the contents of it are known: and it is not to be presumed, from the mere circumstance of another will having been made, that it revoked the former.<sup>39</sup> As

where it was found by a special verdict that the testator after the making of a former will made *another* will in writing, but what the contents and purport were the jury did not know: the second will was holden not to be a revocation of the first: for the other will

though it be expressly found to be different from a former will, if the particulars be unknown:

might concern other lands, or no lands at all, or be a confirmation of the former (x). And though a will be expressly found to be different from a former, yet if it be declared that it is not known in what that difference

consisted, it will be no revocation in law thereof. Thus where it was found by a special verdict (y) that the \*testator did make and duly publish *another* will in writing in the presence of three subscribing witnesses who duly attested the same; that the disposition made by the testator by the second will *was different* from the disposition in the former will, but in what particular was unknown to the jury; but they did not find that the testator cancelled the second will, or that the devisee under the first will destroyed the same, but what was become of

but does not in direct terms revoke the appointment of executors and guardians in the will does not revoke the will; for the legal operation of a codicil is to confirm such parts of the will, to which it refers, as it does not revoke.<sup>40</sup> In the Goods of Howard, L. R. 1 P. & D. 636. See to the same effect, Denny v. Barton, 2 Phil. 575, and Gladstone v. Tempest, 2 Curt. 650 decided before the Wills act.

39. It is undoubtedly within the power of a donor *causa mortis* to revoke a gift of that character at any time before his death. And it seems that, although, as said in the text, the mere circumstance that another will has been made does not necessitate the presumption that the former will was revoked, a will subsequently made amounts to a revocation of a gift *causa mortis*. Jayne v. Murphy, 31 Ill. App. 28.

40. If a codicil be so uncertain as to be

[\*142]

void, it will not revoke the residuary bequest in a will. Carpenter v. Miller's Executors, 3 W. Va. 174; Delafield v. Parrish, 25 N. Y. 9.

(x) Hitchins v. Bassett, 3 Mod. 203, affirmed in the House of Lords, Show. Cas. Parl. 146. "Hence it seems to follow," says Mr. Serj. Williams, in his note to Duppa v. Mayo, 1 Saund. 279 h, "that what Lord Hale is said to have laid down in a former case upon the same will (Seymour v. Nosworthy, Hard. 376), namely, that 'a second substantive independent will, though it does not by express words import a revocation of a former will, or pass any land, amounts in law to a revocation,' is either not correctly reported, or if it be, is overruled by Hitchins v. Bassett."

(y) Goodright v. Harwood, 3 Wils. 497, affirmed in the House of Lords, 7 Bro. B. C. 344. 1 Saund. 279 h.

the second will the jury could not tell : it was adjudged in the King's Bench, on error, reversing the judgment of C. B. to the contrary, that the second will was no revocation of the first ; and the judgment of the Court of King's Bench was affirmed in the House of Lords (z).

In *Cutto v. Gilbert* (a), Sir John Dodson, in the Ecclesiastical Court declined to recognize these doctrines of the Common Law : In that case a testator, having duly executed his will, subsequently executed another testamentary paper, which was not found at his death, and the contents of which were unknown, save that it was headed "last Will ;" and that learned judge, held that the former will was revoked by the execution of the latter, being of opinion that the execution of a will of personality amounts to a revocation of a former will, whether the contents of the later will are known or not, provided there be, in substance and effect, revocatory words. But *this decision was reversed in the Privy Council* ; their lordships being of opinion that the words, "this is my last Will," did not import that the paper contained a different disposition of the property ; and that the mere fact of so calling it did not render it a revocatory instrument (b). Again, in *Freeman v. Freeman* (c), Lord Justice Knight Bruce said, that whatever might be the view of the Ecclesiastical Courts, he did not think a temporal court bound to say that when a man in an instrument, containing temporary dispositions by him describes it as his last will and testament, and other\*wise calls it his will, he is to be taken *primâ facie* as meaning wholly to annul any former testamentary instrument made by him extending to matters to which the latter does not extend. And accordingly the Lord Justices held that the expression, "this is my last Will and Testament," does not operate as a revocation of a former will, without words to that effect, at all events as regards real estate.<sup>41</sup>

In the case of *Dempsey v. Lawson* (d), Sir James Hannen, in reviewing the cases of *Plenty v. West*, *Cutto v. Gilbert*, and the other cases since decided, in his judgment said, "it becomes necessary to consider minutely the nature

a later will, of which nothing is known but that it was headed "last Will," is no revocation.

General rule deducible from cases.

(z) See also *Dickinson v. Stidolph*, 11 C. B., N. S. 357.

(a) 18 Jur. 560.

(b) 9 Moo. P. C. 131. "

(c) 5 De G., M. & G. 704.

41. When a will is contested on the ground that a subsequent will was exe-

cuted by the testator, the *onus probandi* is on the contestant to show the due execution of the subsequent will, in order to establish a revocation of the one propounded. *Mairs v. Freeman*, 3 Redf. 181.

(d) 2 P. D. 98.

and extent of the inconsistency of a later testamentary instrument which will have the effect of revoking an earlier will. In this investigation the court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used, but in seeking the true meaning of the testator the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later Will does not completely cover the whole subject matter of the earlier. This is what was decided in *Plenty v. West*. There the court held upon all the facts before it that it was the intention of the testator that the later paper should stand alone, although that disposed of a part only of his personal estate, and therefore that in effect, though not in terms, it revoked the earlier Will. . . . The case of *Cutto v. Gilbert* (e), merely decides that the bare fact of a testator having executed an instrument as his last Will and Testament the contents of which are unknown, does not operate as a revocation of a previous Will, and this seems very obvious, for the \*missing instrument may have been confirmatory of the first. It certainly does not appear from the judgment in that case that there was any intention to overrule the decision in *Plenty v. West*. . . . The Judicial Committee appear to have approved of the decision in *Plenty v. West*, upon the ground that the fact that the whole of the personal estate was not disposed of by the second Will was not by itself a sufficient reason for uniting the earlier with the later Will and admitting both to probate, the Wills being in other respects essentially different. And Lord Penzance, in *Lemage v. Goodban* (f), does not say that *Plenty v. West* is overruled, but with his accustomed accuracy only says, ‘the case of *Plenty v. West*, so far as it supports the doctrine that the use of the words “last Will” in a testamentary paper necessarily imports a revocation of all previous instruments is, I think, overruled by *Cutto v. Gilbert*.’ Lord Penzance further says, ‘the intention of the testator in the matter is the sole guide and control.’ But the intention to be

(e) 9 Moo. P. C. 131.

(f) L. R. 1 P. &amp; D. 57.

sought and discovered relates to the disposition of the testator's property and not to the form of his Will. What dispositions did he intend? not which or what number of papers did he desire or expect to be admitted to probate? is the true question. I followed that decision in the case of *In the Goods of Petchell (g)*."

Where upon the face of a testamentary document and the facts known to the testator at the time of its execution, it is doubtful whether the testator intended altogether to revoke a former will, the court will admit parol evidence to ascertain the intention (*h*).

If two inconsistent wills be found of the same date, or without any date, and no evidence can be adduced establishing the posteriority of the execution of either, both are necessarily void, and the deceased must be considered intestate: But in every case the courts will struggle to reconcile them, if possible, and collect some consistent disposition from \*the whole (*i*). But if there is an express contradiction between two clauses in a will, it is settled by law that the second part of the will must take effect over the first part (*k*): but it was held by Lord Romilly, M. R., that this rule does not apply where a second bequest is made by implication (*l*), but it may be doubted whether this decision was well founded (*m*).<sup>42</sup>

Two inconsistent wills of the same date or without any date.

Clause in a will controlled by subsequent inconsistent clause.

It may sometimes become a question, in a case where there are several codicils, or other testamentary papers, of different dates, whether the dispositions of the latter are to be considered as additional and cumulative to those of the prior, or as a substitute for, and consequently revocatory of them.

Revocation of a prior disposition, by a substituted one in a later instrument.

And if a testator, by a codicil to his will, should direct a certain mode of making a provision for his wife, and by another subsequent codicil should also direct a provision for her in another mode; on the face of these instruments it might be doubtful, whether by the latter codicil he

(g) L. R. 3 P. & D. 153.

(h) *Jenner v. Finch*, 5 P. D. 106.

(i) *Swinb. Pt. 7*, s. 11, pl. 1. *Godolph. Pt. 1*, c. 19, s. 3. *Phipps v. Earl of Anglesea*, 7 Bro. P. C. 443. *Toml. Ed.*

(k) See *post*, Pt. III. Bk. III. Ch. II. § 1, 4.

(l) *Kerr v. Clinton*, L. R. 8 Eq. 462.

(m) See *post*, \*155.

42. But a specific devise of real estate can be revoked only by the destruction of the will or by the execution of another will or codicil, or by the alienation of the estate during the lifetime of the testator. *Burnham v. Comfort*, 108 N. Y. 535.

intended to increase the provision made by the former, or to revoke it by substituting that contained in the latter.<sup>43</sup> In such cases, the court will admit parol evidence, in order to investigate the *animus* with which the act was done; and if upon such evidence it should appear, that the latter codicil, although containing no revocatory words, was intended by the testator as a substitute for the former, it shall be thereby revoked, though it remain uncanceled (*n*). However, the general principle is, that bequests are, *prima facie*, to be taken cumulatively, when they are on separate papers, unless they are revocatory of each other (*o*). And \*in a case (*p*) in the Prerogative Court, it was said by Sir Herbert Jenner Fust, that, whether the case is to be governed by the old law, or by the Wills Act, parol evidence is not to be admitted, unless there is such doubt and ambiguity *on the face of the papers* as to require the aid of extrinsic evidence to explain them (*q*).

Parol evidence admissible to investigate *animus* of act.

A second will executed under an erroneous supposition that it was a copy of the former will is no revocation.

If a man executes a will, erroneously supposing it to be a copy of his former will, it will be no revocation as to the parts omitted in the supposed copy, and both instruments will be admitted to probate (*r*).

43. Where in his will, a testator made a bequest to A. B. & C., absolutely, and afterwards made a codicil in which he revoked the bequest to A. of his share in the original bequest; such codicil is substitutional, and revokes so much of the original will as is inconsistent with it: but the one-third being thus undisposed of does not go to B. & C. *Mason v. Methodist Epis. Church*, 12 C. E. Gr. 47. But in a case where the residue was given by the will to four and a codicil revoked the bequest as to one, the residue was divided between the remaining three share and share alike. *Heartt v. Livingston*, 53 How. Pr. 487. And this appears to be the construction in Massachusetts. *Towne v. Weston*, 132 Mass. 513.

And in case of a specific devise to A. B. C. & D., with power of sale to the executor, where there is a codicil re-

voking D's interest in the devise, followed by another codicil revoking C's interest, the power of sale is not revoked by either or both of the codicils. *Anderson v. Butler*, 31 S. C. 183.

(*n*) *Methuen v. Methuen*, 2 Phillim. 416. *Greenough v. Martin*, 2 Add. 239. *Jenner v. Finch*, 5 P. D. 106. See *post*, Pt. III. Bk. III. Ch. II. § VII. And as to the admissibility of parol evidence, see *post*, Pt. I. Bk. IV. Ch. II. § V.

(*o*) *Bartholomew v. Henley*, 3 Phillim. 316, by Sir John Nicholl. See *infra*, Pt. III. Bk. III. Ch. II. § VII. as to cumulative legacies.

(*p*) *Thorne v. Rooke*, 2 Curt. 799

(*q*) As to what is to be regarded as such an ambiguity, see *post*, Pt. I. Bk. IV. Ch. II. § V.

(*r*) *Birks v. Birks*, 34 L. J., P. M. & A. 90.

As to the revocation of a finished will by a subsequent unfinished one (if made before Jan. 1, 1838), see the former Editions of this Work, Pt. I. Bk. II. Ch. 3, § 2.

Revocation of finished will by subsequent unfinished will under the old law.

It has already appeared that a cancellation of a will, under an erroneous assumption of facts, may not operate as a revocation (s). Upon the same principle, if a man, by a subsequent will or codicil, make a disposition different from a former one, under a false impression, the *impulse of which is the foundation of his wish to change his former intent*, such an act will be considered only as affecting a contingent presumptive revocation, depending on the existence or non-existence of that fact.<sup>44</sup> As if one having previously devised to A., afterwards by another will, without destroying the first, or by codicil, devise to B., stating her to be his wife, so that it may be understood that he intended her to be benefited in that character only, and it turn out that she was married before, and had a husband living, neither of which facts were in the devisor's knowledge (t), such devise \*or codicil will not operate as a revocation of the former will, because it depends on a contingency which fails (u). It has been said, that care must be taken to distinguish

A subsequent will or codicil, made under the impulse of a mistaken notion of facts, will not revoke a former one.

(s) *Ante*, p. \*131.

44. The revocation of a will by a codicil, which is made upon a false assumption does not take effect, because it is considered conditional and dependent upon the condition which fails. *Mendinhall's Appeal*, 124 Pa. St. 387. So too, any revocation made under a misconception of fact will not take effect. *Dunham v. Averill*, 45 Conn. 61.

In the application of this doctrine many nice distinctions arise and many questions of great importance are presented to courts. In cases where the matters are peculiarly within the knowledge of the testator, and the recitals of the revoking instrument seem to indicate a mistake, the court will be inclined not to disturb the revocation. Thus where a testator by a codicil revoked a legacy to his daughter, giving as a reason that he had made a gift of stock and loan of money to her husband, the codicil will

not be held inoperative on the ground that the transfer of the stock was a sale and not a gift and no loan was ever made, when in fact the transaction was peculiarly within the knowledge of the testator, and was in effect an advancement. *Mendenhall's Appeal*, *ubi supra*.

(t) An appointment by a will to a husband, under circumstances of this nature, occurred in *Kennell v. Abbott*, 4 Ves. 802.

(u) So where a testator, by will dated in 1849, bequeathed the interest of a fund to Charlotte Lee, "but in case the said Charlotte Lee should marry or die unmarried," the fund was to go over. Charlotte Lee was the maiden name of the testator's daughter, who had been married in 1828, and it was found that the testator knew of her marriage, but that it could not be shown under what circumstances he knew it. It also appeared that Charlotte's husband had, in 1849, not been

between cases, where the testator acts under a false impression, originating from a deceit practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised on him (*x*). But there seem to be no grounds for any such distinction. Thus, where a testator gave legacies to the grandchildren of his sister, and afterwards, by a codicil, revoked the legacies, giving as a reason, that the legatees were dead; upon its being proved that the fact of their death was not true, Lord Loughborough held, that the legacies were not revoked, on the ground that the cause of the revocation was false; and said, whether it was by misinformation or mistake was perfectly indifferent (*y*). So in a case in the Prerogative Court (*z*), the deceased supposing his will, appointing his wife sole executrix and universal legatee for life, to be lost, made, in Peru, a nuncupative will (not in conformity with the Statute of Frauds) with a general revocation clause, and appointing two executors, and his wife universal legatee, absolutely: The executors renounced, and she took probate of that will in Peru: The former will being found (of which \*fact he was ignorant at the time of his death), probate thereof, at the wife's prayer, was granted to her: and Sir John Nicholl observed that it was unnecessary to decide the question (about which there might be some doubt), whether the Statute of Frauds would apply to the nuncupative will made in Peru; because it appeared that the deceased did not intend to revoke the former will; but, supposing it to be lost and being unwilling to die intestate, he made the nuncupative will. Accordingly, in *Doe v. Evans* (*a*), where a testatrix by her will devised all her estate to L. E. for life, and to his sons and daughters successively, in strict tail, and L. E. and his only son died in the lifetime of the testatrix, but he left a daughter E. E., of whose birth she knew nothing, and she thereupon made a codicil, in which she recited her former will, and that L. E. had died without leaving any issue, and then devised over: It

heard of for many years. After the testator's death the husband appeared, and on the death of Charlotte claimed the fund. It was held by Page Wood, V.-C., that the circumstances were sufficient to show that the testator, in 1849, believed his daughter's husband to be dead, and that he intended that no husband of hers should have the benefit of the fund; and,

accordingly, that on her death it passed by the gift over: *Crosthwaite v. Dean*, L. R. 5 Eq. 245.

(*x*) 1 Powell on Dev. 525.

(*y*) *Campbell v. French*, 3 Ves. 322.

(*z*) In the Goods of *Morseby*, 1 Hagg. 378.

(*a*) 10 A. & E. 288.



was held, that, as this codicil was made in ignorance of the existence of E. E., it was only a conditional revocation (*b*).

But there does seem to be a distinction between cases, where the testator refers to a fact as having actually happened, and where he merely expresses his doubt, supposition or advice of the fact. Thus in the case of the *Attorney-General v. Lloyd* (*c*), the testator, by his will, \*dated 8th February, 1734, gave particular lands and his personal estate, to be laid out in lands, to charitable uses. He afterwards made a codicil, dated 12th July, 1736, in which, after reciting his doubt whether such devise would be good, he gave the lands to M. B. and his heirs, if by the Mortmain Act they could not pass according to his will. On 17th March, 1737, he made another codicil, the terms of which were, that the testator, "being advised" that the devise of his lands was void, and it being his intention that the charity should be continued, and being advised that his personal estate could be given, he did, by that codicil, give his personal estate to the charitable uses, and his real estate to M. B. The former part of this advice seems to have been ill-founded; for in *Ashburnham v. Bradshaw* (*d*), it had been certified by the opinion of all the judges, to Lord Hardwicke, that a devise of lands under a will to charitable uses, made before the Statute of Mortmain, (which was enacted in 1736,) notwithstanding the testator survived the enactment, passed the land. But Lord Hardwicke observed, that the testator had put the devise on the fact of his being advised; and that he was so advised was a fact in his own knowledge; and he had grounded his devise upon this ad-

*Distinction between cases where testator refers to a fact as having actually happened, and where he merely expresses doubt, supposition, or advice of the fact.*

(*b*) Some time after making the codicil, the testatrix was made acquainted with the existence of E. E., but made no further testamentary disposition: It was held, that this did not set up the codicil: for, having been once inoperative, it could only be republished according to the Statute of Frauds. In *Parker v. Nickson*, 1 De G., J. & S. 117, the words in a will, "I acknowledge N., my second cousin, to be my next of kin and heir-at-law to all my real and personal property, situate in the parish of M.," were held by Lord Westbury, to be an effectual gift to N., who was, in fact, neither heir nor next

of kin of the testator. The will concluded, "N., my second cousin, is my next of kin and heir-at-law, as my brother John is dead and has left no issue." The testator had another brother, named William, and his Lordship held, that these words must not be taken as proving that the testator was under the erroneous belief that his brother William was dead without issue.

(*c*) 3 Atk. 515, disapproved of by Malins, V.-C. in *Thomas v. Howell*, L. R. 18 Eq. 198, 211.

(*d*) 2 Atk. 36.

vice, and not upon the reality of the law, though that should come out in the event one way or another; upon that he made his determination, which he might do to quiet a doubtful question,—“I will not have this litigated after my death, but I will settle it myself, upon some certain foundation” (e). His Lordship afterwards ordered a case to be stated for the opinion of the judges of the King’s Bench, and they certified that the real estate was well devised to M. B., under the second codicil. So in the \*Attorney-General v. Ward (f), the testatrix, having, by her will, given 300*l.* to be divided among such of the children of E. D. as should be living, by a codicil gave to her brother’s son “the 300*l.* designed for E. D.’s children, as I know not whether any of them are alive, and if they are well provided for:” Lord Alvanley held that this operated as a complete revocation of the legacy, though the children of E. D. were alive and claimed the legacy: The learned judge observed, that it had been argued, and with some ground, that if it had rested upon her not knowing whether they were living, there would be good reason to contend, that it fell within the case of “*Pater credens filium suum esse mortuum, alterum instituit hæredem: filio domum redeunte, hujus institutionis vis est nulla;*” (g) but she went further; that she doubted, if they were living, whether they might not be well provided for; and the court would not inquire whether they were well provided for or not.

In Richardson v. Barry (h), (a case before the Wills Act) the deceased had power under a trust deed, to dispose of certain effects by a will, attested by two witnesses: And it was held, that a will, executed accordingly, was revoked by a subsequent will *directly referring to the trust deed*, and containing an express revocatory clause duly executed, but attested by *one* witness only.<sup>45</sup>

(e) His Lordship afterwards said, his principal doubt in this case was, whether the new disposition by the second codicil was put singly upon the point of law; the testator might have been advised that his personal estate had so much increased since making the will as to be sufficient to support the charity.

(f) 3 Ves. 327.

(g) Cicero de Oratore, lib. 1, c. 33.

(h) 3 Hagg. 249.

45. On the other hand, an assignment taking effect as a power in trust is not revoked by a subsequent will. Bennett v. Rosenthal, 11 Daly 91.

And it may be remarked generally that the document must be testamentary in its nature in order to be revoked by a subsequent will; hence an agreement, not testamentary, is not revoked by a subsequent will. Meek’s Appeal, 97 Pa. St. 313.

In *Hughes v. Turner* (i), the testatrix, possessing a power of appointment, duly by will executed that power: By a later will duly executed and attested according to the power, but without any recital of, or reference to, the power, she disposed of a real estate over which the power extended, bequeathed all the rest, residue and remainder of her estates and effects, real or personal, plate, &c. or other property, whether in possession, reversion, or expectancy, or held in trust for her; revoked and made void all and every other \*will and wills by her at any time theretofore made, and declared this only to be her last will and testament: The Court of Delegates, holding that the intention to revoke the former will was, taking all the contents of the later will together, clear, refused probate of the two papers as together containing her will, and granted probate of the later paper alone. But it has been understood (k) that the ground of this decision was, that the contents of the later will taken altogether clearly showed a departure from the original intention of the prior one, and therefore revoked that will, but that the clause of revocation, taken *per se*, and without a clear intention, would not have had that effect. It was argued that by refusing probate of the earlier papers, the question was shut out, whether they were not a good execution of the power (l). But it was holden, notwithstanding, that the Court of Probate must decide, according to its ordinary rules, whether the last paper was revocatory or not, and decreed probate accordingly in the ordinary course (m).

Again, in *Brenchley v. Lynn* (n), a woman, having a power to appoint certain property by will, made a will previously to her marriage in 1834, and by her marriage settlement, of even date with her will, *covenanted not to revoke that will*: After her marriage she executed many testamentary papers, but did not, as alleged, thereby in any way revoke the will: Subsequently she executed "a codicil" to "her last Will," whereby she revoked her "said Will in toto," "so that I may die intestate:" And Dr. Lushington held that, notwithstanding an averment of the necessity of probate being granted of certain former testamentary papers in addition to the last "codicil," in order that the Court of Equity might construe them in reference to the covenant in the settlement, the Ecclesiastical Court was bound, by the authority

(i) 4 Hagg. 52.

(k) See 4 Hagg. 71.

(l) See *post*, Pt. I. Bk. IV. Ch. II. § IX.(m) See this case again stated, *post*,

Pt. I. Bk. IV. Ch. II. § IX.; and also Pt. I. Bk. V. Ch. III. § VI.

(n) 2 Robert. 441.

of the above-mentioned case of *Hughes v. Turner*, to decree probate \*of the last testamentary paper alone: For it appeared from that case, that the duty of deciding, whether the "last codicil" was meant to revoke all the other papers, was thrown on the latter court; and upon the facts before him it could not be doubted that it was so meant (o).

From these cases, Sir C. Cresswell in the case of *In the Goods of Merritt (p)*, appears to have deduced the rule, and acted upon it, that a general clause revoking all former wills was not sufficient to manifest an intention to revoke a will made in execution of a power.

It was long a *vexata quæstio*, whether the principle of law was, that, on the revocation of a latter will, a former uncancelled will should revive, or not. In the Common Law Courts, it was certainly laid down as an absolute proposition, excluding all questions of intention, that the former will should revive (q).

Question prior to Wills Act whether on the revocation of a latter will a former uncancelled will revived.

In the Ecclesiastical Courts, it seems that a different doctrine from that laid down in the Common Law Courts had prevailed; for it had been decided in a variety of cases, that the presumption was *against* the revival of the prior will, and that the *onus* was thrown on the party setting it up, to rebut that presumption (r).

Difference formerly existed between doctrine of Ecclesiastical and Common Law Courts on this point.

Now, however, with respect to wills which are within the operation of the stat. 1 Vict. c. 26, it is enacted by s. 22 of \*that 1 Vict. c. 26, s. 22. act, that "no Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the Act, and showing an intention to revive the same," and the destruction

(o) See *In the Goods of Holt*, 6 Notes of Cas. 93.

(p) 1 Sw. & Tr. 112, 116, 117. See also *In the Goods of Meredith*, 29 L. J., P. M. & A. 155. *In the Goods of Joys*, 30 L. J., P. M. & A. 160. But the authority of this rule may be doubted, and it would rather seem that the rule is that a general revocation of wills does not necessarily revoke an appointment by will, but it must be shown that it is entirely unreasonable that it should have that effect,

otherwise it will be a revocation of the appointment: *Sotheran v. Denning*, 20 C. D. 99. See also *In the Goods of Eustace*, L. R. 3 P. & D. 183. *Re Kingdon*, 32 C. D. 604, which last case goes far to negative Sir C. Cresswell's rule altogether.

(q) *Goodright v. Glazier*, 4 Burr. 2512. *Harwood v. Goodright*, 1 Cowp. 91.

(r) See the different cases cited in *Moore v. Moore*, 1 Phillim. 412.

of a second will, itself revoking one of prior date (*s*), cannot re-instate the first will, even though it may be in existence at the time of the testator's death (*t*).<sup>46</sup>

It may here be mentioned, that it has been held, that a codicil which shows an ineffectual intention to revive an earlier will, which was destroyed, does not thereby revoke a will made subsequently to the destroyed will (*u*).<sup>47</sup>

A codicil referring to a will destroyed by testator does not revoke a later will.

## SECTION III.

### *By express Revocation.*

According to the Statute of Wills (1 Vict. c. 26, s. 20), an express revocation of a will or other testamentary instrument<sup>48</sup> cannot be effectual, unless it be contained in a will or codicil executed as required by the act, or in "some writing declaring an intention to revoke the same, and executed in

Revocations after Jan. 1, 1838: 1 Vict. c. 26, s. 20

(*s*) A subsequent will may revoke a prior disposition, not only if it contains a revocatory clause but also if it is inconsistent with it, *e. g.*, if the second will disposes of the whole estate: *Henfrey v. Henfrey*, 4 Moo. P. C. 29. *Lemage v. Goodban*, L. R. 1 P. & D. 57.

(*t*) *Brown v. Brown*, 8 E. & B. 876. See also *In the Goods of Brown*, 1 Sw. & Tr. 32. *Dickinson v. Swatman*, 30 L. J., P. & M. 84. *Sotheran v. Denning*, 20 C. D. 99.

46. It is so held in New York, *Briggs v. Angus*, 3 Dem. 93; and in Texas, *Hawes v. Nicholas*, 72 Tex. 481; and in Maryland, *Colvin v. Warford*, 20 Md. 391;

and in Kentucky, *Stewart v. Mulholland*, 88 Ky. 38; and in Michigan, *Scott v. Fink*, 45 Mich. 241; and in Virginia, *Rudisill v. Rodes*, 29 Gratt. 47. But in Connecticut the revocation of the second will revives the first, *Peck's Appeal*, 50 Conn. 562; and in New Jersey, *Randall v. Beatty*, 4 Stew. (N. J.) 643; and the fact that the former will was supposed to have been destroyed but was found after the death of the maker will not produce any change in this. *Id.*

In *Peck's Appeal*, *ubi supra*, it is said that the revocation of a former will by the mere execution of a later will is ambulatory and does not take effect until

(*u*) *Rogers v. Goodenough*, 2 Sw. & Tr. 342. See *post*, Pt. I. Bk. II. Ch. IV. § II.

47. But in New York the reverse has been expressly held, and under such circumstances both wills were held to be revoked and, as the codicil could not stand as a separate testamentary act, the decedent was held to have died intestate *Will of Pinckney*, Tuck. 436.

48. To revoke a testamentary disposition is to annul it. *Gardner v. Gardner*, 65 N. H. 230. And where a will has once been revoked by a later one, nothing can ever be claimed under it, even though the later will has been lost or destroyed. *Stevens v. Hope*, 52 Mich. 65.

the manner in which a Will is hereinbefore required to be executed" (x).

By sect. 34, it is enacted, that "this Act shall not extend to any Will made before January 1, 1838:" The construction of which clause has been understood to be, with reference \*to the subject of the present inquiry, that the statute shall not extend to any act of revocation done with respect to a will before January 1, 1838 (y).

Where a testatrix devised real estates, and by a subsequent void deed, attested by two witnesses, conveyed them to other trusts; it was held by Romilly, M. R., that the deed was not a writing declaring an "intention to revoke" within the 20th section of the Statute of Wills. Such a declaration need not be in terms, *i. e.*, "I do declare that I intend to revoke my Will,"<sup>49</sup> but must be in equivalent terms amounting to that (z).

Declaration of intention to revoke within sect. 20 of Wills Act.

the second will becomes operative by the death of the testator and therefore the revocation of the second will will revive the former.

And even where the later will was destroyed with the intention that the former will should be revived and stand as the last will of the testator, if he does not re-execute it, or make a codicil reviving it, although he retains it uncanceled, it is not revived by destruction of the latter will. *Rudisill v. Rodes, ubi supra.*

Whether a later revoking will being cancelled an earlier undestroyed will is revived is a question of intention to be collected from all the circumstances of the case. *Pickens v. Davis*, 134 Mass. 252.

And in such a matter the oral declarations of the testator, made after the cancellation of the will, are admissible in evidence for the purpose of showing the intention of the testator as to reviving the former will. *Pickens v. Davis, ubi supra.*

(x) See this section *verbatim*, *ante*, p. \*110.

(y) *Hobbs v. Knight, ante*, p. \*112. As to the express revocation of wills prior to the above date, see the former editions of this work, Pt. I. Bk. II. Ch. III. § III.

49. The words "I revoke this will" written on the fourth page of a will and not attested are void as a revocation, because not executed as required by statute; they are not a cancellation, because the will itself remains intact. *Will of Ladd*, 60 Wis. 187.

(z) *Ford v. De Pontes*, 30 Beav. 572. And where the testator had obliterated

the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words signed by himself and attested by two witnesses "we are witnesses of the erasure of the above," it was held that the codicil was revoked, for the words above mentioned were "a writing declaring an intention to revoke" within the above section: In the *Goods of Gosling*, 11 P. D. 79. Where a testator sent a letter signed by himself and attested by two witnesses, desiring the destruction of his will, the letter was held to revoke the will: In the *Goods of Durance*, L. R. 2 P. & D. 406.

In the case of *Doe v. Hicks*(a), it was stated by Tindal, C. J., in delivering the opinion of the judges in the House of Lords, that the principle on which that opinion proceeded was, that where a devise in a will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise (b). And the law thus laid down has been recognized and acted upon as an established rule in numerous subsequent cases (c).<sup>50</sup>

To revoke a clear devise, the intention to revoke must be as clear as the devise.

\*Indeed, it may be stated generally as a canon of construction, that a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention (d). But in applying this rule it is sufficient that the subsequent words indicate the testator's intention to cut the gift down with reasonable certainty,<sup>51</sup> and the rule does not mean that you are to institute a comparison between the two clauses as to lucidity (e).<sup>52</sup>

Rule that a clear gift cannot be cut down by subsequent words unless they show equally clear intention.

Application of rule.

It may be deduced from the case of *Onions v. Tyrer* (ee), and the authorities which have been cited in a previous section, (with respect to the doctrine of cancellation, dependent on the efficacy of another act), that even an express revo-

Express revocation subservient to another disposition.

(a) 8 Bing. 479.

(b) See *Accord*. *Cleoburey v. Beckett*, 14 Beav. 587, per Romilly, M. R. *Williams v. Evans*, 1 E. & B. 739. *Kermode v. Macdonald*, L. R. 1 Eq. 457, 3 Ch. 584.

(c) *Patch v. Graves*, 3 Drew. 348, 376. *Robertson v. Powell*, 2 Hurl. & C. 762. *Butler v. Greenwood*, 22 Beav. 303. *Norman v. Kynaston*, 29 Beav. 96. S. C. 3 De G., F. & J. 29. *Molyneux v. Rowe*, 8 De G., M. & G. 368.

50. The expression, in a codicil, "I hereby revoke all the several paragraphs of said will wherein said E is given  $\frac{1}{2}$  of the principal and income," will revoke all the provisions in favor of E. in the will. *Bradlee v. Andrews*, 137 Mass. 50.

(d) *Kiver v. Oldfield*, 4 De G. & A. 30.

51. But a gift of a share of the residue of the estate is strictly dependent upon the original devise in the will and such

gift falls with the revocation of such devise. *Hard v. Davison*, 53 Hun 112.

But a revocation of a legacy will not be set aside unless it be plainly shown that it was made under a false belief. *Dunham v. Averill*, 45 Conn. 61.

(e) *Randfield v. Randfield*, 8 H. of L. 225, 235, 238, by Lords Campbell. & Wensleydale. As to the latter clause prevailing when two clauses are irreconcilable, see *ante*, p. \*145, and *post*, Pt. III. Bk. III. Ch. II. § 1, 4.

52. *Estate of McCoy*, 17 Phila. 482; *Dunham v. Averill*, 45 Conn. 61; *Johns Hopkins University v. Pinckney*, 55 Md. 365, 381; *Jones v. Earls*, 1 Gill 395; *Lee v. Prindle*, 12 Gill & J. 305; *Douglas v. Blackford*, 7 Md. 8; *Doe v. Hicks*, 8 Bing. 475; *Bosley v. Bosley*, 14 How 395; *Quincy v. Rogers*, 9 Cush. 295.

(ee) 2 Vern. 742.

cation of all former wills, though not wanting in any circumstance for a revocation, will not operate as such, if only subservient to another subsequent disposition, which fails (*f*).

Generally speaking, where a will contains a general revocatory clause, it operates a revocation of all prior testamentary acts.<sup>53</sup> But there has already been occasion to point out (*g*), that probate may be granted of a paper of a date prior to such a will, provided the court is satisfied that it was not the intention of the deceased to revoke the particular legacy which is the subject of the earlier paper.

Effect of a general revocatory clause in a will.

A codicil intending to revive a destroyed will no revocation of an intermediate will.

A codicil, which ineffectually intends to revive a prior will which the testator has destroyed, does not operate as a revocation of an intermediate will, if it is not inconsistent therewith, and does not show any intention to revoke (*h*).

(*f*) By Sir W. Grant, 7 Ves. 379; unless it fails by reason of the incapacity of the legatee: *Tupper v. Tupper*, 1 Kay & J. 665, *ante*, p. \*131.

53. In Indiana, if a will, duly subscribed and attested, expressly revokes all prior wills executed by the testator it is valid for the purpose under § 2559 R. S. 1881, whether it is effectual as a testamentary disposition of property or not. *Burns v. Travis*, 117 Ind. 44.

And it is held that a later will properly executed as such and containing a clause revoking a former one is effectual as a revocation, and although having been lost or destroyed, its contents (other than the revocatory clause) cannot be proved so that it can be allowed and executed as a will. In *re Cunningham*, 38 Minn. 169; *Wallis v. Wallis*, 114 Mass. 510; *Jones v. Murphy*, 8 Watts & S. 295, 300; *Price v. Maxwell*, 28 Pa. St. 23; *Hairston v. Hairs-*

*ton*, 30 Miss. 276; *Gossett v. Weatherly*, 5 Jones Eq. 46; *James v. Marvin*, 3 Conn. 576.

But a will with an express clause of revocation of a former will cannot be offered in evidence as a revocation only, without probate. *Reid v. Borland*, 14 Mass. 208; *Stickney v. Hammond*, 138 Id. 116, 120; *Laughton v. Atkins*, 1 Pick. 535; *Wallis v. Wallis*, *ubi supra*.

And the execution of a new will, making other and inconsistent dispositions of the testator's property, is a revocation of a former will disposing of the same property, and this is so whether the former will is expressly revoked by the latter or not. *State v. Crossley*, 69 Ind. 203; *Burns v. Travis*, *ubi supra*.

(*g*) *Ante*, p. \*141.

(*h*) *Rogers v. Goodenough*, 2 Sw. & Tr. 342, *post*, p. \*181.



## \*SECTION IV.

*Revocation by the Republication of a Prior Will.*

If a man make a will, and at a future period republish it, such republication will revoke any will intermediate to the original date of the prior will and the date of its republication (*i*). But this subject will be more conveniently discussed hereafter, when the doctrine of republication, generally, is considered (*k*).

## SECTION V.

*Revocation by Marriage or other change of circumstances, and therewith of Presumptive or Implied Revocation.*

The different methods of *expressly* revoking a will having been now considered, it remains to treat of presumed or implied revocation.

Presumed and implied revocation.

It is enacted by the Wills Act, (1 Vict. c. 26, s. 19) that "no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

1 Vict. c. 26, s. 19: no will after Jan. 1, 1838, to be revoked by presumption.

The general rule has been, from the earliest periods of the Ecclesiastical law, in accordance with this enactment, that a will once executed remains in force, unless revoked by some act done by the testator, *animo revocandi*: such as burning, cancelling, making a new will or the like.

Here it may not be improper to take notice of the case of a *contingent will*, where, whether it will eventually take place as a will or not, depends upon the happening or not happening of a certain event.<sup>54</sup> As where a person intending to go to Ireland,

Contingent will.

(*i*) *Rogers v. Pittis*, 1 Add. 38. *Jansen v. Jansen*, *ibid.* 39. *Walpole v. Lord Cholmondeley*, 7 T. R. 138.

(*k*) *Post*, Pt. I. Bk. II. Ch. IV. § II. p. \*165, *et seq.*

54. Where an instrument is limited by condition or conditions as to its opera-

tion, it cannot be admitted to probate as a will after the failure of the contingency upon the happening of which it was to have taken effect. *Todd's Will*, 2 Watts & S. 145; *Vickery v. Hobbs*, 21 Tex. 570. In *Vickery v. Hobbs* it is said that if the will is defeated before the death of the

made his will in these words:—"If I die before my return from my journey to Ireland, that my house and land at F., and all the appurtenances and furniture thereto belonging, be sold as soon as possible after my death, and \*thereout all my debts and funeral charges be paid. Item, 1,000*l.* to A. out of the said money arising by the said sale, and 100*l.* to B.:" The testator, after making the said will, went to Ireland, and returned to England, lived some years afterwards and died: It was held by Lord Hardwicke that the will was contingent, depending upon the event of the testator's returning to England, or not; and that as he did return, the will could have no effect, but was void (*l.*). The courts, however, are cautious how they construe conditions of this sort.<sup>55</sup> Therefore, where a testator by three letters gave certain testamentary directions, "In case I should die on my travels:" it was held, that, although he returned, and lived many years afterwards, yet as, by sub-

party making it, by a condition therein contained, it can have no effect as a will, unless by force of some act of re-publication.

But there must be noted the distinction which is constantly drawn by the courts between a condition upon which only the will is intended to be operative, and a reason assigned for the making of the will. In the latter case, the will may be enforced, although the reason for making it has passed. In *Traver v. Traver*, 9 Peters 174, the testator said: "Being about to travel a considerable journey, and knowing the uncertainty of life, I think it advisable to make some disposition of my estate, and do make this my last will and testament." This was held to be a reason assigned for the making of the will, and not a condition, upon which the will was to become operative, and therefore, although the testator made his will in contemplation of the journey upon which he was about to set out, and returned, and afterwards died, the will was established.

It is also said that a testamentary paper, which by its terms is to be effective only on the happening of a certain contingency, cannot be admitted to pro-

bate as a will, unless the contingency has occurred. *Morrow's Appeal*, 116 Pa. St. 440.

(*l.*) *Parsons v. Lanoe*, 1 Ves. Sen. 190. 1 Saund. 279, *d.* note to *Duppa v. Mayo*.

55. In *Magee v. McNeil*, 41 Miss. 17, the testator was a soldier in the Confederate Army, and was with the army in the field, and while there he wrote a letter, which was wholly in his own handwriting, and signed by himself, in which he said: "If I never return, I want all I have to be my wife's." He returned home, and subsequently died without making any other will. It was held by the court that this was a conditional will, and although good as a holographic will, it was defeated by the failure of the condition. In *Todd's Will*, 2 Watts & S. 145, the testator said: "My wish, and desire, and intention now is, that if I should not return (which I will, no preventing Providence) what I have shall be divided as follows." The testator returned from that journey, and upon his subsequent death, probate of the will was refused as a conditional will defeated by the failure of the contingency. In *Wagner v. McDonald*, 2 Harr. & J. 346, where the writer said: "If I should

sequent acts, he recognized the papers two years before his death, his return was not such a defeasance as to invalidate the disposition of his property directed by them (*m*). In *Burton v. Collingwood* (*n*), a will written eighteen years before the testator's death, containing this passage, "Lest I die before the next sun, I make this my last Will," was admitted to probate, the court holding the disposition not contingent; and adherence to it being shown by careful preservation (*o*). \*Since the

not come to you again, my son M. shall pay &c.;" after writing that letter, the testator made a journey into Kentucky and returned. It was held that the will was conditional and could not be admitted to probate. In *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101, the testator was wrecked in a steamboat accident on the Mississippi river, and escaped to an island, from which point he wrote: "If I should never come back," rehearsing the fact that the water was very high and considerable ice in the river, and that it was doubtful whether he could ever reach shore. He did, however, reach the shore and returned home and was subsequently murdered. The will being offered for probate, probate was refused on the ground that it was a conditional will defeated.

On the other hand, in Kentucky, it was held that, where a contingency was applicable to only one clause of the will, the contingency being his return from his absence in Missouri and the testator did return, although he did return, the preservation of the paper and the evidence from extrinsic facts, consisting of acts and declarations of the testator (which were admissible for the purpose), showed the recognition of the paper as his last will, and that it was therefore admissible to probate. *Massie v. Griffin*, 2 Metc. (Ky.) 346.

(*m*) *Strauss v. Schmidt*, 3 Phillim. 209. See also *Ingram v. Strong*, 2 Phillim. 294. In *Forbes v. Gordon*, 3 Phillim. 625, Sir John Nicholl said that where a paper begins, "In case of my

inability to make a regular codicil to my will, I desire the following to be taken as a codicil thereto," the court had in many instances decided that it means no more than, "Till I make a regular will, so long I adhere to this paper."

(*n*) 4 Hagg. 176.

(*o*) The following are cases decided since the Wills Act in which wills have been held to be contingent. A will containing the words "should anything happen to me on my passage to Wales or during my stay": *Roberts v. Roberts*, 2 Sw. & Tr. 337. "Being on the eve of embarking for San Francisco, South America, or Mexico, I do hereby, in case of my decease during my absence being fully ascertained and proved, will," &c.: In the Goods of *Winn*, 2 Sw. & Tr. 147. "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter to be divided": In the Goods of *Porter*, L. R. 2 P. & D. 22. "In case anything should happen to me during the remainder of the voyage to Sicily and back to London": In the Goods of *Robinson*, L. R. 2 P. & D. 171. A mariner's will commencing "Instructions to be followed if I die at sea or abroad:" *Lindsay v. Lindsay*, L. R. 2 P. & D. 459. A joint will containing the words "In case we should be called out of this world at one and the same time by one and the same accident:" In the Goods of *Hugo*,

Evidence of adherence cannot establish a will which is in terms conditional.

Wills Act it is clear that no evidence of adherence can establish the will where it is in its terms conditional, as where the will is expressed to take effect "in case of the testator's decease during his absence on a particular voyage" (oo), or "should anything happen to me on my \*passage to Wales or during my stay" (p); for in such cases if the testator's parol declarations were admitted, it would be nothing less than making a will by word of mouth; and the act of adherence cannot carry the case further than a parol declaration.

Where at death of testator the happening of the condition is uncertain.

If at the time of the death of the testator it is uncertain whether the condition, on which the will is to take effect, will or will not happen, probate will, it would seem, be granted at once though it will only determine what is to be done with the property in certain events (q).

2 P. D. 73. The following are cases where wills have been held *not* to be contingent: A will purporting to be made in the exercise of a power and on the assumption that the nominal husband of the testatrix would survive her: *Southall v. Jones*, 28 L. J., P. & M. 412. A will containing the words "In the prospect of a long journey should God not permit me to return to my home I make this my last will." This will was not executed until after the return of the testator from the journey referred to: *In the Goods of Cawthorn*, 3 Sw. & Tr. 417. A will made in Africa and commencing "In the event of my death while serving in this horrid climate or any accident happening to me, I leave, &c.": *In the Goods of Thorne*, 4 Sw. & Tr. 36. A will containing the words, "In the case of any fatal accident happening to me being about to travel by railway, I hereby leave, &c.": *In the Goods of Dobson*, L. R. 1 P. & D. 88. This case was distinguished from the case of *In the Goods of Winn*, *ubi sup.*, as not being limited to a particular journey but referring to railway travelling generally. A will in these words, "I, W. M., being physically weak in health

have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *Appellina* to the floating hospital ship *Berwick Walls* in order to recruit my health, and in the event of my death occurring during such time, I do hereby will and bequeath, &c." *In the Goods of Martin*, L. R. 1 P. & D. 380. A will containing the words, "On leaving this station for Thargomindah and Melbourne in case of my death on the way know all men that this is a memorandum of my last will and testament:" *In the goods of Mayd*, 6 P. D. 17. This case is distinguished from *In the Goods of Porter*, *ubi sup.*, as not containing the words relied on by Lord Penzance in that case, viz., I wish everything that I may be in possession of *at that time* (*i. e.*, at the time of his death abroad) to be divided.

(oo) *In the Goods of Winn*, 2 Sw. & Tr. 147.

(p) *Roberts v. Roberts*, 1 Sw. & Tr. 337.

(q) *In the Goods of Cooper*, Dea. & Sw. 9. *In the Goods of Bangham*, 1 P. D. 429.

A will may be made contingent on the assent of a third party: and such will will only be admitted to probate on the happening of the contingency on which it is dependent, viz., the assent of the third party (*r*).

Generally a will made contingent on an event which has become impossible at the death of the testator will not be admitted to probate, but a contingent or conditional codicil may, it should seem, operate as a republication of a will, or to make a will valid if it has not been duly executed, and on that ground entitled to probate (*s*).<sup>56</sup>

Conditional  
codicil when ad-  
mitted to pro-  
bate.

Under the old law if the testator had endorsed on his will after its execution a memorandum that it was only to take effect on the happening of a particular contingency, such an endorsement would have been in itself testamentary, and would have expressed his intentions in a legal form, so as to have given effect to them.<sup>57</sup> But since the Wills Act, such a memorandum, unless it be duly executed and attested, is wholly unavailing as part of the will, and cannot be used as evidence of the testator's intention that the will should be contingent only (*t*).

Condition un-  
availing unless  
part of duly  
executed will.

(*r*) In the Goods of Smith, L. R. 1 P. & D. 717.

(*s*) In the Goods of Da Silva, 2 Sw. & Tr. 315, *post*, Pt. I. Bk. II. Ch. IV. § I. But if a will be conditional the condition must attach to the whole document, and therefore a revocation contained therein will be subject to the happening of the contingency: In the Goods of Hugo, 2 P. D. 73.

56. In one case where the testator had made a will in 1871 and subsequently in January, 1873, made another will, and by a codicil to the will of January, 1873, declared said will of 1871 to be his last will, and said: "If I die before the 1st of March, 1873, then the will of 1873 shall be my last will;" he died on the 23d day of January, 1873, and it was held that the contingency upon which the will of 1873 was to have been established had failed and the will of 1871 was taken to be his last will, and admitted to probate. *Hamilton's Estate*, 74 Pa. St. 69.

Upon a reconsideration of this question in a later case, attacking the same testamentary act, the decision in 74 Pa. St. was sustained, the court arriving at the same conclusion as in the former case. *Bradish v. McClellan*, 100 Pa. St. 607, 612.

And in a case where a testator said: "This is only intended in case we should die while gone," and the testator and his wife having both returned, he made a codicil, attached to the will, it was held that, notwithstanding the contingency, the original will was established by the republication resulting from the publication of the codicil and then the condition was thereby avoided. *Urey v. Urey*, 86 Ky. 354.

57. In a case where the payee of a promissory note wrote across it's back as follows: "If I am not living at the time this note is paid, I order its contents to be paid to A. H.;" the note was not paid during the lifetime of the testator,

(*t*) *Stockwell v. Ritherdon*, 1 Robert. 661.

\*Where two sisters, being then unmarried, made mutual wills, and the will of one of them was afterwards revoked by her marriage, it was held that the other remained unrevoked (*u*).

Mutual wills.

Before the Wills Act the marriage of a testator did not work an implied revocation, but if a woman made a will and afterwards married, the marriage alone was a revocation of the will (*x*).

Implied revocation before the Wills Act.

But now, by the 18th section of that statute (1 Vict. c. 26) it is enacted, "that every Will made by a man or woman shall be revoked by his or her marriage (*y*) (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)" (*z*).

1 Vict. c. 26, s. 18:

every will to be revoked by the marriage of the testator or testatrix:

This section obviously puts to rest (with respect to wills within its operation) all questions as to implied revocations, by marriage, and the birth of issue, by enacting positively that marriage alone shall be an absolute revocation.<sup>58</sup>

and it was held that this paper was testamentary and probate was allowed as of a contingent will. *Hunt v. Hunt*, 4 N. H. 434.

(*u*) *Hinckley v. Simmons*, 4 Ves. 160.

(*x*) For a statement of the law and authorities as to Implied Revocation of Wills before the Wills Act, see the former editions of this work: Pt. I. Bk. II. Ch. III. § V.

(*y*) Where the husband was domiciled in this country, and had been naturalized, it was held that his marriage with his deceased wife's sister was void, and did not revoke his will under this enactment: *Mette v. Mette*, 1 Sw. & Tr. 416. But from the terms of Section 34, it would seem that this Section has no application to wills made before the Act. In the *Goods of Shirley*, 2 Curt. 657.

(*z*) See *Logan v. Bell*, 1 C. B. 872. The reason for this exception is, that a revocation of the will in a case to which

the exception applies, would operate only in favour of those entitled under the settlement in default of appointment, and the new family of the testator would derive no benefit whatever from it. See In the *Goods of Fitzroy*, 1 Sw. & Tr. 133. In the *Goods of McVicar*, L. R. 1 P & D. 671. In the *Goods of Fenwick*, L. R. 1 P. & D. 319. In the *Goods of Russell*, 15 P. D. 111.

58. In the United States, the questions as to implied revocations by marriage and the birth of issue, are not wholly settled by any provision, such as that above recited, applicable to the whole country. Marriage alone will revoke in some of the states. This is so in Rhode Island, South Carolina, Georgia, Kentucky, North Carolina, Virginia, West Virginia, Connecticut and Illinois. *McAnulty v. McAnulty*, 120 Ill. 26; *Goodsell's Appeal*, 55 Conn. 171; *Miller v. Phillips*, 9 R. I. 141; *Byrd v. Surles*,

But it possibly might not apply to every instance of implied revocation by a change of condition in the testator ; because it has been held,

77 N. C. 435. And if the maker of the will be a *feme sole* the subsequent marriage revokes in New York, Massachusetts, Oregon, Missouri, Indiana, Vermont, Arkansas, Alabama and California. Estate of Davis, Tuck. 107 ; Proctor v. Clarke, 3 Redf. 445 ; Lathrop v. Dunlop, 4 Hun 213 ; Blodgett v. Moore, 141 Mass. 75 ; Bowen v. Hoxie, 137 Id. 527 ; Swan v. Hammond, 138 Id. 45 ; Bowers v. Bowers, 53 Ind. 438 ; Morton v. Onion, 45 Vt. 145.

A widow is "an unmarried woman" within the meaning of the statute providing that the will of an unmarried woman shall be revoked by her subsequent marriage. Re Kaufman's Will, 43 N. Y. St. Rep. 282.

A will executed by a *feme sole* before the passage of the Delaware act authorizing married women to devise their property without their husbands' consent is revoked by her marriage after the passing of that statute, which is not retrospective in its operation. Smith v. Clemson, 6 Hous. 171. And in Vermont, the consent of the husband to let the will stand will not prevent the revocation. Polly Carey's Estate, 49 Vt. 236.

However, in Nevada, by statute, the marriage of a man shall revoke his will, unless provision be made for the wife. Compl. Laws, § 821. And in Missouri, if a man leave a widow, of whom no mention is made in the will, he is held to have died intestate as to the widow. Stokes v. O'Fallon, 2 Mo. 29. And the rule in Pennsylvania is that if a man, having made his will, marries and then dies, leaving a widow, he dies intestate as to his widow, and the will is therefore revoked *pro tanto*. Walker v. Hall, 24 Pa. St. 483 ; Edwards' Appeal, 47 Id. 144. See also Frausen's Case, 26 Id. 204. And as to the construction of § 15 of the

Wills Act of April 8th, 1833, see Fidelity Trust Co.'s Appeal, 121 Pa. St. 1.

The presumption that a will is revoked by marriage may be rebutted in Rhode Island, by showing acts done by the testator, or circumstances which show an intention on his part, that his will shall remain operative after the marriage, and notwithstanding such event. Wheeler v. Wheeler, 1 R. I. 364 ; Miller v. Phillips, 9 Id. 141.

However, in Virginia, the question of the marriage of a testator has no bearing upon a will made in pursuance of a power of appointment. Phaup v. Wooldrige, 14 Gratt. 332.

Prior to the law of 1885 (S. L. 1885, c. 110, § 135) in Connecticut, a will was revoked by marriage and birth of issue, but not by marriage alone. By that act either marriage or birth of issue will work a revocation. Goodsell's Appeal, 55 Conn. 171. The act of 1885 is prospective, not retroactive. Id.

In Massachusetts, under P. S. c. 127, § 8, the will of a *feme sole* is revoked by her subsequent marriage. Blodgett v. Moore, 141 Mass. 75 ; Swan v. Hammond, 138 Id. 45 ; Bowen v. Hoxie, 137 Id. 527.

And in Illinois in absence of proof to the contrary, a woman is presumed to have known the legal effect of her marriage on her will. Crum v. Sawyer, 132 Ill. 443. But her ignorance of the law in this respect will not change the result. Id.

The marriage of a *feme sole* will not revoke a will in New Jersey, Webb v. Jones, 9 Stew. (N. J.) 163 ; nor in Maine, Emery's Appeal, 81 Me. 275 ; nor in Michigan, so long at least, as no children are born, Noyes v. Southworth, 55 Mich. 173 ; nor is an ante-nuptial will of a woman revoked by marriage in

at least in the Ecclesiastical Courts, that the \*concurrence of marriage is not essential for the presumption of revocation in all cases.

New Hampshire, *Fellows v. Allen*, 60 N. H. 439; nor, by statute, in Ohio. Rev. Stat. c. 123, § 37.

In Maine, while the fact that a will may be revoked by operation of law from a change in the condition or circumstances of the maker is recognized, yet the rule of the common law as to *femes sole* is no longer in force. *Emery's Appeal*, *ubi supra*.

But marriage alone does not work a revocation, in case of a man, in Massachusetts, *Warner v. Black*, 4 Gray 162; *Swan v. Hammond*, 138 Mass. 45; but in California it does, unless there be provision made, by settlement or otherwise, for wife or children, in case either wife or children survive, *Sanders v. Simcich*, 65 Cal. 50; *Ferreira v. Chabot*, 63 Id. 564; but under the Illinois act of 1882, which declares that a marriage shall be deemed a revocation of a former will, a marriage, *per se*, whether of a man or a woman, revokes a prior will. *McAnulty v. McAnulty*, 120 Ill. 261.

"Marriage contract," as used in § 1299, C. C., refers to and designates any such contract as expressly purports in its terms to be a contract in contemplation of marriage, making provision in lieu of provision by will; but it does not include a post-nuptial agreement. *Corker v. Corker*, 87 Cal. 643.

In Illinois, if a man make a will by which he disposes of all his estate without making any provision in contemplation of the relations arising from marriage, and then marry, the will will be revoked by his marriage alone. *American Board v. Nelson*, 72 Ill. 564; *Duryea v. Duryea*, 85 Id. 41; *Tyler v. Tyler*, 19 Id. 151.

And where a married woman during her second marriage made a will in favor of her children by her first marriage and

subsequently married a third time, it was held that her will was not revoked by the third marriage; there were, however, no children by either the second or third marriages. *Will of Ward*, 70 Wis. 251. Whether the will would have been revoked in case it had been made in favor of a stranger, *Quære*.

And in a case, where a widow, with three children, who derived her property only from her deceased husband, upon contemplation of a second marriage, made a will by which she bequeathed all her property to her three children, the contents of which will her intended husband knew and to which he gave his verbal assent, and after the making of that will the testatrix married and had a child by her second husband, it was held that on that account her will was revoked by implication of law. *Nutt v. Norton*, 142 Mass. 242.

The execution by will of a power of appointment in an ante-nuptial agreement is not revoked by marriage. *Osgood v. Bliss*, 141 Mass. 474.

Where a testator made his will in 1883, and made a codicil thereto in 1884, in both of which he provided for A., with whom he had commenced improper intercourse in 1883; she bore him a child in 1884; he left her for a time, but renewed intercourse with her late in 1884; in 1886 he took up his residence with A., acknowledged her as his wife and another child was born: it was held that no marriage could be presumed until after 1884, and the will was, therefore, revoked by the marriage. *Matter of Gall*, 32 N. Y. St. Rep. 695.

As to revocation from birth of children or marriage and the birth of children. see n. 60, *infra*.

See, *ante*, p. 89, n. 63.



All such cases, however, appear to be provided for by the 19th section, which enacts, that "no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." <sup>s. 19:</sup> 59 For although, after the passing of this statute, it was held in *Marston v. Roe d.* <sup>no will to be revoked by presumption.</sup>

59. But in New Hampshire revocation does not follow from any of these circumstances, viz: death of legatees, alienation of a large portion of the estate specifically devised, acquisition of other estate to an amount much greater than testator's possessions at the time of the execution of the will, marriage of the testator, there being no issue of such marriage, nor by the concurrence of all these circumstances. *Hoitt v. Hoitt*, 63 N. H. 475.

And in Massachusetts, it is said that the revocation of a will cannot be implied by law from the birth of a child to the testator, contemplated in the will, the death of the testator's wife and of a child leaving issue, the insanity of the testator himself, continuing for forty years, from soon after the making of his will, until his death, or the fourfold increase in value of his property, so as to change in very great degree the proportion between the specific legacies given by the will to some of the children, and the shares of those children who were by the will made residuary legatees. *Warner v. Beach*, 4 Gray 162.

Where a testator has devised specific property and afterwards sells or disposes of the same property this amounts to a revocation *pro tanto*. *Herrington v. Budd*, 5 Denio 321, 323; *Wade v. Holbrook*, 2 Redf. 378, 390; *McNaughton v. McNaughton*, 34 N. Y. 201; *Barstow v. Goodwin*, 2 Bradf. 413; *Moore v. Spier*, 80 Ala. 129; *Burnham v. Comfort*, 108 N. Y. 535; *Brown v. Thorndike*, 15 Pick. 388; *Bosley v. Bosley*, 14 How. 390; *Taylor v. Smiley*, 14 Phila. 76; *Matter of Dowd*, 58 How. Pr. 107; *Coulson v. Holmes*, 5 Sawyer C. C. 279; *Howard v. Carusi*, 4 McArth. 260.

Where a testator holds a mortgage which he devises, if after devising it he foreclose or take a release of the equity of redemption it is a revocation *pro tanto*. *Ballard v. Carter*, 5 Pick. 112.

But where a testator devised specific property to his children, and left a pecuniary legacy to a bastard grandchild; he afterwards sold one tract of the land and the other was swept away by debts, leaving only property enough to pay his debts and the legacy to the bastard grandchild, this did not work a revocation. *Wogan v. Small*, 11 Serg. & R. 141.

Where it appears to have been the intention of the testator that all after-acquired property should pass by his will, a conveyance of all the estate previously devised, by a trust deed containing a power of revocation, which is subsequently exercised and the title vested in the testator does not operate as a revocation of the will, *Morey v. Sohler*, 63 N. H. 507; upon the revesting of the title in the testator, the estate is subject to the will, and the interest of the devisees exists as if no conveyance had been made. *Id.* But if land devised, and afterwards sold, be reconveyed to the testator, so that the title is in him at his death, it will pass by the will without formal republication. *Brown v. Brown*, 16 Barb. 569; *Woolery v. Woolery*, 48 Ind. 523.

Among other alterations of the circumstances of a testator which have been held to amount to a revocation at law, are a sale under tax levy of the real estate devised, *Borden v. Borden*, 2 R. I. 94; and a conveyance of the real estate, although the grantor reserved to himself a ground rent in fee, *Skerrett v. Burd*, 1 Whart. 246; the sale of the devised real

FOX (a), that the revocation consequent on marriage and the birth of issue was not, in fact, grounded on "any presumption of an intention" of the testator to revoke, but took place in consequence of a rule or principle of law independently of any question of intention; yet in all cases of implied revocations in the Ecclesiastical Court the basis of the revocation has always been held to be the intention of the testator presumed from the alteration in circumstances, and consequently the 19th section of the statute will prevent such revocation in future.

estate, although a bond and mortgage for the entire purchase money was taken, it being held that the bond and mortgage passed to the residuary legatees and not to the devisees of the real estate, *Adams v. Winne*, 7 Paige 97. A conveyance in trust to sell for the payment of debts to the extent of the special purpose, is a revocation. *Livingston v. Livingston*, 3 Johns. Ch. 148; *Jones v. Hartley*, 2 Whart. 103; *Padfield v. Padfield*, 72 Ill. 322. And it has been held that where a testator subsequently to his will makes a mortgage of the devised lands, this act revokes the will in equity *pro tanto*. *McTaggart v. Thompson*, 14 Pa. St. 149; *Stubbs v. Houston*, 33 Ala. 555, 564. See also 4 Kent 531; 1 Powell on Devises 556.

On the other hand, an agreement by a testator before the execution of his will to sell land therein specifically devised is not a revocation at law. *Hall v. Bray*, Coxe 212. However, where a testator after the making of his will made a contract to lease land for ninety-nine years, reserving a ground rent with a right to the lessee to extinguish the reversion by paying a fixed sum, such contract worked such a change of interest as will revoke the devise. *Bosley v. Bosley*, 14 How. 390. Nor is a conveyance by a testator to a trustee for the use of his wife such an alteration, as would work a revocation of the will. *Clingan v. Mitcheltree*, 31 Pa. St. 25.

Where a person made a deed of trust conveying to certain persons all the prop-

erty of the grantor, and to their heirs forever with warranty, nevertheless, upon a special trust that they should pay the profits to the grantor during his life, and declaring that at his death everything in such conveyance between the parties thereto should become null and void, being a conveyance of an estate for life will not operate as a revocation of a prior will. *Hughes v. Hughes*, 2 Munf. 209.

Where a conveyance of land was obtained by fraud and undue influence, although the same was acknowledged and recorded, it did not operate such a disseisin of the grantor as to disable such grantor thereafter to devise the estate so granted. And therefore, such conveyance will not amount to a revocation. *Smithwick v. Jordan*, 15 Mass. 113.

It is sometimes held that there may be a tacit revocation. Such a revocation results from some other disposition of the property by the testator. Where a subsequent disposition does not expressly revoke the instrument, both must be executed as far as they can be, but if there is a tacit revocation, the last provision must prevail. In Louisiana, a tacit revocation is provided for by statute. C. C. § 1891. *Succession of Mercer*, 28 La. Ann. 564.

It is said that no conveyance or act done after the execution of a will can effect the provisions of that will, unless it amount to a revocation. *Wood v. Cherry*, 73 N. C. 110.

(a) 8 A. & E. 14.

The enactments contained in these two sections lead to consequences which may be considered as somewhat harsh: for by reason of the former, a man's will must be revoked by his marriage without the birth of children, in a case where he had no intention to revoke it, nor any testamentary duty demanding the revocation; whereas by the operation of the latter, a will made by a married testator must stand unrevoked, notwithstanding that the subsequent birth of children unprovided for, and other concurrent circumstances, may raise a case (as in *Johnston v. Johnston* (b)) of the strongest inference that the testator did not mean to adhere to the will.<sup>60</sup>

(b) 1 Phil. 447.

60. But in the United States a will is, to all intents and purposes, revoked by the birth of issue. It being almost, if not quite, universally held that any child born after the making of a will, who is not provided for in the will, or who has not been otherwise provided for, by settlement generally, shall be entitled to participate in the estate of the testator and, generally, such child takes the same interest in the estate that he would have taken if his parent had died intestate; to such extent at least the will is revoked.

Thus, in New Jersey, in a case where a testator had no children at the time of the execution of the will, but subsequently had six children born, of whom five survived the testator, it was held that, under the statute (Rev. p. 1246, § 20), the will was void and that, consequently, he died intestate, *Coudert v. Coudert*, 16 Stew. (N. J.) 407; and in another case it was adjudged that the children mentioned in the will should contribute ratably to make the share of the afterborn child equal to theirs. *Wilson v. Fritts*, 5 Id. 59. And in Pennsylvania, afterborn children are entitled as though there were no will. *Robeno v. Marlatt*, 136 Pa. St. 35.

Naturally we inquire why marriage, or the birth of issue, or marriage and the birth of issue should operate as a revocation of a will previously made. It may

be considered that such revocation rests upon the tacit condition annexed to the will, that it should not operate if there should be an entire change in the family of the testator, *Baldwin v. Spriggs*, 65 Md. 373; or the presumed alteration of intention arising from changed circumstances, new relations or duties. *Gay v. Gay*, 84 Ala. 38.

Marriage and the birth of issue will revoke in Alabama, Arkansas, California, Missouri, Nebraska, New York, Oregon, South Carolina, and Virginia.

Birth of issue alone does not revoke a will at common law, although this is now so by statute in Connecticut, Delaware, Georgia and Louisiana, and was so in Illinois prior to 1845; in Indiana prior to 1852; in Missouri until 1825; and in Virginia. In other states such child takes a share as in case of intestacy, made up by contribution. This is so in Alabama, Arkansas, California, Colorado, Delaware, District of Columbia, Illinois, Iowa (until restricted in 1873 to posthumous children), Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia and Wisconsin; and unless the child die before actual payment of the share, in Alabama; or before the testator's death and leave no issue, in Indiana; or under age, unmarried and without issue, in

There is another sort of implied revocation, in the nature of ademption; which arises either when the subject of the bequest is altered or parted with, or when the purpose, for which it was bequeathed, has been provided for by the testator by other means.<sup>61</sup> But it will be convenient to postpone treating

Implied revocation by ademption.

Virginia (with reversion on death under age) and West Virginia. *Holloman v. Copeland*, 10 Ga. 79; *Deupree v. Deupree*, 45 Id. 415; *Walker v. Hall*, 34 Pa. St. 483; *Young's Appeal*, 39 Id. 115; *Edward's Appeal*, 47 Id. 144; *Matter of Turner*, 52 Mich. 398; *Drishler v. Van Den Henden*, 49 N. Y. Supr. Ct. 508; *Chace v. Chace*, 6 R. I. 407; *Potter v. Brown*, 11 Id. 232; *Breese v. Stiles*, 22 Wis. 120; *Lorings v. Marsh*, 6 Wall. 337; *Estate of Utz*, 43 Cal. 200; *Goodsell's Appeal*, 55 Conn. 171.

The provisions of the statute for "afterborn" children are equally applicable where the will is that of the mother, as where it is the will of the father. *Matter of Huiell*, 6 Dem. 352.

And it is competent to show the relations of the wife to the husband, and her

love for and devotion to her children as evidence that the omission of mention of the children in the will was intentional and not by mistake or inadvertence. *Buckley v. Gerard*, 123 Mass. 8.

And a bequest to a son-in-law, though not designating him as such, is a naming of the daughter within R. C. 1845, 1080, § 11, of Missouri. *Hockinsmith v. Slusher*, 26 Mo. 237. And the mention of a deceased daughter, nothing being said of her children, raises the presumption that they were intentionally omitted. *Guitar v. Gordon*, 17 Mo. 408. And it has been held that a provision in a will that a certain child shall take no part of the estate, is a sufficient provision for such child, under the statute to prevent a revocation. *Block v. Block*, 3 Mo. 407; *Pounds v. Dale*, 48 Id. 270.

61. A partial revocation only produces what is inaptly called a revocation *pro tanto*, instead of an ademption of the subject of the devise, and thus necessarily limits the operation of the will to the extent of the alienation; not by reason of any defect in the will itself, but because it pleased the testator to make a disposition of such part of his estate different from what he originally intended, which it is always competent for him to do, either by conveyance, or by a new will or codicil. *Fellows v. Allen*, 60 N. H. 439, 441; *Carter v. Thomas*, 4 Greenl. 341, 343, 344; *Graves v. Sheldon*, 2 D. Chip. 71, 75; *Blandin v. Blandin*, 9 Vt. 210, 211; *Hawes v. Humphrey*, 9 Pick. 350; *Terry v. Edminster*, Id. 355 n.; *Webster v. Webster*, 105 Mass. 538, 542; *Balliet's Appeal*, 14 Pa. St. 451; *Brush*

*v. Brush*, 11 Ohio 287; *Floyd v. Floyd*, 7 B. Mon. 290; *In re Nan Mickel*, 14 Johns. 324; *McNaughton v. McNaughton*, 34 N. Y. 201; *Warren v. Taylor*, 56 Iowa 182; *Wells v. Wells*, 35 Miss. 638.

But after a devise of real property, a deed of such property, by the testator to the devisee, will in no way affect the will. *Pickett v. Leonard*, 104 N. C. 326. But a different view is taken in Kentucky, where it is said that the conveyance will operate as a revocation even where the grantee and the devisee is the same person, for he is then in by the deed, and not by the will. *Kean's Will*, 9 Dana 25.

And where a testator after bequeathing by his will a certain claim against a debtor, exchanges with the latter the original evidences of the debt for his bond or other evidences of indebtedness,

\*of this mode of revocation, till the subject of legacies, generally, is considered (e).

But in Arkansas, where some of the children of the testator are omitted from the will, the will is not revoked thereby, but the omitted children may recover their proportion from the devisees or legatees. *Trotter v. Trotter*, 31 Ark. 145.

Pretermitted children succeed immediately upon the death of the testator by operation of law in the same manner as if he had died intestate. *Smith v. Olmstead*, 88 Cal. 582. And declarations of the testator are not admissible to show whether the omission was intentional. *In re Stevens*, 83 Id. 322.

But this presumption of revocation may be rebutted by proof of a settlement providing for the child, which settlement may be made either before or after the execution of the will. *Gay v. Gay*, 84 Ala. 38.

And where a testator made provision

for his daughter in trust, until she arrived at the age of twenty-one, and then that she should take the trust fund, and in case of her death before that time, the trust fund was to be divided among her brothers and sisters then living, and a brother was born after the making of the will, it was held that this contingent provision was not such provision as is contemplated in the statute as to revocation. *Potter v. Brown*, 11 R. I. 232.

And in a case in New York where the only child of the testator was born after the execution of the will and was "unprovided for by any settlement and neither provided for nor in any way mentioned in his will" (2 R. S. 65, § 49); such child takes the whole real estate, as if his father had died intestate. And where there is a power of sale in the executor, which has been exercised,

the legacy is not revoked by implication, under the Code of Louisiana. *Succession of Irwin*, 33 La. Ann. 63.

Before the revised statutes took effect in Massachusetts, it was held that if a testator, after devising a mortgage, either foreclosed it, or took a release of the equity of redemption, or an absolute deed, canceling the mortgage and paying the mortgagor the difference, it was a revocation of the will. *Ballard v. Carter*, 5 Pick. 112; *Brigham v. Winchester*, 1 Metc. 390. In Connecticut, it seems that as the foreclosure converts the mortgage from personal into real estate, the real estate would descend to the heirs, unencumbered by any bequest not charged upon real estate. *Swift v. Edson*, 5 Conn. 531.

But a sale of land devised does not revoke a will as to any portion of such land not sold, *Swails v. Swails*, 98 Ind.

511; such sale being a revocation only *pro tanto*. *Moore v. Spier*, 80 Ala. 129. Such an instrument is still valid and operative as to other property of the testator and should be admitted to probate as to it. *Moore v. Spier*, *ubi supra*.

Nor does a sale of all the real estate of the testator work a revocation, as to personal property, *Warren v. Taylor*, 56 Iowa 182; nor of all the real and part of the personal property. *Prater v. Whittle*, 16 S. C. 40. Nor does a mere sale create any presumption of an intent to revoke. *Haselwood v. Webster*, 82 Ky. 409. Nor does such sale work a revocation in case a part of the purchase money is still unpaid at the testator's death, unless the intention is clearly shown in writing. *Slaughter v. Stephens*, 81 Ala. 418.

See *post*, American Notes to Pt. III. Bk. III. Ch. III.

(e) See *post*, Pt. III. Bk. III. Ch. III.

Material difference between wills of realty and of personalty arising from the office of executor.

It may be proper, however, here to point out a material difference with respect to this species of revocation, between wills of realty and wills of personalty, arising from the office of executor. If the whole subject of a will of realty be adeemed, the will is completely revoked, and is wholly

it is proper for the child to bring ejectment for the real estate, as he cannot be required to follow the fund in the hands of the executor. *Smith v. Robertson* 89 N. Y. 555. Nor need they follow the fund in Pennsylvania. *Robeno v. Marlatt*, 136 Pa. St. 35.

But property acquired by the testator after the execution of the will, and which is unaffected by the will, is not a provision for a child born afterwards. *Baldwin v. Spriggs*, 65 Md. 373.

The provision in Massachusetts (G. S. C. 92, § 25) enacting that where a testator omits to provide in his will for any of his children, they shall take the same share of his estate, that they would have been entitled to, if he had died intestate, unless he has provided for them in his lifetime, or unless it appears that the omission was intentional does not apply to an estate in which he has merely a power of appointment. *Sewall v. Wilmer*, 132 Mass. 131; *Blagge v. Miles*, 1 Story C. C. 426.

By the statutes of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Ohio and Alabama, a posthumous child, and, in all of those states except Delaware and Alabama, children born after the making of the will, and in the lifetime of the father, will inherit in like manner as if he had died intestate, unless some provision be made for them, in the will, or otherwise, or they be particularly noticed in the will. The reasonable operation of this rule is only to disturb and revoke the will *pro tanto*, or as far as duty requires.

In Massachusetts, if it is evident from the will that the child was in contemplation of the testator, he cannot claim a distributive share of the estate. *Church v. Crocker*, 3 Mass. 17; *Wild v. Brewer*, 2 Mass. 570; *Prentiss v. Prentiss*, 11 Allen 47, 49. But after the making of the will, and the birth of the omitted child, if the testator say to his wife, "you will have all there is," that is not sufficient to show intention to omit the child. *Bancroft v. Ives*, 3 Gray 367.

But that the omission of one child was intentional may be shown by parol. *Wilson v. Fosket*, 6 Metc. 400; *Buckley v. Gerard*, 123 Mass. 8; *Converse v. Wales*, 4 Allen 512; *Ramsdill v. Wentworth*, 101 Mass. 125; *Lorieu v. Kellar*, 5 Iowa 196. But in some states this cannot be shown by parol. *Chace v. Chace*, 6 R. I. 407; *Bradley v. Bradley*, 24 Mo. 311; *Estate of Garraud*, 35 Cal. 336.

In Maine, Massachusetts, Rhode Island, Connecticut, New York, Maryland and, probably in other states, if the devisee or legatee dies in the lifetime of the testator, his lineal descendants are entitled to his share, unless the will anticipates and provides for the case. This is confined, in Connecticut, to a child or grandchild; in Massachusetts, Rhode Island and Maine, to them, or *their relations*; and in New York, to *children or other descendants*. The rule in Maryland goes further, and, by statute, no devise or bequest fails by reason of the death of the devisee or legatee before the testator; and it takes effect in like manner as if they had survived the testator.

And in Iowa the will is absolutely re-

ineffectual: but should the same thing happen with respect to a will of personalty, in which an executor is appointed, the will must still be proved, as if its dispositions had never been revoked (*g*).

voked by the birth of a child. *Chicago, B. & Q. R. R. Co. v. Wassermann*, 22 Fed. Rep. 872; *Ware v. Wisner*, 4 McCrary C. C. 66; *Alven v. Johnson*, 63 Iowa 124; *Fallon v. Chidester*, 46 Id. 588. And this rule is not changed by the fact that the wife was enciente at the time of the execution of the will. *Chicago, B. & Q. R. R. Co. v. Wassermann, ubi supra*. So the will fails in Louisiana on account of birth of a child. *Green v. Baptist Church*, 27 La. Ann. 563. And in Ohio, the birth of a child will operate as an implied revocation of a will. *Ash v. Ash*, 9 Ohio St. 383; *Evans v. Anderson*, 15 Id. 324. And the will having been revoked by the birth of the child, it is not revived by the fact that the testator survived the child. *Ash v. Ash, ubi supra*. And in Indiana the birth of a child to the testator after the execution of his will works an entire revocation of the will, provided that no provision is made in the will for afterborn children. *Hughes v. Hughes*, 37 Ind. 183.

The statutes in force in Iowa prior to the adoption of the Code of 1857 provided for partial revocation on account of the birth of children after the making of a will. The repeal of those statutes restored the common law. *Negus v. Negus*, 46 Iowa 487.

The birth of a posthumous child is an implied entire revocation, in Massachusetts, *Bowen v. Hoxie*, 137 Mass. 527; *Warner v. Beach*, 4 Gray 162; *Swan v. Hammond*, 138 Mass. 45; and in Indiana, *Morse v. Morse*, 42 Ind. 365; and in Pennsylvania, *Estate of Squier*, 11 Phila. 110; *Edward's Appeal*, 47 Pa. St. 144;

and in Georgia, *Hart v. Hart*, 70 Ga. 764; and upon the death of such posthumous child the widow succeeds. *Estate of Squier, ubi supra*. And in Kentucky, the rule as to posthumous children applies to any child born within ten months after the death of the parent. *Massie v. Hiatt*, 82 Ky. 314.

But in Indiana, a will is not revoked by the adoption of a child; adoption not being contemplated by § 2560 R. S. 1881. *Davis v. Fogle*, 124 Ind. 41. But in California, by virtue of § 1387 C. C. an illegitimate child is entitled to the same interest in the estate of the mother as any other child, and the unintentional omission of such child revokes the will. *Estate of Wardell*, 57 Cal. 484.

And under some circumstances, in Iowa, the birth of an illegitimate child will revoke the will of his father. This is so where such child has been notoriously recognized by the father; because, under the Iowa statute such child inherits share and share alike with legitimate children. Hence the birth and recognition of such child revokes in the same manner that the birth of a legitimate child revokes. *Milburn v. Milburn*, 60 Iowa 411. But in New York the court expresses doubt whether the provisions of the statute for children not mentioned in the will would apply to the illegitimate child of a mother who has died leaving a will. *Matter of Bunce*, 6 Dem. 278. However, the will of a testatrix so dying, will be admitted to probate. *Id*.

Any person who, but for the will, would share in the devised property may

(*g*) *Beard v. Beard*, 3 Atk. 72. See *Henfrey v. Henfrey*, 4 Moore, P. C. C.

29, 32, *ante*, p. \*140. See *In the Goods of Lancaster*, 1 Sw. & Tr. 464.

take advantage of the revocation of a will by the birth of a child, and an action may be maintained by him. *Alden v. Johnson*, 63 Iowa 124.

Where a writing offered for probate is a record of the proceedings by which the testator adopted a natural child and it is relied upon as working a revocation of

the will of the testator, as it contains none of the elements of a testamentary paper, and as it cannot be helped by evidence *abunde* that the testator intended such son to inherit his property, and such record to revoke his will, it cannot operate as a revocation of the will. *Davis v. King*, 89 N. C. 441.



## \*CHAPTER THE FOURTH.

### OF THE REPUBLICATION OF WILLS.

By stat. 1 Vict. c. 26, s. 22, "no Will or codicil, or any part thereof, *which shall be in any manner revoked*, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, *and showing an intention to revive the same*; and when any Will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown." <sup>1</sup>

1 Vict. c. 26: No will revoked to be revived (after Jan. 1, 1838) otherwise than by re-execution or a codicil showing an intention to revive it.

### SECTION 1.

#### *How a Will may be Republished or Revived.*

By the law as it stood before the passing of the Wills Act, by reason of the enactments of the 5th section of the Statute of Frauds, no will of lands could be republished, except by re-execution in the presence of three attesting witnesses,

What amounted to a republication by the law before the Wills Act.

1. "By republishing a will was meant repeating, either expressly or by construction, the formal declaration which, before Jan. 1, 1838, used to be made by a testator at the time of signing his will, that the document signed was his last will and testament. Prior to that date, the term signified the revival of a revoked instrument. Since the Wills act 1838, this formality has been dispensed with. \* \* \* For the term republication then we must now substitute that of re-execution, although the former is now occasionally used; yet really since the Wills act 1838, there has been no such thing as the republication of a will, the execution of a codicil being equiva-

lent to the re-execution of a will, if the act be done with such intention, or rather perhaps without any contrary intention." Flood on Wills 361.

In the United States, the expression commonly used in this connection is "republication." Although, as heretofore shown, in many of the states either by statute or by construction, no formal publication of a will is longer necessary, and therefore no republication strictly so called, could be required. Yet the reviving of a will either by a reacknowledgment of it, or by addition thereto or alteration thereof by a codicil, is quite uniformly, throughout the United States, called the republication of the will. In

or by a codicil duly executed according to the statute. But as that section did not apply to wills of personalty, such a will might be republished, not only by an unattested codicil, or other writing, but by the mere parol acts or declarations of the testator (a). A will of personalty stood nearly in the same situation as a will of lands did before the Statute of Frauds;—it must have been in writing, by the provisions of the Statute of Wills, but no other formalities were necessary; and we find that, before the Statute of Frauds, and after the passing of the Statute of Wills, it was holden that a written \*will of lands might be republished by parol (b): as where, after a will had been revoked by operation of law, the testator *allowed* it to be his will, without writing it anew, it was held a republication, and that the land should pass by the will as much as if it had never been revoked (c).

Republication of  
a cancelled or  
obliterated will.

Satisfactory proof of recognition, *animo republicandi*, by the testator, was sufficient republication even of a cancelled or obliterated will, if it continued legible (d).

As to republication by codicil, the cases on wills, made before the Wills Act, show that a codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will whether it be so described in such codicil or not: and, as such, furnishes conclusive evidence of the testator's considering his will as then existing (e). But although the effect of a codicil, as to republication, is by no means dependent on its being annexed to the \*will, yet if there are several wills of different dates, and there be a question to which of these the codicil is to be taken as a codicil, the circumstance

Republication by  
a codicil: in case  
of wills made be-  
fore the Will Act.

those states where publication is not required, it might be as consistent to speak of execution and re-execution as it is in England, but since, in many of the states, publication and republication, as such, are actually required, it is not deemed advisable to substitute the word re-execution for republication in the discussion of this matter, and therefore the former expression will be adhered to, and the republication of a will will be spoken of without regard to whether the statute requires an act of republication or not.

(a) Wentw. Off. Ex. ch. 1, p. 60, 14th edit.

(b) Jackson v. Hurlock, Amb. 494. Beckford v. Parnecott, Cro. Eliz. 493. 1 Sapnd. 277, c. d.

(c) 1 Roll. Abr. 617 (Z), pl. 2.

(d) Wentw. Off. Ex. ch. 1, p. 65, 14th edit.

(e) Acherley v. Vernon, 3 Bro. P. C. 107. Potter v. Potter, 1 Ves. sen. 437. Jackson v. Hurlock, Amb. 487. Gibson v. Lord Montford, 1 Ves. sen. 485. Serocold v. Hemming, 2 Cas. t. Lee, 490. Doe v. Davy, Cowp. 158. Barnes v.

of annexation is most powerful to show that it was intended as a codicil to the will to which it is annexed, and to no other (*f*). The authorities just cited would seem to apply to wills made since the Wills Act, for although the 22nd section requires that in the case of revoked wills the codicil should show an intention to revive the will, this is no more than was necessarily implied by the finding, that the codicil *so referred to the will it revived* as to become a part of it, which was an essential finding under the old law.<sup>2</sup>

Old cases as to republication by codicil not obsolete.

But although the general rule as to the republishing operation of a codicil is as above stated, yet in all cases of this kind the question to be considered is, whether the particular case is or is not within the general rule (*g*): for if it appears on the face of the codicil that it was not the intention of

A codicil will not republish if a contrary intention appear on the face of it.

Crowe, 1 Ves. 486 (overruling Att.-Gen. v. Downing, Amb. 573. *Pigott v. Waller*, 7 Ves. 98. *Goodtitle v. Meredith*, 2 M. & S. 5. *Hulme v. Heygate*, 1 Mer. 285. *Rowley v. Eyton*, 2 Mer. 128. *Duffield v. Elwes*, 3 B. & C. 705. *Guest v. Willasey*, 2 Bing. 429; 3 Bing. 614. In the Goods of Crosbey, 2 Hagg. 80; 1 Saund. 278, *b*, *et seq.*, note to *Duppa v. Mayo*. *Williams v. Goodtitle*, 10 B. & C. 895. *Doe v. Walker*, 12 M. & W. 591. *Skinner v. Ogle*, 1 Rob. 363. *Doe v. Marchant*, 6 M. & G. 813, 825. *Dickinson v. Stidolph*, 11 C. B. N. S. 341. *Re Earle's Trust*, 4 K. & J. 673. So a will or codicil containing a devise of real estates, but not duly attested, may be republished and made operative by a subsequent codicil having the requisite attestation, though the latter document be in no way annexed to the will or codicil. But it has been held that it must distinctly refer to it: see *Doe v. Evans*, 1 Cr. & M. 42. *Atterton v. Robins*, 1 A. & E. 423. So in *Re Smith*, 45 C. D. 632, *Stirling, J.*, held, in reference to the will of a married woman, which purported to dispose of property over which she had no disposing power

during the lifetime of her husband, that a codicil executed after her husband's death, which contained no reference to her will, did not constitute a republication of that will, and the learned judge said that the passage in the text must be read as speaking of a codicil which refers to the will. Though a codicil confirms a will and for certain purposes brings down the will to the date of the codicil, it certainly does not make the will necessarily operate as if it had been originally made at the date of the codicil: *Hopwood v. Hopwood*, 7 H. of L. 728, 740, per Lord Campbell.

(*f*) *Rogers v. Pittis*, Add. 41. *Barnes v. Crowe*, 1 Ves. 490.

2. The codicil by which a will is republished need not be physically annexed or attached to the republished will; but the reference to the republished will being clear in the codicil, it is as effectual as an act of republication, as if it were attached to the will intended to be republished. *Harvy v. Chouteau*, 14 Mo. 587; *Payne v. Payne*, 18 Cal. 291; *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 590; *Burge v. Hamilton*, 72 Ga. 568.

But in the case of conditional wills, the

(*g*) By Lord Eldon, C., in *Bowes v. Bowes*, 2 B. & P. 506.

the testator to republish, the ordinary presumption derived from the existence of the codicil will be counteracted (*h*).

It remains to consider the effect of the Wills Act on the mode of republication (*i*) or revival of wills.

\*The only mode in which since the Wills Act a will which has been revoked can be revived, is that pointed out by the 22nd section (*a*).

intention to republish by a codicil is considered to be more manifest where the codicil itself is physically made a part of the will. Probably this is so, because it so clearly shows the intention of the testator to retain the provisions of the will, notwithstanding the fact that the contingency on which it was made has expired. *Kline's Appeal*, 86 Pa. St. 663; *Urey v. Urey*, 86 Ky. 354.

(*h*) *Strathmore v. Bowes*, 7 T. R. 482. S. C. *sub. nom.* *Bowes v. Bowes* in Dom. Proc. 2 B. & P. 500. See also Lord Mansfield's judgment in *Heylin v. Heylin*, Cowp. 132. *Parker v. Biscoe*, 3 B. Moore 24. *Smith v. Dearmer*, 3 Y. & J. 278. *Ashley v. Waugh*, cited in *Doe v. Walker*, 12 M. & W. 598, 601. *Money-penny v. Bristow*, 2 Russ. & M. 117. *Hughes v. Turner*, 3 M. & K. 666. *Doe v. Hole*, 15 Q. B. 848. *Hughes v. Hosking*, 11 Moo. P. C. 1.

(*i*) The Real Property Commissioners (4th Report, pp. 33, 34) intimate that since publication is no longer necessary for a will (see sect. 13 of the stat. 1 Vict. c. 26) it will be improper to continue the expression republication. But it may be observed that this expression has always been in use, as a convenient term, with respect to wills of personal estate, although no publication was ever necessary for their validity. And the 34th section (see *post*, p. \*179) of the Act itself (as was observed by Sir H. Jenner Fust in *Skinner v. Ogle*, 4 Notes of Cas. 78) distinguishes between a republication and a revival.

(*a*) A codicil reviving a revoked will will not necessarily revive every codicil

thereto. The principle is thus stated by Fry, J., in *Green v. Tribe*, 9 C. D. 231, 234: "On the one hand, where a testator in a codicil uses the word 'Will' abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the Will of the testator; and consequently where a testator by a codicil confirms in general terms 'his will' or 'his last will and testament,' the Will together with all codicils is taken to be confirmed. On the other hand, the testator may by apt words express his intention to revoke any codicil already made and to set up the original Will unaffected by any codicil." The learned Judge goes on to say that the reference to the date of the original will is not an indication of the intention to deprive all instruments other than the original will itself of any force, and cites *Crosbie v. Macdonal*, 4 Ves. 610; *Smith v. Cunningham*, 1 Add. 448; *Greenough v. Martin*, 2 Add. 239; In the Goods of *de la Saussaye*, L. R. 3 P. & D. 42; *Gordon v. Lord Reay*, 5 Sim. 274; *Aaron v. Aaron*, 3 De G. & Sm. 475, as authorities for this proposition; and after pointing out that in the last two cases the codicil held to be republished was a codicil which, from defective execution, had no proper force of its own, goes on to say that the disapproval expressed by Sir G. Jessel of *Gordon v. Reay* in *Burton v. Newbery*, 1 C. D. 234, only amounted to a decision, that where recourse is had to a subsequent codicil to give vigour to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative

There must be a re-execution (*b*), or a duly \*executed codicil. There are no other means of showing an intention to revive (*bb*).<sup>3</sup> Destruction of the revoking instrument is not sufficient (*c*).

codicil so as to set it up. The two classes of cases differ essentially: in the one the earlier codicil has a proper force of its own; in the other the earlier codicil must, if left to itself, fail: in the one class the question is, Does the later codicil revoke the earlier and operative one; in the other class you inquire, Does the later codicil set up the earlier and inoperative one: to the one class the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application. *Doe v. Hicks*, 8 Bing. 475. *Farrer v. St. Catherine's College*, L. R. 16 Eq. 19. See also *Follett v. Pettman*, 23 C. D. 337. The same principles were applied by Sir J. Hannen, where the question was whether a codicil, referring to a will by date, revived a revoked codicil to that will, in the case of *In the Goods of Reynolds*, L. R. 3 P. & D. 35,

in which case the deceased executed a will in 1866 and a codicil to it in May, 1871, and in November, 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the Will of R., dated May, 1866." It concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced, "Codicil to the Will of R., dated May, 1866, in the presence of," &c. It was held that the only intention to be gathered from the words of the codicil was that the testator intended to revive the will of 1866 but not the codicil of May, 1871.

(*b*) As to what amounts to a re-execution, see *Dunn v. Dunn*, L. R. 1 P. & D. 277.

(*bb*) The intention to revive, and what is intended to be revived, must be gathered

3. But where a testator, being informed that the chief object of his bounty was dead (he not being dead) on account of such information, should make another will giving all the property to the person falsely reporting such death, the setting aside of the second will on account of fraud will operate as a republication of the former will. *Merrill v. Rolston*, 5 Redf. 220, 256.

(*c*) *Major v. Williams*, 3 Curt. 432. The above section was much considered by Lord Penzance in the case of *In the Goods of Steele*, L. R. 1 P. & D. 575, where it was laid down by his Lordship that a codicil may, by referring in adequate terms to a revoked will, revive that will if it be in existence, but the codicil must "show an intention to revive the same," according to the words of the section; and in order to satisfy those words

the intention must appear on the face of the codicil, either by express words referring to a will as revoked, and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the Court, with reasonable certainty, the existence of the intention; and that since the passing of the statute, a will cannot be revived by mere implication. It was also laid down in the above case that references in codicils to revoked wills by their dates were insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the will so referred to. But the correctness of this ruling may be questioned: In the *Goods of Reynolds*, L. R. 3 P. & D. 35. See In the *Goods of Dennis* [1891] P. 326.

\*But it must be observed that the 22nd section, is confined to wills, &c., "*which shall be in any manner revoked.*" It is obvious, however, that, inasmuch as the old doctrine of the republication of wills by parol acts or declarations depends on the principle that the will so recognized becomes a new will of the date of the recognition, no such republication can take place, in respect of any will whatever, since the statute came into operation, because no new will can be made, \*unless with the prescribed formalities.<sup>4</sup> Again, it is clear that no republication can now, in any case, be effected by a codicil, unless the codicil be executed

from the contents of the codicil itself, and evidence is not admissible in the absence of latent ambiguity to show what it was to which the testator intended to refer: In the Goods of Steele, L. R. 1 P. & D. 575, 576. Walpole v. Lord Orford, 3 Ves. 402. In the Goods of Goodenough, 2 Sw. & Tr. 141. A codicil referring inaccurately to a will may republish it. See Jansen v. Jansen, cited by Sir J. Nicholl in Rogers v. Pittis, 1 Add. 38. In the Goods of Houblon, 11 Jur. N. S. 549. Lord St. Helens v. Lady Exeter, 3 Phillim. 461. Thompson v. Hempenstall, 1 Rob. 783. A reference to a prior will by date may be shown to be a mistake by internal evidence gathered from the contents of the codicil: In the Goods of Wilson, L. R. 1 P. & D. 575, 582, read in the light of surrounding circumstances: In the Goods of May, L. R. 1 P. & D. 575, 582. In the Goods of Whatman, 34 L. J., P. & M. 17. Where a codicil, by mistake as to the date of a prior will, refers to an earlier will than that intended to be referred to, the codicil will not revive the earlier will to which it so refers, and the codicil may be admitted to probate together with the later will. In the Goods of Ince, 2 P. D. 111. But where the codicil makes reference to the provisions of the earlier will such earlier will is confirmed and will revive; and the mistake cannot be corrected otherwise than by admitting the earlier will to probate together with the codicil and the

later will. In the Goods of Stedham, 6 P. D. 205. In the Goods of Dyke, *ibid.* The reference need not be by date, but may be inferred from a reference in the reviving codicil to the contents of the will intended to be revived: In the Goods of McCabe, 2 Sw. & Tr. 478. It is to be observed that even if a codicil refer to a will with the intention of reviving it, and it turns out that such will has been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival: In the Goods of Steele, L. R. 1 P. & D. 575, 576. Hale v. Tokelove, 2 Rob. 318. Newton v. Newton. 5 L. T. (N. S.) 218. Rogers v. Goodenough, 2 Sw. & Tr. 342. When a testator refers in a codicil to a *last* will, and there is nothing in the contents of the codicil to point to any particular will, it must be construed to refer to the will in legal existence as the last will and not to a revoked will: Hale v. Tokelove, *ubi sup.*: p. 326. A codicil which is expressed to take effect only in an event which does not happen republishes it should seem a will to which it refers by date, and it is on this ground entitled to probate: In the Goods of Da Silva, 2 Sw. & Tr. 315.

4. Havard v. Davis, 2 Binn. 406, 425; Jack v. Shoenberger, 22 Pa. St. 416; Musser v. Curry, 3 Wash. C. C. 481; Barker v. Bell, 46 Ala. 216; Love v. Johnston, 12 Ired. 355; Sawyer v. Sawyer, 7 Jones L. 134; Warner v. Warner, 37 Vt. 356; Hickman v. Holliday, 6

according to the exigencies of the statute;<sup>5</sup> because such republication depends on the codicil becoming a part of the will; and it cannot become a part unless it be so executed.<sup>6</sup> But if be so executed, it will still amount to a republication of the will, according to the old law, unless it appears, on the face of it, that it was not the intention of the testator to republish (*d*); or unless the will has been in some manner

Mon. 587; *Mooers v. White*, 6 Johns. Ch. 375; *Hatch v. Hatch*, 2 Hayw. 33; *Dunlap v. Dunlap*, 4 Desaus. 321; *Jackson v. Holloway*, 7 Johns. 394; *Jackson v. Potter*, 9 Id. 312.

5. But when a testatrix, whose will had been revoked by her marriage, executed a codicil, which she declared to be a "*codicil to her last will and testament and a reaffirmation of the latter*," it was held that, under the New York statutes, this did not republish the will, and the deceased was declared to have died intestate. *Proctor v. Clarke*, 3 Redf. 445.

6. Proof of the due execution of a codicil which contains an express reference to a will previously executed, which it declares it is to be taken as a part of, supplies the want of proof of the proper execution of the will itself. *Storm's Will*, 3 Redf. 327. And such codicil confirms the provisions of the will and supplies all omissions and remedies all defects if any in the execution of the will. *McCurdy v. Neall*, 15 Stew. (N. J.) 333; *Burge v. Hamilton*, 72 Ga. 568; *Watson v. Turner*, 89 Ala. 220.

As a general proposition a will and the codicils thereto must be taken and considered together as part of one and

the same instrument, and the dispositions of the will, are not to be disturbed further than is necessary to give effect to the codicil. *Hard v. Ashley*, 117 N. Y. 606; *Williams v. Freeman*, 83 Id. 561. But this general rule does not apply where anything appears in the instrument showing that the word "Will" was not intended to cover or embrace the codicil. *Wetmore v. Parker*, 52 N. Y. 450, 463; *Pierpont v. Patrick*, 53 Id. 591; *Sloane v. Stevens*, 107 Id. 122.

But the codicil must control the will when they are plainly inconsistent but only to such extent as to give effect to the codicil. *Crozier v. Bray*, 120 N. Y. 366; *Austin v. Oakes*, 117 N. Y. 577. But this does not apply when the codicil is void. *Id.* But when there are several codicils containing conflicting provisions for different parties, declarations contained in the last codicil will control the disposition of the estate. *Richardson v. Hall*, 127 Mass. 64.

A codicil should not be allowed to interfere with any of the specific provisions of a will, unless its language very clearly produce such a result, or in terms it expressly recognize the alterations. *Reichard's Appeal*, 116 Pa. St. 232. But

(*d*) *Doe v. Walker*, 12 M. & W. 591, *post*, p. \*178. *Skinner v. Ogle*, 4 Notes of Cas. 74. Republication of wills which are unrevoked has ceased to be a matter of so much importance, since now, by sect. 24 of the Wills Act, every will is construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had

been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. In the cases above cited there was a will made before the Wills Act, disposing of real property intermediately acquired between the will and republication, and the question of republication was therefore important.

revoked, in which case the statute further requires that the codicil should show an intention to revive the will (e).<sup>7</sup>

\*By section 34,—“This Act shall not extend to any Will made before the first day of January, 1838.”

The result appears to be this: that a republication or revival by  
 Result.                      parol acts or declarations, or by an unattested codicil or  
                                  other writing, according to the old law, shall be valid, if  
 it took place before the 1st of January, 1838; but that, after the expiration of the year 1837, no republication shall be effectual unless by re-execution, according to the solemnities required by the statute of

where a codicil shows a clear intention of the testator to alter the will in one particular as to a devise, there arises an implication that it was not intended by said codicil to change the will in any other particular as to the said devise. *Vaughn v. Bunch*, 53 Miss. 513; *Redfield v. Redfield*, 126 N. Y. 466; *Jenkins v. Lawrence*, 86 Va. 35.

But if there is real repugnance between the will and the codicil, then the dispositions made by the codicil must prevail; but where there is no real inconsistency effect must be given to both. *Brown v. Cleveland*, 58 How. Pr. 293. And it is the duty of the court to reconcile all language employed by the testator, and to give such construction as will carry it out and into effect, if possible. *Lynch v. Prendergast*, 67 Barb. 501; *Hallyburton v. Carson*, 86 N. C. 290.

(e) A will and codicil revoked, under the Wills Act, by the marriage of the testator, were held to be revived by a codicil made after the marriage and duly attested, though it did not expressly confirm or revive any particular will, but referred merely to “the last will of me,” and “my said will,” (it not appearing that more than one will of the testator was in existence): *Neate v. Pickard*, 2 Notes of Cas. 406. See also *Accord*. In the Goods of Terrible, 1 Sw. & Tr. 140. Again, where one part of a will in duplicate remained undestroyed in the posses-

sion of the testator, but the other part in the possession of his solicitor had been destroyed by the testator on the execution of a subsequent will made in 1838, in terms revoking the prior will, it was held that such prior will was revived by a codicil, made subsequently to the second will, though referring to the prior will *merely by date*; for that such reference sufficiently showed “an intention to revive:” *Payne v. Trappes*, 1 Rob. 583. Lord Penzance, however, said that the decision proceeded upon the ground that the judge was convinced of the testator’s intention, not that he felt bound by the language in the face of an opposite conviction: that there may be little beyond the reference by date to show the intention to revive, but the Court did not in *Payne v. Trappes* (*ubi sup.*), say that the date alone was sufficient: In the Goods of Steele, L. R. 1 P. & D. 575, 578. See also *Hale v. Tokelove*, 2 Rob. 318, *post*, p. \*181. But the physical annexation (by a piece of tape, *e. g.*) of a duly executed codicil of a later date to testamentary papers duly executed but revoked, is no ground for inferring the “intention to revive,” required by the statute. And it should seem that such intention can only be shown by the contents of the codicil itself: *Marsh v. Marsh*, 1 Sw. & Tr. 528.

7. In Montana, a letter by a testator to the lawyer who had in possession a will



Victoria for an original will, or by a codicil executed in the same manner, notwithstanding the will itself may have been executed before the 1st of January, 1838 (f).<sup>8</sup>

## SECTION II

### *Of the Consequences of Republication.*

It has long been settled law that the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republishing, and makes it *speak*, as it were, *at that time*.<sup>9</sup> In short the will so republished is a new will.

The will republished is a new will of the date of the republication;

made by him before marriage fulfilling all the requirements of a holographic will, and informing the lawyer of his marriage, and stating that he wanted him to change the will, so that the wife will be entitled to all that belongs to her as such in accordance with the laws is entitled to probate as a codicil republishing the will. *Barney v. Hays*, 29 Pac. 282.

(f) *Hobbs v. Knight*, 1 Curt. 768, 774. *De Zichy Ferraris v. Lord Hertford*, 3 Curt. 468, 512. *Noble v. Phelps*, L. R. 2 P. & D. 282. So, conversely, a will of lands made before January 1, 1838, and revoked, may be republished after that day by a codicil attested by two witnesses only: *Andrews v. Turner*, 3 Q. B. 177.

8. But in Pennsylvania republication by parol is recognized, *Havard v. Davis*, 2 Binn. 406, 425; *Jones v. Hartley*, 2 Whart. 103; *Jack v. Schoenberger*, 22 Pa. St. 416; so too, in New York. Mat-

ter of *Simpson*, 56 How. Pr. 125. But republication by parol is not effectual in Connecticut, *Witter v. Mott*, 2 Conn. 67; nor in Vermont, *Warner v. Warner*, 37 Vt. 356; nor North Carolina, *Love v. Johnston*, 12 Ired. 355; nor South Carolina, *Cogdell v. Cogdell*, 3 Desaus. 346; nor Iowa, *Carey v. Baughn*, 36 Iowa 540.

Where one has made a holographic will, and placed it among his valuable papers, and afterwards, being about to go abroad, he deposits such will, together with other papers, with a friend for safe keeping, this depositing will not amount to a republication. *Battle v. Speight*, 9 Ired. L. 288. And it is probable that a holographic will once revoked can be republished only by a written instrument setting forth the testator's intentions, and duly attested by the statutory number of witnesses, or by a paper written by the testator himself and deposited by him as

9. And the effect of a republication by codicil is to make the will speak as if itself published at the time of the publication of the codicil. *Brimmer v. Sohler*, 1 Cush. 118; *Haven v. Foster*, 14 Pick. 534; *Barker v. Bell*, 46 Ala. 216; *Jones v. Shewmake*, 35 Ga. 151; *Payne v.*

*Payne*, 18 Cal. 291; *Musser v. Curry*, 3 Wash. C. C. 481; *Murray v. Oliver*, 6 Ired. Eq. 55; *Harvy v. Chouteau*, 14 Mo. 587; *Armstrong v. Armstrong*, 14 B. Mon. 333, 338; *Alexander v. Waller*, 6 Bush 330; *Carr v. Porter*, 33 Gratt. 278; *Hatcher v. Hatcher*, 80 Va. 169.

Consequently, upon the ordinary and universal principle that, of any number of wills, the last and newest is that in force, it revokes any will of a date prior to that of the republication (g).

it revokes any other will, of a date prior to that of republication :  
 \*But there is a great distinction between wills and codicils as to what is revoked : for as every codicil is, in construction of law, a part of the will, a testator by expressly referring to, and confirming the will, will not be considered as intending to set it up against a codicil or codicils, revoking it in part.<sup>10</sup> And, therefore, in a case where a testator made his will, and afterwards executed several codicils thereto, containing partial alterations of, and additions to the will ; and by a further codicil, referring to the will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the will ; this confirmation of the will was held not to revive the parts of it which were altered or revoked by the former codicils ; Lord Alvanley, M. R., observing, that if a man rati-

required for the original will. *Love v. Johnston*, 12 Ired. 355 ; *Sawyer v. Sawyer*, 7 Jones L. 134. And such subsequent writing would be construed to be a codicil. *Id.* But where a testator, just before his death, said that he had made a will, and deposited it with S., and that all the change he desired in it was to add another executor, this was not a sufficient republication. *Jackson v. Potter*, 9 Johns. 312.

And where it is the intention to republish a will by means of a codicil, it is not necessary that any particular words should be used to accomplish such republication. *Carr v. Porter*, 33 Gratt. 278.

But where a will has been once revoked new life cannot be imputed to it except by re-execution ; mere recognition is not sufficient. *Stewart v. Mulholland*, 88 Ky. 38. And where a will has been revoked by marriage it cannot be revived by subsequent recognition, although a holographic will. *Id.*

(g) *Rogers v. Pittis*, 1 Add. 38. This proposition seems to be true, notwithstanding the fact that a later will is not necessarily a revocation of earlier wills,

because, where such wills are not inconsistent, the series of wills may together constitute the last will of the testator ; for it would seem that, if a man republishes one of the earlier wills in a series, he is either republishing a will which is inconsistent with the later wills in the series, or he is republishing a part of a will constituted by the series to the exclusion of the later parts, and *qua cunque via* the testamentary papers later than that republished are revoked.

10. A will and the codicils thereto without regard to the number, constitute but one instrument. *Thompson v. Churchill*, 60 Vt. 371 ; *Lyman v. Turner*, 62 Id. 465. Where a codicil is added to a will, it confirms the will to the extent of its own provisions and no more. *Barry v. Sturdivant*, 53 Miss. 490.

And where a codicil expressly ratifies and confirms a will and directs a payment of \$7,000, in addition to a payment of \$3,000, directed in the will, the intention is that the payment be made out of the same fund as provided in the will. *Snow v. Foley*, 119 Mass. 102.

fies and confirms his last will he ratifies and confirms it with every codicil that has been added to it (*h*).

\*In *Upfill v. Marshall* (*i*), a will (dated February, 1837) disposed of real and personal estate: A codicil (dated June, 1837) partly revoked the disposition of the personalty: A memorandum (dated July, 1838) formally republished the will: And it was held that parol evidence was admissible to show *quo animo* the memorandum was made; and upon that evidence, that the codicil was not revoked by the republication of the will.

And now, by stat. 1 Vict. c. 26, s. 22, "when any Will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend <sup>1 Vict. c. 26, s. 22.</sup> to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

In a case where a will and codicil, which had been revoked, under the Wills Act, by the testator's marriage, was revived by a codicil referring to the will, several alterations appeared on the face of the will: And it was held by Sir H. Jenner Fust, that the codicil revived the will as it stood at the time of republication, being of opinion that it was the intention of the deceased in the alterations to revoke the altered legacies, and that therefore he could not have intended to revive that part of the will which he had revoked before (*k*).

There is another consequence of a republished will being considered as a new will of the date of the republication, which though still important in the description of persons mentioned in the will used to be of further importance in the description of the estate comprised in it when wills of land spoke as from the date of the will and not from the

Republication extends the operation of the will to persons to whom the description is applicable at date of republication.

(*h*) *Crosbie v. MacDonal*, 4 Ves. 610: In the Goods of De La Saussaye, L. R. 3 P. & D. 42. It is to be remembered that since the decision in *Cutto v. Gilbert*, 9 Moo. P. C. 131, the fact that the revoking instrument is a will does not necessarily make it revoke prior testamentary instruments. The question as to what is revoked is always a question of intention. *Farrer v. St. Catharine's*

College, L. R. 16 Eq. 19. *Green v. Tribe*, 9 C. D. 231. *Follett v. Pettman*, 23 C. D. 337. Where there are several codicils of different dates, it will always be a question to be determined from the contents of the codicils, and (at all events, in a Court of Probate) from all other circumstances of the case, whether the latter are cumulative to, or substituted for, and revocatory of the former;

(*i*) 3 Curt. 636.

(*k*) *Neate v. Piakarl*, 2 Notes of Cas. 406.

death, *viz.*, that the operation of the will is by republication extended to subjects which have arisen between its date and republication. As if one give to Sarah his wife a piece \*of plate, or other thing, and hath no such wife at the time, but after marrieth one of that name, and then publisheth the will again; <sup>11</sup> now this shall be a good bequest (*l*). So if one devise goods which he hath not, if he after do purchase the same, and then say that his will before made shall stand or be his will, it shall be a good will and bequest: for this in effect is a new making (*m*). So where a man had devised a lease to his daughter, and afterwards renewed the lease, which was held to amount to a revocation by ademption of the lease originally bequeathed; it was holden, that the renewed lease passed by means of a codicil made after the renewal, which, although it took no notice of the lease, operated as a republication of the will (*n*).<sup>12</sup> And so far has the doctrine that a republication gives words, used in the original will, the same force and effect as they would have had if first written at the time of the republication, been extended, that it has been considered that a bequest may extend to *any person* to whom the description is applicable at the period of republication, though not originally intended (*o*).<sup>13</sup>

and if upon the face of a testamentary document and the facts known to the testatrix at the time of its execution, it is doubtful whether the testatrix intended altogether to revoke a former will, the Court will admit parol evidence to ascertain the intention: *Methuen v. Methuen*, 2 Phil. 416. *Greenough v. Martin*, 2 Add. 239. *Thorne v. Rooke*, 2 Curt. 799. *Jenner v. Ffinch*, 5 P. D. 106. *Ante*, p. \*145. See also *infra*, Pt. I. Bk. IV. Ch. II. § V.

11. And where, by a codicil, a testator substitutes a wife as legatee in place of her husband, this amounts to a republication of the will, and the wife takes her husband's distributive share, subject, however, to any advances made to him. *Appeal of Buehler*, 100 Pa. St. 385.

(*l*) 1 Went. Off. Ex. c. 1, p. 62, 14th edition.

(*m*) 1 Went. Off. Ex. c. 1, p. 62, 14th edition.

(*n*) *Alford v. Earle*, 2 Vern. 208. S.

[\*173]

C. cited under the name of *Alford v. Alford*, 3 P. Wms. 168. See also *Coppin v. Fernyhough*, 2 Bro. C. C. 291. *Porter v. Smith*, 16 Sim. 251.

12. But where a testator, by his will, gave a legacy, and thereafter, during his lifetime, advanced such legacy to the legatee, that legacy will not be revived by the republication of the will. *Ware v. People*, 19 Ill. App. 196. Nor will the republication by a codicil revive legacies which have been adeemed. *Langdon v. Astor*, 16 N. Y. 9.

(*o*) *Perkins v. Micklethwaite*, 1 P. Wms. 275. See *post*, p. \*179.

13. Where a testator makes a codicil in which, after changing several bequests, he uses the following language: "I also give and bequeath to S." This makes S. a legatee under the original will. *Pond v. Allen*, 15 R. I. 171. And in a case where to a will which had no residuary clause a codicil was added, which directed that an additional sum should be dis-

But it has been held that in the case of a married woman, whose will is only the exercise of a power, her republication of it by a codicil made after her husband's death has not necessarily the effect of extending the operation of the will so as to make it include that which was not included in the power given to her to make the will: Thus, where a married woman, by her will dated in 1824, and made in exercise of a power, duly appointed and devised certain hereditaments therein specified, and also all other the hereditaments, if any such there were, which she had any power to appoint and devise, and afterwards, when a widow, in the \*year 1829, made a codicil, whereby she gave some legacies, but did not dispose of the residue of her estate, and she confirmed all wills and codicils which she had theretofore made, it was held by Sir J. Romilly, that the will, as confirmed, passed only such hereditaments as were subject to her power, and not certain other hereditaments to which she had become entitled at the date of the codicil; for that the codicil did not extend or enlarge the appointment, so as to make it a devise of that which was not contained in the power (*p*).

*Secus, as to a will in the exercise of a power, semble:*

This consequence of republication was not so important with respect to personalty as it was with regard to realty, before the passing of the Wills Act (1 Vict. c. 26); because a will of personalty, if it contained prospective words sufficiently comprehensive, would operate on the personal estate of the testator, to which those words applied, although acquired since the making of the will, without any republication of it (*q*): whereas no real estate which the testator had not at the date of the will would pass by it, however express, comprehensive, and general the words, or however manifest the intention of the testator might be (*r*). Consequently no after-purchased lands could pass, nor any lands which did not remain in the same condition from the date of the will to the death of the testator, unless there were a republication, according to the solemnities required by the Statute of Frauds;<sup>14</sup> for any the least

*distinction between wills of realty and personalty in this respect.*

tributed in conformity with the will, this did not enlarge the bequests made by the will. *Matter of Rosa*, 60 Hun 420.

(*p*) *Du Hourmelin v. Sheldon*, 19 Beav. 339.

(*q*) See, as to the ademption of legacies, and the revival of adeemed

legacies by republication, the subsequent part of this Treatise, (Pt. III. Bk. III. Ch. III.)

(*r*) 1 Saund. 277, *e*, note to *Duppa v. Mayo*.

14. Although a codicil refer to personal property alone, it may operate as a re-

alteration, or new modelling of the estate after the will, was an actual revocation (s).

But now, by stat. 1 Vict. c. 26, s. 3, the power of disposing by will executed as required by that act is extended to all such real estate as the testator may be entitled to at the \*time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.<sup>15</sup>

It should further be observed that, by the 24th section of the same statute, it is enacted, "that every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will" (t).

1 Vict. c. 26, s. 24:  
a will shall be construed to speak from the death of the testator, unless a contrary intention shall appear by the will:

publication as to realty also, even so as to pass after-acquired lands. *Carr v. Porter*, 33 Gratt. 278.

(s) 1 Saund. 278, e, note to *Duppa v. Mayo*.

15. Where land will not pass in fee because not limited to heirs; the execution of a codicil will pass such land in fee under the devise in the will, the land being given to the same devisee in the codicil, because the publication of the codicil will be held to be a republication of the will.

(t) It is not at all necessary to find this "contrary intention" expressed in so many words, or in some way quite free from doubt. It is enough if it be found, on the fair construction of the will, adopting those rules of construction which are usually adopted in construing wills, that the contrary intention does appear. Accordingly, where in a will of real and personal estate bearing a date, which date was contrasted in the gift itself with the time of the testator's death, the testator gave "all the estates of which I am now seised and possessed," and used the word "now" in other parts of his will, clearly alluding to the period at which he was making his will, Lord Cottenham held

that the testator had thereby indicated a contrary intention, so as to take the case out of the general rule that the will shall be construed to speak and to take effect from the testator's death, and that real estate acquired after the date of the will did not pass by it.—In the course of the argument, his Lordship said he admitted the word "now" would, under the Act, be the time of the death if there was no date to the will: *Cole v. Scott*, 1 Mac. & G. 518, 16 Sim. 259. (See the observations on this case in *Langdale v. Briggs*, 3 Sm. & G. 253, 254. 8 De G., M. & G. 437, and in *Re Ord*, 12 C. D. 22, 25. But in a case where a testator after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, released him from "all claims in respect of the aforesaid moneys and all other moneys due from him to the testator," and by a codicil released the son from another specified debt for moneys misappropriated by the son, it was held that the "contrary intention" did not appear, and that the son was released from the repayment of the money advanced to him by the testator after the

\*The latter of these two enactments in effect puts the case of real property on the same footing as that on which \*personal property

date of the codicil. *Everett v. Everett*, 7 C. D. 428. The Court sometimes refuses to find the 'contrary intention,' unless very clearly expressed, even though the bequest be specific, and even though the words used in the will were originally or by the time of the death of the testator by reason of some change in the condition, have become somewhat inapt to describe the subject-matter of bequest, see *Trinder v. Trinder*, L. R. 1 Eq. 695, where a testatrix having bequeathed her shares in the Great Western Railway, and having at the date of her will had no shares strictly speaking in the Great Western or any other company, but possessing Wilts and Somerset stock of the Great Western Railway, and also other stock which was increased between the date of her will and her death, it was held that all the Great Western and Wilts and Somerset stock in the possession of the testatrix at her death passed under the bequest. And see the remarks of Cairns, C., in *Morrice v. Aylmer*, L. R. 10 Ch. 148, deciding that under a bequest of Railway 'shares' railway 'stock' passed. See further, as to the construction of this section: *Douglas v. Douglas*, Kay, 400. *Bullock v. Bennett*, 1 Kay & J. 315. 7 De G., M. & G. 283. *Goodlad v. Burnett*, 1 Kay & J. 341. *Jepson v. Key*, 2 Hurl. & C. 873. *Langdale v. Briggs*, 3 Sm. & G. 246. 8 De G., M. & G. 391, 437. *Re Otley Railway*, 34 L. J., Ch. 596. S. C. 11 Jur., N. S. 818. *Wagstaff v. Wagstaff*, L. R., 8 Eq. 229. *Re Ord*, 9 C. D. 667; 12 C. D. 22. *Saxton v. Saxton*, 13 C. D. 359. *Re Russell*, 19 C. D. 432. *Re Portal & Lamb*, 27 C. D. 600, *reversed* 30 C. D. 50. *Re Knight*, 34 C. D. 518. *Post*, Pt. III. Bk. III. Ch. IV. § VIII. To prevent the application of the section, an intention must be shown excluding the effect given to the

will by the statute, namely, the effect of a continuing operation during the subsequent life of the testator: By Lord Westbury, in *Thomas v. Jones*, 1 De G., J. & Sm. 83. As to whether the section is to be applied to an excepting clause, See *Hughes v. Jones*, 1 Hemm. & M. 765, 770. The fact that a will is made before a settlement creating a power will not afford ground for holding that such *contrary intention* appears by the will as that it will not execute the power created by the settlement. *Boyes v. Cook*, 14 C. D. 53. *Airey v. Bower*, 12 App. Cas. 263. This section applies to a specific bequest of a particular thing as well as to a generic bequest. When a bequest is of that which is generic, of that which may be increased or diminished, then the Wills Act requires something more on the face of the will for the purpose of indicating such contrary intention than it does when the will refers to a particular thing, as "my ring" or "my horse," *Goodlad v. Burnett*, 1 K. & J. 341. The section applies, it will be seen, as well to personal as to real estate. Even before the Wills Act was passed, the will spoke as regards general personal estate from the death, but a very little was held to make the bequest indicate an intention to pass the specific property only which the testator might have belonging to him of the description in question at the time of making his will. Now, however, since the Wills Act has expressly enacted that a will shall be construed with reference to personal estate to speak and take effect as if it had been executed immediately before the testator's death, unless a contrary intention appears by the will, some more specific indication of such "contrary intention" is required than was thought sufficient before the Wills Act: *Goodlad v. Burnett*, 1 K. &

already stood: For the general rule, as to wills of mere personalty, established before the Wills Act \*passed, was, that they speak from the

J. 341. It will be seen that a great many of the above cited cases although dealing in a sense with the question of the construction of the 24th section, depended mainly upon the question whether the description of the property contained in the will sufficiently described the property of which the testator died possessed: for, although specific gifts are within sect. 24, so as to make the will cover after-acquired property if the description admits of it, and a contrary intention does not appear by the will (Re Ord, 12 C. D. 22, 25), yet the words of the specific devise might, from inaptness of description, exclude after-acquired property of the same kind, even though no contrary intention should appear by the will. Thus where A. devised "my cottage and all my land at S." and A. subsequently contracted to purchase a large mansion house, it was held that, construing the will as made immediately before the death of the testator, the words used did not sufficiently describe the big house: but that if A. had simply devised "all my land at S." then the big house would have been included. Re Portal & Lamb, 30 C. D. 53. A bequest, if specific under the old law, remains specific, but is enlarged as to its effect by the operation of the enactment, not that the nature of the bequest is altered at all (Turner, L.J., in *Langdale v. Briggs*, 8 D. G. M. & G. 391, quoted with approval by Jessel, M.R., in *Bothamley v. Sherson*, L. R. 20 Eq. 304). But Lindley, L.J., in *Re Portal & Lamb ubi sup.*, expressed his opinion that this section leaves open the question whether a particular property passes by the specific or the residuary devise.

The difficulty arising from the partial inapplicability of the words of the will to the condition or form of the subject-

matter of bequest at the time of the death often arises when the testator at the date of making his will is possessed of leasehold property, but before his death may have purchased the reversion, and the property may thus have become freehold. The construction will depend upon whether the words of description, though partially inapt, sufficiently identify the subject-matter of bequest. The clause in the statute says that the will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death, and if there is nothing in the will to confine its operation to the interest which the testator had at the date of the will, the mere method which the testator adopts of describing his property does not bind him to that and nothing else. *Saxton v. Saxton*, 13 C. D. 359; *Cox v. Bennett*, L. R. 6 Eq. 422; *Miles v. Miles*, L. R. 1 Eq. 462. The remarks of Malins, V. C., in *Saxton v. Saxton (ubi sup.)*, throw doubt on the authority of *Emuss v. Smith*, 2 De G. & Sm. 722 an early case in which it was held that a bequest of a leasehold garden, the reversion of which was afterwards purchased, was adeemed by the subsequent conveyance of the fee to the testator, and formed part of his residuary estate. When, however, it is not merely that the testator's description is inapt to define the condition of the property at the time of his death, but the words coupled with the evidence of the testator's surroundings fail to identify the subject-matter itself, it appears that the property will not pass under the bequest. So where a testator gave the lease of the house in which he should be living at the time of his decease to his wife, and at the date of the will he was living in a house he held for a short time at rack



day of the testator's death, and are not referable to the state of the property at the time of making the will, unless there are expressions in the will showing it was intended to describe property with \*reference to the day of the date of the will, and not to the day of the death (*u*).<sup>16</sup>

It has been decided that the effect of this section is not to make a will valid, which was invalid in its inception (*e. g.* a will of a married woman unauthorised by a power), but to

Effect of s. 24.

give a rule for the construction of a valid testamentary instrument (*x*). But the will of a married woman is not excluded by the 8th section from the operation of this section (*y*).

Will of married woman not excluded by s. 8 from the operation of s. 24:

rent, and he subsequently bought and went to reside in a freehold house where he died, it was held that the freehold house was not devised to the testator's widow: *Re Knight*, 34 C. D. 518. See also *Blagrove v. Coore*, 27 Beav. 138. In the case of *Wedgwood v. Denton*, L. R. 12 Eq. 290, it was held that a will bequeathing a house which a testatrix held for the life of T. K., and the term of twenty-one years after, passed a leasehold interest in the same house for seventy-five years which the testatrix had obtained since the date of the will on the surrender of the original lease, or at all events that an interest passed for the period of twenty-one years from the death of T. K.

As to what evidence is admissible of the surroundings of the testator, both at the date of his will and subsequently up to his death, see *Castle v. Fox*, L. R. 11 Eq. 542. In that case the testator devised "Cleeve Court with the appurtenances," and Malins, V.-C. held that the whole of the evidence showing what the testator treated as part of the Cleeve Court estate, not only before but between the date of his will and his death, was as legitimate as any evidence that could be given, for the purpose of putting the Court in the position of the testator. Where a testator uses language which is not in itself definite, but is to a certain extent popular, and does not point out the subject referred to by any strict

(*u*) *Cole v. Scott*, 1 Mac. & G. 529. *Post*, Pt. III. Bk. III. Ch. IV. § VIII. See *Douglas v. Douglas*, Kay, 400, 404, and *Goodlad v. Burnett*, 1 Kay & J. 341, 347, 348, as to the cases where the testator bequeathed the whole of some one *genus* of his property, as "all debts due to me on bond," or, all "*my stock*." The effect of the Wills Act on cases of this kind will be considered hereafter. See Pt. III. Bk. III. Ch. IV. § VIII.

16. But where, in a codicil, a testator stated that he was about to convey real estate to his son's wife, this will be taken

to be an expression of an intention to grant by conveyance *inter vivos* and not as a devise by inference. *Hurlbut v. Hutton*, 15 Stew. (N. J.) 15.

(*x*) *Price v. Parker*, 16 Sim. 198, 202, *ante*, p. \*58. *Noble v. Phelps*, L. R. 2 P. & D. 276. Nor has the Married Women's Property Act, 1882, altered the law in this respect. *Re Price*, 28 C. D. 709.

(*y*) *Thomas v. Jones*, 1 De G., J. & S. 62. *Noble v. Phelps*, L. R., 2 P. & D. 276. See also *Willock v. Noble*, L. R. 7 H. L. 590, *per Cairns*, C. See *ante*, p. \*46.

Upon this enactment it may be further remarked, that even in the case of wills within its operation, it has not rendered wholly inapplicable the doctrines which have just been stated with respect to the consequences of the republication of wills; because the statute does not enact absolutely that the will shall speak as if it had been made just before the death of the testator, but only that it shall do so in respect of the property comprised in it. Therefore, with respect to the description of persons in the will, the law remains as before the passing of the act (2).

1 Vict. c. 26, s. 34:

a will republished, &c., shall be deemed to have been made when republished:

It is further enacted by the 34th section, that "every Will re-executed, or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." 17

boundary, then the Court will apply the knowledge, that it may acquire from extrinsic circumstances, to the interpretation of the words he has used in his will, and when the Court arrives at anything which completely exhausts the whole of those words, then, and not till then, is there a restriction in the enquiry and examination into extrinsic circumstances, *Webb v. Byng*, 1 K. & J. 580. See also *Doe v. Jersey*, 3 B. & C. 870; and *Oke-den v. Clifden*, 2 Russ. 309.

(2) *Bullock v. Bennett*, 7 De G. & M. & G. 283. It must be remembered that since the Wills Act nothing short of re-execution of the will itself, or the formal execution, under the Act, of some document affirming it, can be held to confer any new testamentary validity upon it. See *ante*, p. \*166.

17. See *ante*, p. 5, n. 2, and cases there cited.

The provision of the New York statute is that the will of a testator, provided he thereby express his intention to devise all his real estate, shall be construed to pass all the real estate which he was entitled to pass at the time of his death. *Youngs v. Youngs*, 45 N. Y. 254. This rule seems to prevail in other states also.

*Winchester v. Forster*, 3 Cush. 366; *Pray v. Waterston*, 12 Metc. 262; *Wait v. Belding*, 24 Pick. 136; *Blaney v. Blaney*, 1 Cush. 107; *Canfield v. Bostwick*, 21 Com. 550; *Brewster v. McCall*, 15 Id. 274; *Pruden v. Pruden*, 14 Ohio St. 253; *Warner v. Swearingen*, 6 Dana 199; *Willis v. Watson*, 4 Scam. 67; *Loveren v. Lamprey*, 22 N. H. 444; *Wynne v. Wynne*, 2 Swan 407; *Waltón v. Walton*, 7 J. J. Marsh. 58; *Allen v. Harrison*, 3 Call 289; *Henderson v. Ryan*, 27 Tex. 670, 674.

But in many of the states the question has been much discussed as to whether the statute applies only to wills made after the passage of the act or to all wills that shall take effect after its passage. In some cases it has been held that it applies to any will where the death of the testator is after the enactment of the statute. *Condict v. King*, 2 Beas. 375; *Van Tilburgh v. Hollinshead*, 1 McCart. 36, n.; *Hamilton v. Flinn*, 21 Tex. 713; *Meserve v. Meserve*, 63 Me. 518; *Smith v. Jones*, 4 Ohio 115; *Alexander v. Worthington*, 5 Md. 471; *Magruder v. Carroll*, 4 Id. 335; *Wilson v. Wilson*, 6 Id. 487; *De Peyster v. Clendining*, 8 Paige 295; *Loveren v. Lamprey*, 22 N.

\*A codicil duly executed will give effect and operation to unattested alterations in a will (*d*): or to unexecuted papers, which have been written between the periods of the execution of the will and codicil, where the will if treated as executed on the date of the codicil and read, as speaking at that date, contains language which within the principle of *Allen v.*

A codicil may give effect to unattested alterations or additions to the will:

*H. 434; Winchester v. Forster*, 3 Cush. 366; *Cushing v. Aylwin*, 12 Metc. 169.

In other cases it has been held to the contrary. *Roberts v. Elliot*, 3 Mon. 395; *Parker v. Bogardus*, 5 N. Y. 309; *Ellison v. Miller*, 11 Barb. 332; *Green v. Dikeman*, 18 Barb. 535; *Brewster v. McCall*, 15 Conn. 274, 289; *Mullock v. Souder*, 5 Watts. & S. 198; *Gable v. Daub*, 40 Pa. St. 217; *Gibbon v. Gibbon*, 40 Ga. 562; *Battle v. Speight*, 9 Ired. L. 288. See also *Alexander v. Waller*, 6 Bush 330, 341; *Peters v. Spillman*, 18 Ill. 370; *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 590; *Means v. Evans*, 4 Desaus. 242.

If it be required by the statute that the intention of the testator to pass after-acquired real estate appear, it becomes highly proper to ascertain what expressions will indicate such intention. The words "all the residue" have been held sufficient, *Fluke v. Fluke*, 1 C. E. Gr. 478; so too, the words "whole estate," *Flournoy v. Flournoy*, 1 Bush 523; so also the words, "all my real and personal property," *Liggat v. Hart*, 23 Mo. 127; and "all my estate." *Winchester v. Forster*, 3 Cush. 366. The words "such estate as it hath pleased God to bless me with" have been held insufficient, *Dennis v. Warder*, 3 B. Mon. 173; so too, the words, in the appointing of executors, "for the full and final settlement of my estate whether real or personal," *Lynes v. Townsend*, 33 N. Y. 558; and "all the rest and residue of my estate." *Youngs v. Youngs*, 45 N. Y. 254; *Havens v. Havens*, 1 Sandf. Ch. 324.

In *Haven v. Foster*, 14 Pick. 534, 540, it was said by Shaw, C. J.: "If the will

be republished, then all the words contained in it, and which have reference to time, must be considered as applying to the time of the republication and not to that of the original will. The very same words may embrace very different parcels and amounts of estate, as they are used at one time or at another. If they are words of description, more or less general, as 'all my real estate;'—'all my real estate in such a county;'—'all my warehouses and wharfs in such a city;'—'all my wild lands,' &c., it is manifest, that such words, used on one day, would embrace a different estate, from that included in the same description on another day, as the estate described by them may have been enlarged or diminished by acquisition or alienation, in the meantime. By the rule under consideration, the will is considered as speaking on the day of republication, and to have the same effect as if originally made on that day, and to embrace the subject matter, as it exists at that time. Where, therefore, there is a general residuary clause, as if one devises, and afterwards acquires real estate, and does not republish his will, the residuary devise does not carry the after-purchased estate, because the devisee was not seized at the execution of the will. But if such will be republished, after the purchase of the real estate, it carries this real estate, because the words of the original, as used and spoken on the day of republication, embrace it in terms."

(*d*) *Per* Sir H. Jenner Fust, in *Skinner v. Ogle*, 4 Notes of Cas. 79. In the *Goods of Wyatt*, 2 Sw. & Tr. 494.

Maddock (e), would operate as an incorporation of the document to which it refers. But, when this is not the case, the mere fact of unexecuted papers having been written or signed, between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so, if the will had been originally executed at the later date (f).

The general question whether, and in what cases, an unexecuted will or other paper may be rendered valid as a testamentary disposition by a subsequent duly executed codicil, has been already considered in an earlier part of this work (g).<sup>18</sup>

A testator having, after the Wills Act came into operation, duly executed two wholly inconsistent wills, destroyed the earlier one *animo revocandi*, and then duly executed a codicil, showing an intention to revive it. Dr. Lushington held that this codicil necessarily revoked the later will, though it might be inoperative to revive the earlier one by reason of its having been so destroyed. The learned judge further expressed the inclination of his opinion (though it was not necessary to decide that question) that probate could not be decreed of the draft of the destroyed will; for that it was an unexecuted paper, not specifically adverted to or recognised by the codicil.<sup>19</sup> But he gave no opinion on the point, (which indeed does not appear to have been raised,) whether as in the case of a lost will, or a will destroyed unduly or *sine animo revocandi* (h),

(e) 11 Moo. P. C. 427.

(f) In the Goods of Truro, L. R. 1 P. & D. 201. In the Goods of Lancaster, 29 L. J. P. & M. 155.

(g) *Ante*, Pt. I. Bk. II. Ch. II. § II. p. \*86.

18. Upon a paper on which was writing dated 1858 and purporting to dispose of H.'s property, but without any signature or attestation, H. in 1864 wrote further, beginning with the caption "Codicil to above will," which latter writing was duly executed and attested. It was held that this amounted to a republication of the will of 1858, and although that will could not be enforced as a will for want of both signature and attestation, it was made valid and an enforceable will by the

proper execution of the codicil. *Hatcher v. Hatcher*, 80 Va. 169. So the improper or informal execution of a will is corrected by the proper execution of a codicil. *Mooers v. White*, 6 Johns. Ch. 374, 375; *Storm's Will*, 3 Redf. 327. Republication of a will is tantamount to making a will *de novo* and a will as republished is a new will. *Storm's Will*, *ubi supra*.

19. A codicil to a will expressly revoked is not revived by a reference thereto in a subsequent will or codicil in the words "Whereas my two sisters named in my codicil" of a certain date, "are both dead." In the Goods of Dennis, P. [1891] 326.

(h) See *post*, Pt. I. Bk. IV. Ch. II. § VII.

probate might have been granted of the will itself, as contained in the draft and the depositions of the witnesses (*i*).

This decision was approved and acted on by Sir C. Cresswell as establishing the principle that where a will had been destroyed by the testator, or with his approval, it cannot be revived by any intention of his manifested in a subsequent codicil (*k*).

It has been already observed, that although a will made by a widow before or during coverture, will not revive by the mere circumstance of her husband's death, yet if she republish it, it will become valid (*l*).<sup>20</sup> Likewise, although if the testator made his will while *non compos*, and afterwards recover his understanding, the will does not thereby obtain any force or strength (*m*); yet if he should, after having regained a sound state of mind, republish the will made during his former insanity, it would doubtless become a valid will.

Effect of republication by a widow:

by a person formerly of non-sane memory, who has recovered his understanding.

(*i*) *Hale v. Tokelove*, 2 Rob. 318.

(*k*) *Rogers v. Goodenough*, 2 Sw. & Tr. 342. In the Goods of Steele, L. R. 1 P. & D. 575. The learned judge, moreover, held that the codicil did not revoke an intermediate will, not being inconsistent therewith and not showing any intention to revoke it. See *ante*, p. \*155.

(*l*) *Ante*, pp \*49, \*58. See *Du Hourmelin v. Sheldon*, cited *ante*, p. \*174.

20. See *ante*, p. 75, n. 59; p. 82, n. 66.

(*m*) *Swinb. Pt. 2, s. 3, pl. 2. Godolph. Pt. 1, c. 8, pl. 2.*

## \*BOOK THE THIRD.

### OF THE APPOINTMENT OF EXECUTORS, AND THE ACCEPTANCE OR REFUSAL OF THE OFFICE.

The word executor, as the term is at present accepted, may be defined to be, the person to whom the execution of a last will and testament of personal estate is, by the testator's appointment, confided (*d*). "To appoint an executor," says Swinburne (*e*), "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts, and performance of his Will." <sup>1</sup>

Definition of  
term "executor."  
Bare nomination  
of executor en-  
titles will to pro-  
bate.

The bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved (*f*). <sup>2</sup>

(*d*) 2 Black. Comm. 503. Farrington v. Knightly, 1 P. Wms. 548, 549. Toller, 30.

(*e*) Swinb. Pt. 4, s. 2, pl. 2. Brownrigg v. Pike, 7 P. D. 61-64.

1. It may be essential to administer upon the estate of a decedent in more jurisdictions than one. The executor being appointed to stand in the place of the testator, the question arises at times as to in what jurisdiction such executor is accountable. As a general rule, the distribution of personal property must be made according to the law of the place of the testator's domicil. Harvey v. Richards, 1 Mason 381, 407; Normand v. Grogard, 2 C. E. Gr. 425.

However, it is held that where there are domestic creditors of the estate, the

payment of the debts may be decreed out of the estate in the hand of the resident executor. Dawes v. Boylston, 9 Mass. 337; Richards v. Dutch, 8 Id. 506; Harvey v. Richards, *ubi supra*.

In some states, it has been held, however, that for the purpose of the payment of legacies, in making distribution, the surplus of the estate must be remitted to the place of domicil. But it would seem to be the better rule that such question is not a question of jurisdiction, but of judicial discretion, under the circumstances of each particular case. Despard v. Churchill, 53 N. Y. 192, 200; Normand v. Grogard, *ubi supra*.

(*f*) Godolph. Pt. 2, c. 5, s. 1. Brownrigg v. Pike, 7 P. D. 61-64. In the Goods of Lancaster, 1 Sw. & Tr. 464.

2. Where the question is raised as to whether a will effectively appoints a person named therein executor, the intention of the testator must be gathered from the words of the will, free of conjecture, under the guidance of precedents and

rules of law. Myers v. Eddy, 47 Barb. 263; Terpening v. Skinner, 30 Id. 373. And where the words of a will are plain the intent always follows. Therefore, where the words in question are, "Prior to my decease," the fact that the persons,

## \*CHAPTER THE FIRST.

## WHO IS CAPABLE OF BEING AN EXECUTOR.

Generally speaking, all persons who are capable of making wills, and some others besides, are capable of being made executors (a). From the earliest time it has been a rule, that every person may be an executor, saving such as are expressly forbidden (b).

Who may be an executor.

It seems to be admitted that the King may be constituted executor ; in which case he appoints such persons as he shall think proper to officiate the execution of the will, against whom such as have cause of action may bring their suits : also the King may appoint others to take the accounts of such executors (c). Thus, Katherine, Queen Dowager of England, mother of Henry the Sixth, made her last will and testament, and, thereof constituted King Henry the Sixth her sole executor : Whereupon the King appointed Robert Rolleston, keeper of the great wardrobe, John Merston, and Richard Alreed, esquires, to execute the said will, by the oversight of the Cardinal, the Duke of Gloucester, and the Bishop of Lincoln, or two of them, to whom they should account (d).

The King.

This seems to be so even though the will deals only with realty : In the Goods of Jordan, L. R. 1 P. & D. 555. But such a will cannot be proved if no executor be appointed : In the Goods of Bootle, L. R. 3 P. & D. 177. Nor if the will be that of a married woman in execution of a power which relates only to real estate. *O'Dwyer v. Geare*, 1 Sw. & Tr. 465. In the Goods of Barden, L. R. 1 P. & D. 325. In the Goods of Tomlinson, 6 P. D. 209. See In the Goods of Hornbuckle, 15 P. D. 149, 151. But the will of a married woman dealing only with

realty, but appointing executors, is entitled to probate where a portion of the estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882 : In the Goods of Cubbon, 11 P. D. 169. Or of property to which she is entitled as separate estate : *Brownrigg v. Pike*, 7 P. D. 61. See also in the Goods of Hornbuckle, 15 P. D. 149. See *ante*, p. \*58, \*162.

(a) 2 Black. Comm. 503.

(b) Swinb. Pt. 5, s. 1, pl. 1.

(c) Godolph. Pt. 2, c. 1, s. 2.

(d) 4 Inst. 335.

mentioned though very aged, did not die until after the death of the testatrix, is a controlling circumstance in determining that it was not her intention to have others appointed in case of their death after her death. *Fosdick v. Delafield*, 2

Redf. 392, 403 ; *Cheeseman v. Wilt*, 1 Yeates 411 ; *Carr v. Jeannereth*, 2 McCord 66 ; *Jenkins v. Van Schaack*, 3 Paige 242 ; *Van Ostrand v. Moore*, 52 N. Y. 12.

Doubts have been entertained whether a corporation aggregate can be executor; principally because they cannot prove a will, or at least cannot take the oath for the due execution of the office (e).<sup>1</sup> But there are authorities in \*favour of the capability (f); and it is said to be now settled, that on their being so named, they may appoint persons styled syndics, to receive administration with the will annexed, who are sworn like other administrators (g). No doubt appears ever to have been entertained, but that a corporation sole may be executor (h). Where a testator in India nominated his brother, and "Messrs. Cockerell & Co., East India agents, London," and one A. B., to be his executors, and before his death the firm of Cockerell & Co., which consisted of four members, had been dissolved, Sir H. Jenner Fust held that the appointment was not of the firm collectively, but of the persons composing it individually, and that each of the members was entitled to be joined in the probate with the other executors (i).

Corporations.

A partnership firm.

Aliens.

By the "Naturalization Act, 1870," an alien has the same capacity of taking, acquiring, holding and disposing of property as if he were a natural-born British subject (k), and is therefore capable of being an executor (l).<sup>2</sup>

(e) 1 Black. Comm. 477. Com. Dig. Admon. B. (2). Went. Off. Ex. c. 1, p. 39, 14th edit. The other grounds of the last author's doubt are stated to be: 1st, Because they cannot be feoffees in trust, to others' use: 2ndly, They are a body framed for a special purpose.

1. In *Georgetown College v. Brown*; 34 Md. 450, it is expressly held that letters testamentary or of administration

will not be granted to a corporation, nor, according to the English practice, will a corporation when named executor, be allowed to designate a person to receive administration with the will annexed. So in Maryland, the right of administration cannot be delegated. But in Delaware a corporation may be authorized to administer on the estate of a decedent. *Fidelity Insurance, &c., Co. v. Niven*, 5

(f) Swinb. Pt. 5, s. 9. Godolph. Pt. 3, c. 1, s. 1. 1 Roll. Abr. tit. Executors, T. 7, citing 12 E. 4, 9, b.

(g) 3 Bac. Abr. by Gwillim, p. 5, tit. Executors, A. 2. Toller, 30, 31. In the Goods of Darke, 1 Sw. & Tr. 516. But the grant will not be made until the appointment of "Syndics is before the Court, *ibid.*

(h) Godolph. Pt. 2, c. 6. Wentw. Off. Ex. p. 39, 14th edit. See In the Goods of Haynes, 3 Curt. 75.

[\*184]

(i) In the Goods of Fernie, 6 Notes of Cas. 657.

(k) See stat. 33 & 34 Vict. c. 14, s. 2. See *ante*, p. \*9.

(l) As to the question of the capability of aliens to be executors prior to the passing of the above Act, see the former editions of this work, Pt. I. Bk. III. Ch. I.

2. "Letters of administration are not of necessity to be granted within the limits of the jurisdiction: the granting



An infant may be appointed executor, how young so ever he be (m), and even a child *in ventre sa mere* (n), (who is considered in law, to all intents and purposes, as actually born) (o), <sup>Infants.</sup> inasmuch that when such is so appointed, if the mother bring forth two

Del. 416. It is clear that corporations or societies cannot be the administrators of an estate, the societies being beneficiaries under the will and entitled to the property. *Matter of Thompson's Estate*, 33 Barb. 334.

In *Porter v. Trall*, 3 Stew. (N. J.) 106, the question is raised whether a corpora-

tion can be an executor in New Jersey, but the point was not decided:

(m) Wentw. Off. Ex. c. 18, p. 390, 14th edit. Swinb. Pt. 5, s. 1, pl. 6.

(n) Godolph. Pt. 2, c. 9, s. 1.

(o) 2 Saund. 387, note to *Purefoy v. Rogers*.

thereof being not a judicial but a ministerial (and therefore not a local) act, wherein the bishop acts, as a person designated and appointed by law." Grimke's Law of Executors, p. 193, § 16.

It is not essential that an executor should be a resident of the jurisdiction in which the will is probated. For both by the common law and by statute, in some of the states, it is held that an executor may be an alien and that he may be resident out of the King's allegiance, and yet he may be qualified to hold his trust. It is said in Wisconsin that this liberal and beneficial common law dictum, and the rights flowing from it, is too sacred to be swept away by construction. And in Wisconsin the language of the Wills Act is, "if any executor shall reside out of this state," clearly indicating that the executor need not be a resident of Wisconsin. *Cutler v. Howard*, 9 Wis. 309. And the New York statute (2 R. S. 70, § 7) contemplates that a non-resident, being appointed executor, may receive letters testamentary. *McGregor v. McGregor*, 1 Keyes 133.

The same may be said as to administration. The fact that the applicant for administration is not a citizen and resident of the state, is no legal objection to his appointment as administrator, unless there be special statutory provision of the state to that effect. *Ex parte Barker*,

2 Leigh 719, 720; *Jones v. Jones*, 12 Rich. 623. This was the common law rule. *McClaurin v. Thompson*, Dud. 335.

But in Kentucky, the fact that the widow is a non-resident of the state, though her husband resided in Kentucky, is sufficient reason for rejecting her claim, where, by statute, the widow is entitled to administration, and granting administration to another. *Radford v. Radford*, 5 Dana 156. But see *Thompson v. Hucket*, 2 Hill (S. C.) 347.

However, in New Hampshire, where two persons are of the same relationship to the deceased, and one resides within the jurisdiction and the other resides without, ordinarily the one residing within is entitled to the administration; but where such applicant makes a claim against the estate, which is disputed by the heirs, it is properly within the discretion of the judge to appoint the one residing out of the state. *Pickering v. Pendexter*, 46 N. H. 69.

But it is held in Illinois that a non-resident cannot be legally appointed administrator on an estate within that commonwealth, not even upon the estate of a non-resident dying abroad and leaving effects in Illinois. *Child v. Gratiot*, 41 Ill. 357.

But in Pennsylvania, the mere fact that an executor resides beyond the jurisdiction of the court, does not give to the

38 Geo. III. c. 87: sole executor cannot act till 21 years old: or three children at that one birth, they are all to be admitted executors (*p*).<sup>3</sup> But if an infant \*be appointed sole executor, by statute 38 Geo. III. c. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration, *cum testamento annexo*, shall be granted to the guardian of such infant, or to such other person as the court shall think fit, until such infant shall have attained the age of twenty-one years (*q*). This act only applies in case of an infant being sole executor; for if there are several executors, and one of them is of full age, no administration *durante minore ætate* ought to be granted; for he who is of full age may execute the will (*r*).

It has been said, that if it be a woman infant who is made executrix, and if her husband be of age and assent, it is as if she were of age, and her husband shall have the execution of the will (*s*): and in Prince's Case (*t*), it was resolved by the justices of the Common Pleas, that if administration be committed during the minority of the executrix, and she take husband of full age, then the administration shall cease.<sup>4</sup> But this has since been doubted (*u*).

(*p*) Godolph. Pt. 2, c. 9, s. 1.

3. It has been held in Pennsylvania that a child *en ventre sa mere* is for all purposes, for his own benefit, considered as absolutely born. Such child, therefore, may be an executor. *Swift v. Duffield*, 5 Serg. & R. 38, 40; *McKnight v. Read*, 1 Whart. 213, 220.

But, in North Carolina, an infant of tender years is not capable of being an executor. *Bailey v. Miller*, 5 Ired. 444.

(*q*) See In the Goods of Stewart, L. R. 3 P. & D. 244. *Post*, Pt. I. Bk. V. Ch. III. § III. Before the passing of this act the law considered him capable of acting as executor at the age of seventeen: Godolph. Pt. 2, c. 9, s. 2. *Swinb. Pt. 5*, s. 1, pl. 6.

(*r*) Pigot and Gascoigne's case, cited Brownl. 46. *Foxwist v. Tremaine*, 1 Mod. 47, by Twysden, J. See further,

*post*, Pt. I. Bk. V. Ch. III. § III. as to infant executors and administration *durante minoritate*. See also 2 Williams' Notes to Saunders, 637.

(*s*) Wentw. Off. Ex. c. 18, p. 392. Toller, 31.

(*t*) 5 Co. 29, b.

4. A man who marries a woman who is an executrix becomes by the marriage an executor in her right, and renders himself a trustee with her of the assets of the estate, and as such he may be compelled to account. *Wood v. Chetwood*, 12 C. E. Gr. 311, 313. *Linsay v. Linsay*, 1 Desaus. 150. Of course it follows from this that there can be no question that where a bill is brought against a married woman as executrix her husband is a necessary party. *Wood v. Chetwood*, *ubi supra*.

(*u*) See *post*, Pt. I. Bk. V. Ch. III. § III.

Register or the Orphans' Court the right to demand of him a bond conditioned for the

proper performance of his duties as executor. *Harberger's Appeal*, 98 Pa. St. 29, 33.

Formerly a married woman could not by the law of England take upon her the office of executrix or administratrix without the consent of her husband. But now by the Married Women's Property Act, 1882, [which came into force Jan. 1, 1883] it is enacted (sect. 1, sub-s. 2), "that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract . . . as if she were a *feme sole*," and also (sect. 24) "the word 'contract' in the Act shall include \*the acceptance of any trust or of the office of executrix or administratrix . . . ." The act also (sect. 18) enables a married woman who is an executrix or administratrix alone or jointly with any person or persons of the estate of any deceased person to act in such office as if she were a *feme sole* for purposes of action, transfer of stock, &c., without any consent on the part of her husband. These sections would seem to apply to any married woman whether married before or after the commencement of the act, and so since this date (Jan. 1, 1883) it has become unnecessary to consider the question as to the consent of the husband, as the wife as such executrix or administratrix now acts independently of him in all respects as if she were a *feme sole*.<sup>5</sup>

There are few or none, who, by our law, are disabled, on account of their crimes, from being executors: and therefore it has always been holden, that persons attainted or outlawed may sue as executors, because they sue *in auter droit*, and for the benefit of the parties deceased (*v*). And it has been decided that a person ap-

*Feme covert:*

Married Women's Property Act, 1882, 45 & 46 Vict. c. 75.

s. 1 (sub-s. 2):

s. 24:

s. 18.

Extent of application of Married Women's Property Act.

Persons attainted and outlaws.

5. In Maryland a *feme covert* may act as executrix or administratrix. *Binnerman v. Weaver*, 8 Md. 517. And she may so qualify in Maine. *Stewart*, Appellant, 56 Me. 300. And the Massachusetts provisions are very similar to those of Maine. *Barber v. Bush*, 7 Mass. 510. In Alabama it is provided by statute (Code, §§ 1660, 1673, 1683), that administration may be granted to a married woman if her husband consent to her appointment. *English v. McNair*, 34 Ala. 40. And where the validity of her administration is collaterally at-

tacked, her husband's assent will be presumed. *Id*.

(*v*) *Wentw. Off. Ex.* 36, 14th edition. *Godolph. Pt. 2*, c. 6, s. 1. *Vin. Abr. tit. Utlawry*, n. a. pl. 2. So a villein was capable of being an executor: *Swinb. Pt. 5*, s. 1, pl. 3; *Off. Ex.* 36, 14th edition: and the lord could not seize those goods which he had to the use of the deceased; and he might sue his lord for a debt due to the testator: *Lit. B. 2*, c. 11, s. 192. But it was held that an outlaw could not move to have an attorney's bill taxed, where he (the outlaw) was administrator,

pointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in a Court of Probate with a view of establishing the validity of the will by which he is appointed executor; for that his office being *in autre droit* was not forfeited by the conviction (x).<sup>6</sup> By the civil and canon law, \*indeed, not only traitors and felons, but heretics, apostates, usurers, famous libellers, incestuous bastards, and many others, are incapable of being executors (y).

The court cannot refuse to grant the probate of a will to a person appointed executor, on account of his poverty or insol-  
Persons in mean or insolvent circumstances:
 vency.<sup>7</sup> Therefore, where, to a *mandamus* to the judge of the Prerogative Court, to grant the probate of a will to a person named executor therein, the Ordinary returned that he was an absconding person, and insolvent, and that he refused to give caution

with the will annexed, by which all the personal estate was bequeathed to him, subject to payment of the debts, &c., and one of the bills which he sought to tax related to business done for himself and the testatrix jointly, and the other to business done for the testatrix alone: *Re Mander*, 6 Q. B. 867.

(x) *Smethurst v. Tomlin*, 2 Sw. & Tr. 143. Nor will the Court pass over an executor by reason of his bad character only. In the Goods of Samson, L. R. 3 P. & D. 48.

6. No degree of legal or moral guilt or delinquency is sufficient to exclude a person from the administration unless such person has been actually convicted of an infamous crime. The conviction intended by the statute is upon indictment or other criminal proceeding. *Coope v. Lowerre*, 1 Barb. ch. 45.

But while admitting that moral delinquency does not disqualify, the court cannot close its eyes to the fact that in the hands of a professional gambler the estate is likely to be lost by being squandered. *McMahon v. Harrison*, 6 N. Y. 443, 448.

(y) *Swinb.* Pt. 5, s. 2, 3, 4, 7, 9, 10. *Godolph.* Pt. 2, p. 6.

7. A mere allegation of irresponsibility

is not enough to compel an executor to give security, and in a case where such an allegation is made, if it be denied, the issue must be tried, and the charges proved. *Cotterell v. Brock*, 1 Bradf. 148. But the surrogate cannot require an executor to prove his responsibility, before any doubt is raised as to such responsibility by proof introduced by the contestant. *Colgrove v. Horton*, 2 Barb. Ch. 261.

Where the question as to the precarious circumstances of an executor has been raised, it is proper in determining the question as to whether security shall be required, to take into consideration the proportion of the estate belonging to the executor by the provisions of the will, as determining *pro tanto* the executor's pecuniary means. *Cotterell v. Brock*, *ubi supra*.

In *Webb v. Dietrich*, 7 Watts & S. 401, 402, it is said that lunacy or drunkenness, mismanagement and that executor *is about to become insolvent* are good grounds for removal. And in *Ludwick v. The Commonwealth*, 18 Pa. St. 172, 175, it is said that a man cannot be a habitual drunkard without waste or mismanagement—the very act of drunkenness itself is waste.

to pay legacies bequeathed to some of the testator's infant relations; a peremptory *mandamus* was granted; for the Ordinary has no authority to interpose and demand caution of the executor when the testator himself required none (z).

So where, after probate of the will, the executor became bankrupt, and a suit was commenced in the Ecclesiastical Court to revoke the probate, and grant administration to another; <sup>bankrupt.</sup> the Court of Queen's Bench granted a prohibition (a).<sup>8</sup>

The consequence of these decisions was, that the Court of Chancery was forced to assume a new jurisdiction (b): and that court restrained an insolvent or bankrupt executor, and appointed a receiver:<sup>9</sup> and if it was necessary to bring actions at law to recover part of the effects, since that <sup>when the Court of Chancery controlled insolvent executors by the appointment of receivers:</sup> must be in the name of the executor, the court compelled him to allow his name to be used (c).

(z) *Rex v. Sir Richard Raines*, 1 Lord Raym. 361. S. C. 1 Salk. 299. 3 Salk. 162. 1 Stra. 672. Carth. 457. Holt, 310. *Hathornthwaite v. Russell*, 2 Atk. 127. S. C. Barnard. Chan. C. 334. See also 3 P. Wms. 336, note to *Slanning v. Style*.

(a) *Hills v. Mills*, 1 Show. 293.

8. Bankruptcy might furnish a sufficient reason for removing an executor, poverty will not. The selection of one to be an executor is an expression of the highest degree of personal confidence, and character rather than pecuniary responsibility controls the selection. *Shields v. Shields*, 60 Barb. 56. But insolvency is not, *per se*, sufficient ground to require executors to give bonds, especially when it appears that the pecuniary condition of the executors is as good as it was at the time of their appointment by the testator. *Willson v. Whitfield*, 38 Ga. 269.

The mere fact that the executor is not possessed of property of his own, equal in value to that of the estate of which the testator has appointed him executor, is not sufficient ground for his removal or for requiring him to give security. *Mandeville v. Mandeville*, 8 Paige 475.

Where the executor mismanages the estate confided to him, or puts the assets in jeopardy by his actual or impending insolvency, the court will restrain him from all further intermeddling with the estate, and compel him to restore the funds in his hands. *Elmendorf v. Lansing*, 4 Johns. Ch. 562.

(b) By Lord Mansfield, in *Rex v. Simpson*, 1 W. Black. 458.

9. Where an executrix marries a second husband in necessitous circumstances and there are infant children of the first marriage, the court will appoint a receiver, if it appear from the evidence that the husband of the executrix is manifestly incapable of managing the trust in a judicious manner and the estate is likely to be wasted or the assets to be diminished by his neglect or ignorance of the proper mode of management. *Stairley v. Rabe*, 1 McMull. Eq. 22.

(c) *Uterson v. Mair*, 2 Ves. jun. 95. *Scott v. Becher*, 4 Price, 346. In like manner it restrained the assignees of a bankrupt executor from paying over the fund to him, and this upon petition in the bankruptcy, from the peculiar authority it had over them: *Ibid.* Possi-

\*But if a person, known by the testator to be a bankrupt or insolvent, be appointed an executor by him, such person cannot, on the ground of insolvency alone, be controlled by the appointment of a receiver (*d*). It is not, however, to be inferred from the circumstance of the will having been made some time before the commission, and not altered afterwards, that the testator had a deliberate intention to entrust the management of his estate to an insolvent executor (*e*). It must be observed, finally, that the court will certainly not grant a receiver upon the single ground, that the executor is in mean circumstances (*f*).

The general principle upon which the court will restrain executors and administrators by the appointment of receivers will be pointed out hereafter (*g*).

By our law, as well as by the civil law, idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of the trust or not (*h*).<sup>10</sup>

bly now, however, since the fusion by the Judicature Act of all the Courts into one, the Probate Division would refuse to grant probate in any case where Equity would restrain the executor (if probate were granted to him) and appoint a receiver. See *In the Goods of Gunn*, 9 P. D. 242. As to the disability in former times of persons excommunicated, Roman Catholics, persons denying the Trinity, &c., and persons not qualifying for office, see the former editions of this work, Pt. I. Bk. III. Ch. I.

(*d*) *Gladdon v. Stoneman*, 21st March, 1808, *coram* Lord Eldon, C., reported in a note to 1 Madd. 143. *Langley v. Hawke*, 5 Madd. 46. *Stainton v. The Carron Company*, 18 Beav. 146, 161.

(*e*) *Langley v. Hawke*, 5 Madd. 46.

(*f*) *Hathornthwaite v. Russell*, 2 Atk. 126. *S. C.* *Barnard. Chanc. Cas.* 334. *Anon.* 12 Ves. 4. *Howard v. Papera*, 1 Madd. 142.

(*g*) *Infra*, Pt. V. Bk. II. Ch. II.

(*h*) *Godolph. Pt. 2*, c. 6, s. 2. *Bac. Abr. Exors. (A.)* 5. 2 *Robert*. 133, 134.

[\*188]

10. The incompetency referred to in the New York statute, consists of three kinds: Drunkenness, improvidence, and want of understanding. "Want of understanding" does not refer to a want of understanding of the law, because it is not the intent of the statute to deprive an uneducated person from the right of administration upon the estates of decedents. And it therefore applies to an entire lack of mental capacity. Want of understanding of the law, or the legal duties of an administrator can be supplied by the advice of counsel on such subjects. *Administration of Shilton*, Tuck. 73.

But an ill-regulated temper and lack of self-control have no such relation to the qualities of prudence and understanding as to disqualify a person subject thereto from discharging the trust of executor. *McGregor v. McGregor*, 1 Keyes. 133.

The words "evidently unsuitable," in the statute of Massachusetts, are not restricted to insanity or incapability. They

Therefore it has been agreed, that if an executor become *non compos*, the court may, on account of this natural disability, commit administration to another (i).<sup>11</sup>

confer upon the Probate Judge the discretion to remove for any cause that he may deem proper, as where the personal interests of the executor conflict with his duties as executor. *Thayer v. Horner*, 11 Met. 104, 110; *Winship v. Bass*, 12 Mass. 198; *Drake v. Green*, 10 Allen 124, 126; *Putney v. Fletcher*, 148 Mass. 247, 248.

(i) *Hills v. Mills*, 1 Salk. 36. *Evans v. Tyler*, 2 Robert. 128, 134. See *post*, Pt. I. Bk. V. Ch. III. § VI.

11. But perhaps an executor would not be removed, because of insanity, until after office found. *Petition of Taggart*, 1 Ashmead 321. And also in the case of one who is a drunkard, he probably would not be removed until after he had been so found, *Cohen's Appeal*, 2 Watts 175; but even the finding, by an inquisition, that he is a habitual drunkard would not *per se* show that he was deprived of his powers to perform the office. *Sill v. McKnight*, 7 Watts & S. 244;

*Imhoff v. Witmer*, 31 Pa. St. 243, 245. But a party found to be a habitual drunkard is not adjudged to be destitute of all capacity, but only so far as to justify the taking the property out of his control as a measure of precaution. *Beeson v. Beeson*, 9 Pa. St. 279, 295.

In one case where the question was whether the husband of the deceased was incompetent, by reason of drunkenness, to administer on her estate, it was the conclusion of the court that only such habits of drunkenness, as were habitual, continued, inveterate, and irremediable and wholly incapacitating the party for the transaction of business were intended by the statute as a disqualification of any person from the trust of administration, on the ground of drunkenness. It should be intemperance of such a gross character, as would warrant overseers of the poor in adjudging the person an habitual drunkard. *Elmer v. Kechele*, 1 Redf. 472.

## \*CHAPTER THE SECOND.

## OF THE APPOINTMENT OF EXECUTORS—BY WHAT WORDS EXECUTORS MAY BE APPOINTED.

An executor can derive his office from a testamentary appointment only (a).<sup>1</sup>

His appointment may either be express, or constructive; in which case he is usually called executor *according to the tenor*; <sup>2</sup> Executor according to the tenor: for, although no executor be expressly nominated in the will by the word executor, yet, if by any word or circumlocution the testator recommend, or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors (b).<sup>3</sup>

(a) A will (says the author of the Office of Executor, p. 3, 14th edit.) is the only bed where an executor can be begotten or conceived. According to the old doctrine, an executor could not be primarily appointed in a codicil.

1. Under the statute of the State of New York, the executor cannot obtain his authority from the naked probate of the will, as under the ecclesiastical usage. He is named in the will, but he is appointed by the court and his authority is derived, not from the testator alone, but from the people of the State of New York, who confirm the nomination of the testator. Bronson's Will, Tuck. 464, 466. The executor derives his appointment from the will. The letters testamentary, are but the authentic evidence of the power conferred by the will and are founded upon the probate of the instrument. The will is the source of the power. Holladay v. Holladay, 16 Oreg. 147. A Probate Court cannot appoint an executor. It can only clothe the executor appointed by the will with the authority to act. Blakely v. Frazier, 20 S. C. 144.

2. An executor according to the tenor is one not directly appointed by the will an executor, but who is charged with the duties which appertain to one. 1 Bouvier Law Dict. (11th ed.) 498.

In State v. Watson, 2 Spears 97, it was said that section 4 of the act of 1839 seemed to explode the whole doctrine of an executor according to the tenor, but this case was subsequently overruled and it was expressly held that an executor according to the tenor could be appointed in South Carolina, notwithstanding the act of 1839. Watson v. Mayrant, 1 Rich. Eq. 449.

(b) Swinb. Pt. 4, s. 4, pl. 3. Godolph. Pt. 2, c. 5, s. 2. Wentw. Off. Ex. 20, 14th edition. In the Goods of Manly, 3 Sw. & Tr. 56.

3. It is not necessary that the appointment of an executor should be made in so many words. Ex parte McDowell, 2 Bradf. 32; Ex parte McCormick, Id. 170; Matter of Blancan, 4 Redf. 151; State v. Watson, 2 Spears 97; Watson v. Mayrant, 1 Rich. Eq. 449; Nunn v. Owens, 2 Strofh. 101; Grant v. Spann, 34 Miss. 294; Myers v. Davies, 10 B.



As if he declare by his will that A. B. shall have his goods after his death to "pay his debts, and otherwise to dispose at his pleasure," or to that effect, by this A. B. is made executor (c). So if the testator say, "I commit all my goods to the administration of A. B." (d), or, to "the disposition of A. B." (e); in this case he is made executor. \*And where certain persons were directed by the will to pay debts, funeral charges, and the expenses of proving the will, they were held to be clearly executors according to the tenor (f). So where the testator in a codicil said, "I appoint my nephew my residuary legatee, to discharge all lawful demands against my Will," the nephew was admitted executor (g). So if the testator say, "I make A. B. lord of all my goods" (h), or "I make my wife lady of all my goods" (i), or "I leave all my goods to A. B." (k), or "I leave A. B. legatary of all my goods" (l), or "I leave the residue of all my goods to A. B." (m), it will amount to the appointment of such persons respectively as executors according to the tenor (n). And

by words pointing at the office or rights of an executor:

Mon. 394; Hartnett v. Wandell, 60 N. Y. 346. In a will made in France the appointment of a person to be "general and universal legatee" is sufficient to create him executor. Matter of Blancan, *ubi supra*.

(c) *Ibid.* Henfrey v. Henfrey, 4 Moore, P. C. C. 33. So where one said on his death-bed to his wife that she *should pay all and take all*, by this she was executrix: Brightman v. Keighley, Cro. Eliz. 43.

(d) Godolph. Pt. 2, c. 5, s. 3. Bro. Executors, pl. 73.

(e) Pemberton v. Cony, Cro. Eliz. 164. Godolph. Pt. 2, c. 5, s. 3. So if he says, "I will that A. B. shall dispose of my goods which are in his custody," he is thereby made executor of those parcels or goods: *Ibid.*

(f) In the Goods of Fry, 1 Hagg. 80. See also In the Goods of Almosnino, 1 Sw. & Tr. 508. In the Goods of Collett, Dea. & Sw. 274. In the Goods of Baylis, L. R. 1 P. & D. 21. In the Goods of Adamson, L. R. 3 P. & D. 253. In the Goods of Bell, 4 P. D. 85. In the Goods of Lush, 13 P. D. 20.

(g) Grant v. Leslie, 3 Phillim. 116.

(h) Godolph. Pt. 2, c. 5, s. 3. Swinb. Pt. 4, s. 4, pl. 3.

(i) Swinb. Pt. 4, s. 4, pl. 3.

(k) Godolph. Pt. 2, c. 5, s. 3. Swinb. Pt. 4, s. 4, pl. 3.

(l) *Ibid.*

(m) *Ibid.* "I devise all my personal goods to my two daughters and my wife, whom I make executrix;" this was holden to appoint them all three executrices: Foxwith v. Tremaine, Ventr. 102. So where a will contained a clause to the effect "I appoint my sister A. B. my executrix, only requesting that my nephews C. D. and E. F. will kindly act for and with this dear sister." C. D. and E. F. were held to be executors according to the tenor: In the Goods of Brown, 2 P. D. 110. See Powell v. Stratford, 3 Phil. 118.

(n) In Androvin v. Poilblanc, 3 Atk. 301, Lord Hardwicke said, a person named "universal heir," in a will, would have a right to go to the Ecclesiastical Court for the probate. But it has lately been held otherwise as to a person named universal legatee: In the Goods of Oliphant, 1 Sw. & Tr. 525.

where by his will a testator said, "I appoint A. B. and C. D.," but did not state in what capacity he appointed them : and also bequeathed legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to it, the court held that by the words of the will A. B. and C. D. were appointed \*executors (o).<sup>4</sup> Again, where a testator did not specifically appoint any executor but nominated four persons to act as his trustees, and bequeathed to them his residuary estate, with power to receive any sums due to the residue, and to give a discharge for the same, and in the will gave directions to his "executors," using the terms "trustees" and executors indifferently, as referring to the same persons, it was held that the trustees were executors according to the tenor, and entitled to probate (p). But it appears that the practice of the Prerogative Court has been to grant administration with the will annexed to the universal legatee of a testamentary paper, but not to decree probate to him as executor according to the tenor. And Sir C. Cresswell, on a late occasion, adhered to this practice (q).

Where the testator gave divers legacies, and then appointed that, his debts and legacies being paid, his wife should have the residue of his goods, so that she put in security for the performance of his will, this was held by three common law judges to make her executrix (r).<sup>5</sup> Again, where the will said nothing of the testator's debts, but contained

(o) In the Goods of Bradley, 8 P. D. 215.

4. An executor may be appointed either expressly or by construction, and where a person is not appointed executor by that name, but the testator commits to his charge the duties which ordinarily devolve upon an executor to perform, the intention to invest him with that character will be inferred and he will be an executor according to the tenor. Thus where a testator said "After all my just debts being paid I wish my brother to invest my property \* \* \* in some safe bank in the city of New York, \* \* \* the interest accruing thereupon to be transmitted semi-annually to my father; and the capital at my father's death to be divided share and share alike among my three brothers," it was held

that it could not have been his intention to entrust these important duties to his brother and commit to an administrator the payment of his debts, and that therefore the brother was executor according to the tenor. *Ex parte McDonnell*, 2 Bradf. 32.

(p) In the Goods of Leven, 15 P. D. 22.

(q) In the Goods of Oliphant, 1 Sw. & Tr. 525.

(r) Wentw. Off. Ex. p. 20, 14th edition. But if the testator bequeath the residue of his goods *the debts discharged*, in this case, according to Swinburne, the universal legatary doth still remain legatary, and is to receive his legacy at the hands of the executor or administrator : Swinb. Pt. 4; s. 4, pl. 7.

5. *Matter of Blacan*, 4 Redf. 151.

only devises of real and personal legacies, to be paid within two months after his death, and concluded, without any bequest of the residue or express appointment of executors, in these words, "I appoint A. B., C. D., and E. F., to receive and pay the contents above mentioned;" Sir G. Lee held that the persons so named were executors according to the tenor; for they could not receive and pay the legacies without collecting in the effects; and no one can assent to a legacy but he that has the management of the estate, because legacies cannot be paid till after the debts, and he only who \*has the management of the estate knows whether the assets are sufficient (s).

But where a testator, being entitled to many shares in the Sun Fire Office, and in the mines of Scotland, and a lease for years of a coal-meter's place, gave the same, by a will containing no appointment of an executor, to trustees in trust for his daughter, and after several contingencies gave the remainder thereof to his son, and if he should die in his minority without issue, give the remainder thereof to the trustees for their own use, and gave all the residue of his estate to the said trustees, to pay one moiety to his daughter, and the other moiety to his son; Sir G. Lee held that there were no words in this will that made the trustees executors; inasmuch as they had only power to pay what was vested in them as trustees to the particular persons for whose use they held it, but had not a general power to receive and pay what was due to and from the estate, which is the office of an executor (t). So where the whole personal estate was left to a trustee on trust for a specific purpose, and no executor was named in the will, it was held by Sir C. Cresswell that such trustee was not entitled to probate as executor according to the tenor (u).

Where persons have been held not to be executors according to the tenor:

(s) *Pickering v. Towers*, 2 Cas. temp. Lee, 401.

(t) *Boddicott v. Dalzeel*, 2 Cas. temp. Lee, 294. See also *Fawkener v. Jordan*, *ibid.* 327; and *Moss v. Bardwell*, 3 Sw. & Tr. 187, as to the distinction between the offices of trustee and executor.

(u) In the Goods of Jones, 2 Sw. & Tr. 155. Unless the Court can gather from the words of the will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant

probate to him as executor according to the tenor thereof: In the Goods of Punchard, L. R. 2 P. & D. 369. In the Goods of Lowry, L. R. 3 P. & D. 157. In the Goods of Baylis, L. R. 1 P. & D. 21. In the Goods of Stewart, L. R. 3 P. & D. 244. But a direction in a will to a person to pay the testator's debts or funeral expenses out of a particular fund and not out of the general estate, does not constitute such person executor according to the tenor: In the Goods of Davis, 3 Curt. 748. In the

An executor may be appointed by necessary implication : <sup>6</sup> \*as where the testator says, "I will that A. B. be my executor, if by necessary im- C. D. will not ;" in this case C. D. may be admitted, plication. if he please, into the executorship (x). So where the testator gave a legacy to A. B. and several legacies to other persons, among the rest, to his daughter-in-law, C. D. : immediately after which legacies followed these words ; "but should the within-named C. D. be not living, I do constitute and appoint A. B. my whole and sole executrix of this my last Will and Testament, and give her the residue ;" <sup>7</sup> probate was decreed to C. D., as executrix by implication, according to the tenor of the will (y). Or if the testator supposing his child, his brother, or his kinsman to be dead, say in his will, "Forasmuch as my child, my brother, &c., is dead, I make A. B. my executor," in this case, if the

Goods of Toomy, 3 Sw. & Tr. 562. In the Goods of Fraser, L. R. 2 P. & D. 183.

6. Where a testator did not in terms nominate his wife executrix, but by one clause of his will appointed J. C. H. sole executor on the event of the death of his wife during the minority of his children, the wife was held to be appointed by implication. Bayeaux v. Bayeaux, 8 Paige 333. And where a testator said "I want J. H. H. to attend to my business as executor," it was held to be an appointment by implication. Nunn v. Owens, 2 Strobb. 101.

Where no executor has been expressly nominated by the testator, authority given to a trustee, legatee or other person named in the will to collect and pay off debts due to or by the testator, is equivalent to the appointment of such person as executor. Grant v. Spann, 34 Miss. 294. An executor may be appointed by implication, by committing to his charge the duties which it is the province of an executor to perform, or by conferring the rights which belong to the office. Carpenter v. Cameron, 7 Watts. 51. And this is so, even though the testator style him trustee. Myers v. Davies, 10 B. Mon. 394, 396. But the appointment of executors by

construction or implication is not favored. Hartnett v. Wandell, 2 Hun 552. In doubtful cases, administration *cum testamento annexo* must be resorted to. Hartnett v. Wandell, *ubi supra*. Such implication will arise where a testatrix in her will in favor of her husband says, "I dispense with his giving security." Matter of Blancan, 4 Redf. 151, 153.

(z) Godolph. Pt. 2, c. 5, s. 3. Swinb. Pt. 4, s. 4, pl. 6. If the testator makes A. B. or C. D. his executors, in this case they shall both be executors, for "or" shall be construed, "and : " Godolph. Pt. 2, c. 5, s. 3, c. 3, s. 1.

7. But where a testatrix, after naming executors, provided that if they should both die "*prior to my decease*," or in case they should both decline to act, then L. D. should be executor, and neither of them died until after her death, and one of them acted as executor and died, it was held that L. D. was not appointed executor by implication, as in order to have him succeed to the administration of the estate it would be necessary to reject the words "*prior to my decease*." Fosdick v. Delafield, 2 Redf. 392.

(y) Naylor v. Stainsby, 2 Cas. temp. Lee, 54.

person whom the testator thought dead be alive, he shall be executor (z). So where a man made his last will, and did will thereby, that none should have any dealings with his goods until his son came to the age of eighteen years, except J. S., by this J. S. was held to be made executor during the minority of his son (a).

There is a great distinction between the office of coadjutor, or overseer, and that of executor. The coadjutor, or over\*seer, has no power to administer or intermeddle otherwise than to counsel, persuade, and advise; and if that fail to remedy negligence or miscarrying in the executors, he may complain to the court, and his charges in so doing ought to be allowed out of the testator's estate (b). It is therefore material to inquire what words in a will amount only to an appointment as coadjutor, or overseer. If A. be made an executor, and B. a coadjutor, without more, he is not by this made a joint executor with A. (c). But if A. be made executor, and the testator after, in his will, expresseth that B. shall administer also with him, and in aid of him, here B. is an executor as well as A., and may prove the will alone as executor, if A. refuse (d). Where an infant was made an executor, and A. and B. *overseers*, with this condition, that they should have the rule and dis-

What words appoint a coadjutor or overseer: distinction between his office and that of executor.

(z) Godolph. Pt. 2, c. 5, s. 3. Swinb. Pt. 4, s. 4, pl. 6.

(a) *Brightman v. Keighley*, Cro. Eliz. 43. However, in Godolphin, Pt. 3, c. 3, s. 5, it is laid down that if the testator say, "If my son, A. B., marry with C. D., let him not be my executor," or "one of my 'executors,'" this would not hold; because an "executor may not be instituted, nor the office of executor inferred, only by conjecturals." Where a testatrix executed a will containing these words: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble to see that everything is justly divided," but not naming any executor, and beneath the signature of the testatrix, and opposite the names of the attesting witnesses were the words "executors and witnesses," the Court held that there was no appointment of executors. In the *Goods of Woods*, L. R. 1 P. & D. 556.

(b) Wentw. Off. Ex. 2, 14th edition. Sir Thomas Ridley takes occasion to wish that overseers might be made of more use; although he says, they be looked upon only as candle-holders; having no power to do anything but hold the candle, while the executors tell the deceased's money: Ridley, Pt. 4, c. 2. 4 Burn, E. Law, 126, 8th edition.

(c) Bro. Executors, pl. 73. Wentw. Off. Ex. 21, 14th edition. Godolph. Pt. 2, c. 2, s. 4. The words in the year-book, 21 H. VI. 6, are, "I will that A. and B. shall be my executors, and also that I. and K. be coadjutors of the same A. and B. to distribute my goods."

(d) Bro. Executors, pl. 73. Wentw. Off. Ex. 21, 14th edit. Where a testator willed that A. and B. should be his executors, and that I. and K. should be the executors of A. and B. to dispose of his goods, they are all executors: Dyer, 4, pl. 10, in marg.

position of his goods, and payment and receipt of debts unto the full age of the infant, by this they were held to be executors in the meantime (e).

Although when there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office, yet there is no objection either in principle or practice, to admit an executor according to the tenor to probate, jointly with an executor expressly nominated.<sup>8</sup> Thus in *Powell v. Stratford* (f), the testator's \*wife was expressly named as executrix; and Lord H. was to assist her, but he was not called executor; the court said he might be so according to the tenor. So in another case (g), the deceased left a will and four codicils; and in the will named certain persons executors, and his nephew residuary legatee: in the last codicil, dated at a time when his nephew was on the point of attaining twenty-one years, the words were, "I appoint my nephew my residuary legatee to discharge all lawful demands against my Will and codicils signed of different dates:" It was held that the nephew should be joined in the probate. And in a subsequent case, where an executor was expressly nominated for general purposes, another person was held to be executor, according to the tenor, for limited purposes (h).

**An executor by the tenor may be admitted to probate jointly with an executor expressly nominated.**

Again, in a case where a person had been expressly appointed executor for a limited purpose in a will, it was held, that he was appointed general executor by a codicil, by implication merely, without express words (i).

In another case, where a person by his will directed that the legatees should appoint two persons to execute his testamentary bequests, probate was granted in the Prerogative Court to the nominees as executors; and on that occasion the Deputy Registrar informed the court that, in practice, instances had frequently occurred of granting probates to persons nominated by those authorized by the tes-

**Appointee of legatees.**

(e) Wentw. Off. Ex. 21, 14th edit.

8. The courts have gone to great lengths in giving effect to wills designating or authorizing the designation of executors. Thus where an executor was expressly nominated for general purposes, another person has been held to be executor according to the tenor for limited

purposes. *Hartnett v. Wandell*, 60 N. Y. 346, 351.

(f) 3 Phil. 118. In the Goods of Brown, 2 P. D. 110.

(g) *Grant v. Leslie*, 3 Phillim. 116.

(h) *Lynch v. Bellew*, 3 Phillim. 424.

(i) In the Goods of Aird, 1 Hagg. 336.

tator so to nominate (*k*). And it has been held, that the Wills Act does not preclude this practice (*l*).

An executor may be appointed solely, or in conjunction \*with others : but in the latter case they are all considered in law in the light of an individual person (*m*).<sup>9</sup> Likewise a testator may appoint several persons as executors in several degrees : as where he makes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor ; and if his son will not or cannot be executor, then he makes his brother, and so on (*n*). In which case the wife is said to be *instituted* executor in the first degree, B. is said to be *substituted* in the second degree, C. to be *substituted* in the third degree, and so on (*o*). It must be observed, that if an instituted executor once accepts the office, and afterwards dies intestate, the substitutes, in what degree soever, are all excluded ; because the condition of law, (if he will not or cannot be executor,) was once accomplished by such \*acceptance of the instituted executor (*p*). But where a testator appoints an executor, and provides that *in case of his death*, another should be substituted ; on the death of the original executor, although

Several executors :

and in several degrees.

Substituted executors.

If instituted executor accepts office and dies intestate the substitutes are all excluded :

unless testator otherwise expressly provides.

(*k*) In the Goods of Cringan, 1 Hagg. 548: The testator in this case died in Scotland; and Sir John Nicholl said he was informed that such a provision, as to the appointment of executors, is not very unusual in that country. See in the Goods of Ryder, 2 Sw. & Tr. 127, where the person authorised to nominate had nominated himself, and probate was granted to him.

(*l*) *Infra*, p. \*197, note (*s*).

(*m*) Toller, 37. See *post*, Pt. III. Bk. I. Ch. II.

9. Howsoever numerous a man's executors may be, they will always be considered in law as but one person. Ames v. Armstrong, 106 Mass. 15, 18.

(*n*) Swinb. Pt. 4, s. 19, pl. 1. Godolph. Pt. 2, c. 4, s. 1. So where a testator appointed his son sole executor, but in the

event of his going abroad, or being or remaining abroad for upwards of two calendar months, then he appointed B. his executor, and the son after the death of the testator went abroad without taking probate and there remained, Sir J. P. Wilde granted probate to B., but reserved power to the son to prove the will: In the Goods of Lane, 33 L. J., P. M. & A. 185.

(*o*) The substituted executor cannot propound the will, till the person first named executor has been cited to accept or refuse the office: Smith v. Crofts, 2 Cas. temp. Lee, 557. But where a testatrix appointed her nephew Charles her executor, "but in case he shall happen at the time of my decease to be abroad, or from any other cause incapable of acting as such executor, then and in such case I

(*p*) Swinb. Pt. 4, s. 19, pl. 10. Godolph. Pt. 2, c. 4, s. 2.

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he has proved the will, the executor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime, or afterwards (q).

Where a testatrix appointed A. and B. executors of her last will, and "in case of the death of either of them," empowered the survivor to appoint another, "so that there should continue to be two executors:" Upon the death of A., B. appointed C. executor to act with him: C. did not take probate during the lifetime of B.: And it was held by Sir H. Jenner Fust, that probate might pass to C., and that he might appoint another executor to act with him (r).<sup>10</sup> So where a testator bequeathed his estate in trust to F. and G., who were nominated executors, with directions conjointly with the testator's wife to appoint a third person as trustee and

Several executors with power to survivor to appoint a fresh one.

appoint my nephew Eardley executor, to act only during such time as the said Charles shall be resident abroad, or otherwise incapable of acting," and the nephew Charles died in the lifetime of the testatrix, probate was granted by Sir John Dodson to the nephew Eardley, as executor: In the Goods of Wilmot, 2 Robert. 579. In the Goods of Langford, L. R. 1 P. & D. 458. In that case an appointment of A. as executor, and "in case of his absence on foreign duty," of B. as executrix, was held to be an appointment of B. as substituted executrix in the event of A.'s absence from the country when the necessity for proving the will arose; A. was in England at the time of the testator's death, but was absent on foreign service in her Majesty's navy when the application for probate was made, and was likely to be absent for some years; probate was granted to B.

(q) In the Goods of Lighton, 1 Hagg. 235. In the Goods of Johnson, 1 Sw. & Tr. 17. In the Goods of Foster, L. R. 2 P. & D. 304. So he may be admitted if the intention is that the substituted executor shall be executor, if the original executor cannot or will not act, and the latter dies in the testator's lifetime: In

the Goods of Betts, 30 L. J., P. M. & A. 167.

(r) In the Goods of Deichman, 3 Curt. 123.

10. In Bronson's Will, Tuck. 464, it was held by the surrogate that under the statute of the State of New York a testator could not authorize one of two surviving executors to name another executor by deed, and that the surrogate had no power to issue letters to the party thus designated. However, this construction of the statute of New York was subsequently overruled, and it was held in Hartnett v. Wandell, 60 N. Y. 246; S. C. 16 Abb. Pr. N. S. 383, that such a designation by the testator of one to be appointed by another party was a good appointment, and that letters could issue to the party so designated. To the same effect is Alexander's Will, 16 Abb. Pr. N. S. 9. In which latter case, it is said that 2 R. S. 69, § 1 does not preclude the surrogate from issuing letters to one not expressly named in the will. It is also said that a testator may appoint an executor through an agent after his death. Bishop v. Bishop, 56 Conn. 208. And where a testator provided that if the executor died, resigned or failed to qual-



executor, it was held by Sir H. Jenner Fust that, though there was no probability of agreement between F. and G., and the testator's wife, in the choice of such third person, the appointment of executors was not thereby void, but that F. and G. were entitled to probate, with a power reserved for the third person when appointed (s).

\*Where the testator in his will appointed two persons his executors, and in a codicil named his wife "sole executrix of this my Will," the court held that the appointment of executors in the will was revoked (t).

Appointment of executors, in a will revoked by codicil naming a "sole executor."

An appointment of "A. as my executor with any two of my sons," was held bad, as to the sons, for uncertainty (u).

appointment bad for uncertainty.

ify, the Orphans' Court of Philadelphia county should name another executor, and the executor named did not qualify and the court named another, and issued letters to him, it was held that such appointment of an executor was valid. *State v. Rogers*, 1 Hous. (Del.) 569. And in New Jersey the doctrine of the appointment of a designated executor is also maintained. *Knox v. Newman*, 17 Stew. (N. J.) 309.

(s) *Jackson v. Paulet*, 2 Robert. 344. It was objected that, under the Wills Act, probate could be decreed only to a person named in a duly executed testamentary paper. But the court said, the case was not like one where a testator, in his will, reserves to himself a power to deal hereafter with his will by writings not duly executed. (See *ante*, p. \*89.)

(t) In the Goods of Lowe, 3 Sw. & Tr. 478. But a reappointment in a subse-

quent will of one of the executors named in a former will with a new co-executor is no revocation of the appointment of executors in the first will: In the Goods of Leese, 31 L. J., P. M. & A. 169. Where, however, in a similar case, the word "sole" was used in a subsequent will, the first appointment was held to be revoked. In the Goods of Bailly, L. R. 1 P. & D. 628.

(u) In the Goods of Baylis, 2 Sw. & T. 613. Where a testator, having three sisters living when he made his will, appointed "one of my sisters" sole executrix, and two of the sisters died in his lifetime, Sir J. Hannen held that the appointment was void from uncertainty. In the Goods of Blackwell, 2 P. D. 72. As to the admission of parol evidence to correct an imperfect description of the executor contained in a will, see In the Goods of De Rosaz, 2 P. D. 66.

[\*198]

## \*CHAPTER THE THIRD.

## IN WHAT WAYS THE APPOINTMENT OF EXECUTOR MAY BE QUALIFIED.

The appointment of an executor may be either absolute or qualified.

Appointment of executor : It may be absolute, when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time (a). It may be qualified, by limitations as to the time or place wherein, or the subject-matter whereon, the office is to be exercised : or the creation of the office may be conditional.<sup>1</sup>

It may be qualified by limitations in point of time, inasmuch as the time may be limited when the person appointed shall begin, or when he shall cease, to be executor. Thus if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death (b), or at an uncertain time, as upon the death or marriage of his son (c), this is a good appointment. Where the deceased appointed two executors, and, in case of the death of either of them, appointed two others to be executors in their stead ; on the death of the original executor who had alone proved the will, the substituted executors were admitted to the office (d). So if a man appoints his son to be executor when he shall come to full age (e), such qualified appointment is good :

(a) Toller, 36.

1. The interest acquired by an executor in the decedent's estate, is materially different from that acquired by an administrator. The executor's interest is what the testator gives him ; that of the administrator is only what the law of his appointment enjoins. *Hill v. Tucker*, 13 How. (U. S.) 458, 466.

In the appointment of an executor, the testator may make the interest absolute or qualified in respect to his estate. It may be qualified as to the subject matter, place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such. He

may be executor for one or several purposes, for part of the effects in the possession of the testator at the time of his death, or for such as may be in action, if it be only for a debt due. *Hill v. Tucker*, *ubi supra*.

(b) Swinb. Pt. 4, s. 17, pl. 1. Wentw. Off. Ex. 22, 14th edition.

(c) Swinb. Pt. 4, s. 17, pl. 4.

(d) In the Goods of Lighton, 1 Hagg. 235 : A proxy of consent was exhibited from the original executor who had not proved. See also *Accord*. In the Goods of Johnson, 1 Sw. & Tr. 17.

(e) Wentw. Off. Ex. 22, 23, 14th edition.

and in the meantime he has no executor. Again, the testator \*may appoint the executor of A. to be his executor : and then if he die before A. he has no executor till A. die (*f*). So a man may make A. and B. his executors, and appoint that A. shall not intermeddle during the life of B., and by this they shall be executors successively, and not jointly (*g*). Likewise the testator may appoint a person to be his executor for a particular period of time only, as during as to when he shall cease : five years next after his decease (*h*), or during the minority of his son, or the widowhood of his wife (*i*), or until the death or marriage of his son (*k*). In a case (*l*) where a widow was appointed executrix and residuary legatee for life, with remainder, as to the residue, to the nieces of the testator, and by a codicil it was provided, that, in case she thought proper to marry again, she and the nieces should agree on proper persons to be trustees, to whom she was directed to assign all the real and personal estate, in trust for the uses of the will, but so as not to be liable to the debts, or subject to the power, of her second husband, it was held that her executorship expired on her second marriage.<sup>2</sup>

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other, the Court of Probate may commit administration to another person, until there be an executor, or after the executorship is ended (*m*). in these cases an administrator may be appointed till there be an executor, or after the executorship is ended.

In like manner, the appointment may be limited in point of place : as thus, the testator may make A. his executor for his goods in Cornwall, B. for those in Devon, and C. for those \*in Somerset (*n*) : or he may make different executors for his 2. Limitations in point of place.

(*f*) Wentw. Off. Ex. 22, 23, 14th edit. Godolph. Pt. 2, c. 2, s. 4.

(*g*) Wentw. Off. Ex. 31, 14th edition. Bro. Executors, 155.

(*h*) Swinb. Pt. 4, s. 17, pl. 1.

(*i*) Wentw. Off. Ex. 29, 14th edition. Godolph. Pt. 2, c. 2, s. 3.

(*k*) Swinb. Pt. 4, s. 17, pl. 4.

(*l*) Bond v. Faikney, 2 Cas. temp. Lee, 371.

2. Where a testator appoints executors to act until his son reaches twenty-one, their power as executors terminates upon the majority of the son, but the son

cannot become executor by the tenor upon the expiration of the term of the executorship, although he might be appointed administrator *de bonis non cum testamento annexo*. Frisby v. Withers, 61 Tex. 134.

(*m*) Swinb. Pt. 4, s. 17, pl. 2. Plowd. 279, 281 : This will be an administration *cum testamento annexo*, and the person entitled to it will be discovered by referring to the rules respecting that species of administration : See *post*, Pt. I. Bk. V. Ch. III. § I.

(*n*) Swinb. Pt. 4, s. 18, pl. 1. Godolph.

goods in different dioceses, or different provinces (o): or, which seems more rational and expedient, he may so divide the duty when his property is in various countries (p).<sup>3</sup>

Again, the power of an executor may be limited as to the subject-matter upon which it is to be exercised. Thus the testator may make A. his executor for his plate and household stuff, B. for his sheep and cattle, C. for his leases and estates by extent, and D. for his debts due to him (q). So a person may be made executor for one particular thing only, as touching such

3. Limitations as to the subject-matter.

Pt. 2, c. 2, s. 3. Wentw. Off. Ex. 29, 14th edition. *Spratt v. Harris*, 4 Hagg. 408, 409.

(o) Swinb. Pt. 4, s. 18, pl. 4.

(p) *Spratt v. Harris*, Toller, 36. 4 Hagg. 408, 489. Where a testator appointed a man who was resident in Portugal, to be his executor "in Portugal," it was held that the words "in Portugal" were equivalent to "for Portugal," and that such executor was not entitled to probate in this country: *Velho v. Leite*, 3 Sw. & Tr. 456. Again, where W. made a will in England in 1861, and appointed B. and C. executors thereof, and in May, 1863, being in India, he made a codicil, and on the 9th of June executed a paper, whereby he appointed E. & F. "my executors in this country:" The Court held that the context of the paper, giving the testator's reasons for the appointment of E. and F., showed that he did not mean them to have any power over his property in England, and granted probate to B. and C. without reserving power to E. and F.. In the Goods of Wallich, 3 Sw. & Tr. 423. If power had been reserved of making a similar grant to them, this, it would seem, would not affect the validity of the probate. In the Goods of Pulman, 3 Sw. & Tr. 269. But where a testator executed two wills, one disposing of property in Tasmania, and appointed executors resident in Tasmania; the other disposing of property in England, and ap-

pointing three executors distinct from those appointed in the other will, the Court granted probate to issue of both wills as together containing the will of the testator. In the Goods of Harris, L. R. 2 P. & D. 83.

3. It is not infrequently the practice to appoint different executors for different jurisdictions, and it is undoubtedly within the practice and the construction given by the courts for the testator to appoint different executors in different countries, in which his effects may lay, or he may even appoint different executors as to different parts of his estate in the same country. *Hunter v. Bryson*, 5 Gill & J. 483; *Sherman v. Page*, 21 Hun 59.

Executors may be appointed with separate functions, or to succeed each other in the event that those first named should die, become incapacitated, or should resign, or two persons may be appointed to act for a specified period or during the minority of the person named as executor, or during the absence of an executor from the country. *Hartnett v. Wandell*, 60 N. Y. 346, 351. And in accordance with such views, it has been held that a testator in providing for the execution of his will is not limited to the designation by name of an executor, but may designate to another the power of naming an executor. *Hartnett v. Wandell*, *ubi supra*.

a statute or bond, and no more (r). And \*the same will may contain the appointment of one executor for general, and another for limited purposes (s). But although a testator may thus appoint separate executors of distinct parts of his property, and may divide their authority, yet *quoad* creditors, they are all executors, and as one executor, and may be sued as one executor (t).

Separate executors may all be sued as one executor.

Lastly, the appointment may be conditional; and the condition may be either precedent or subsequent (u). Thus it may be, that he give security to pay the legacies, and in general to perform the will before he acts as executor (x). In *Alice Francis' Case* (y), the testator willed, that if his wife suffered J. S. to enjoy Blackacre for three years, then she should be his executrix; but if she disturbed J. S., then he made his son executor: It was held in C. B. by all the justices (the Lord Anderson at first *dissentiente*) that she was executrix presently; for this should not be construed a condition precedent, but as a condition to abridge her power to be executrix, if she perform it not.<sup>4</sup>

4. The appointment may be conditional.

(q) *Dyer*, 4, *u.* *Wentw. Off. Ex.* 29, 14th edition. *Godolph. Pt. 2*, c. 3, pl. 2, 3.

(r) *Wentw. Off. Ex.* 29, 14th edition. *Davies v. Queen's Proctor*, 2 *Robert.* 413. But when the testator said, "I make my wife my full and whole executrix of all my cattle, corn, and movable goods," and said nothing of what should be done with the residue of his estate, as leases and debts, *Jones and Croke, Justices*, held that she was sole and absolute executrix for the whole estate, as well leases and debts as other things: But *Berkeley, Justice*, thought that she was a special executrix for the things named, and not a general executrix: *Rose v. Bartlett*, *Cro. Car.* 293. Where a testator by his will gave several specific legacies, but did not dispose of the residue of his personal estate, and appointed his daughter executrix of all property not named in his will, the Court refused to grant probate of the will to the daughter as executrix thereof. In the *Goods of Wakeham*, *L. R.* 2 P. & D. 395.

(s) *Lynch v. Bellew*, 3 *Phillim.* 424.

(t) *Rose v. Bartlett*, *Cro. Car.* 293.

(u) *Wentw. Off. Ex.* 23, 14th edition. *Godolph. Pt. 2*, c. 2, s. 1. Should the executorship be determined by a breach of the condition, yet all acts done by the executor in pursuance of his office, before such condition broken, are good: *Godolph. Pt. 2*, c. 2, s. 1. See *post*, *Pt. I. Bk. VI. Ch. III.*

(x) *Godolph. Pt. 2*, c. 2, s. 1. *Wentw. Off. Ex.* 28, 14th edition. Where A. made B. and C. executors, and added, "I will that C. shall pay my other executor all such debts as he owes me, before he meddle with anything of this my will, or take any advantage of this my will for the discharge of the same debts, for that I have made him one of my executors," it was held that C. could not administer, or be executor, before he paid the debts: *Stapleton v. Truelock*, 3 *Leon.* 2 pl. 6.

(y) *Dyer*, 4, pl. 8, in margin. *Wentw. Off. Ex.* 28, 14th edition.

\*In a case where an executor was appointed, provided he proved the will within three calendar months next after the death of the deceased, it was held, that, in computing the time, the day of the death was to be excluded (*z*). But if he fails to prove the will within three months, his appointment is void (at all events if there be substituted executors), though the failure were through the inadvertence of his solicitor, and though he has acted in the execution of the trust of the will (*a*).

It is not thought expedient to go further into the law of conditional appointments of executors, which the reader will find fully discussed in Swinburne (*b*) and Godolphin (*c*). The parts of the subjects which seem necessary to be introduced into this Treatise will be found subsequently, when conditional legacies are considered (*d*).

4. Where a testator named three executors in his will, and then said, "In case my son shall at the time of my decease be of the full age of twenty-one years, and all the persons herein appointed be living, I do hereby nominate and appoint my said son executor in the place and stead of the third executor; but in case of the death of either of the said three executors, at the time of my decease, I nominate and appoint my said son executor, in the place and stead of the one then deceased." One of the executors died before the death of the testator, but at that time the son was not twenty-one years of age. Subsequently and upon the son's attaining his majority, the surrogate issued letters testamentary

to him as the third executor under his father's will. It was held that under the condition in the will the testator did not intend that his son should become an executor, unless he should have attained the age of twenty-one years at the time of his death. *Knox v. Newman*, 17 Stew. (N. J.) 309.

(*z*) In the Goods of Wilmot, 1 Curt. 1.

(*a*) In the Goods of Day, 7 Notes of Cas. 553. See also In the Goods of Lane, 33 L. J., P. M. & A. 185, *ante*, p. \*196, note (*n*).

(*b*) Pt. 4, s. 5—16.

(*c*) Pt. 1, c. 13, 14. Pt. 2, c. 2.

(*d*) *Post*, Pt. III. Bk. III. Ch. II. § VI.

## \*CHAPTER THE FOURTH.

## IN WHAT CASES THE APPOINTED EXECUTOR MAY TRANSMIT HIS APPOINTMENT.

Although the executor cannot assign the executorship (a), yet the interest vested in him by the will of the deceased may, generally speaking, be continued and kept alive by the will of the executor; so that if there be a *sole* executor of A., the executor of such executor is, to all intents and purposes, the executor and representative of the first testator (b).<sup>1</sup> But if the first executor dies intestate, then his administrator is not such

1. Where there is a sole executor, his executor represents the first testator:

(a) *Bedell v. Constable*, Vaugh. 182.

(b) *Com. Dig. tit. Administration* (G) *tit. Administration* (B. 6). *Touchst.* 464. *Stat. 25 Edw. III. st. 5, c. 5.* *Wentw. Off. Executor*, 461, 14th edition. 2 *Bl. Comm.* 506. The rule is the same, though the original probate was a limited one: In the Goods of Beer, 2 *Robert.* 349. See *post*, Pt. III. Bk. I. Ch. III. as to whether a power given to an executor is transmissible to his executor.

1. But this is not so in New York. *Fosdick v. Delafield*, 2 *Redf.* 392, 404. But the English rule prevails in many states. *Burch v. Burch*, 19 *Ga.* 174; *Lay v. Lay*, 10 *S. C.* 208; *O'Driscoll v. Fishburne*, 1 *Nott & McC.* 77; *Roanoke Navigation Co. v. Green*, 3 *Dev. L.* 434; *Carrol v. Cormet*, 2 *J. J. Marsh.* 195; *Drayton's Will*, 4 *McCord* 46; *Hart v. Smith*, 20 *Fla.* 58; *Perry v. De Wolf*, 2 *R. I.* 103.

But if the second executor renounce and refuse to administer under the first will, *at the time he qualifies* under the second, he will not be the executor of the first executor, but he cannot renounce at any later time. *Hart v. Smith*, *ubi supra*.

This is regulated by statute in New York, it being provided that "no executor of an executor shall, as such, be authorized to administer on the estate of

the first testator," 2 *Stat. at L.* 73, § 17; so also in Pennsylvania, *Purd. Dig.* (1853) 189; and in Massachusetts, *G. S.*, c. 93, § 9. But see *Waters v. Stickney*, 12 *Allen* 1, 9. The statutory provision in New Jersey is the same as in New York. *Rev.* 396, § 2.

The provision is also made by statute in some other states that "no executor of an executor can, as such, administer on the estate of the first testator," in Alabama (*C. C.* 1886, p. 468, § 2012); California (*Derring's Code*, 3, 1353); Colorado (*G. S.* 1883, p. 1028, § 3515); Connecticut (*G. S.* 1888, § 553); Delaware (*R. L.* 1874, p. 541); Idaho (*R. S.* 1887, § 5344); Kansas (*G. S.* 1889, § 2794); Kentucky (*G. S.* 1888, p. 592, § 11); Michigan (*G. S.* 1882, § 5845); Missouri (*R. S.* 1889, c. 1, art. 1, § 6); Nebraska (*C. S.* 1891, p. 421, § 174); Nevada (*G. S.* 1885, § 2712); New Hampshire (*P. S.* 1891, c. 188, § 8); North Dakota (*C. L. Dak.* 1887, § 3395); Ohio (*R. S.* 1892, § 6003); South Carolina (*G. S.* 1882, § 1904); South Dakota (*C. L. Dak.* 1887, § 3395); Virginia (*Code* 1887, § 2643); West Virginia (*Code* 1891, c. 85, § 8).

In some of the states the provision is that "if all the executors \* \* \* die

a representative, but an administrator *de bonis non* of the original testator must be appointed by the Court of Probate (c); for the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator<sup>2</sup>: But the administrator of the executor is merely the officer of the Court of Probate and has no privity or relation to the

or resign \* \* \* letters of administration *de bonis non* shall be granted;” this is the provision in Arkansas (Dig. 1884, § 40); Indiana (R. S. 1881, § 2240); Mississippi (Code 1892, § 1856); North Carolina (Code 1883, § 2166); Vermont (G. S. 1863, p. 387, § 11); and Wyoming (R. S. 1877, § 2022). In Illinois (R. S. 1891, p. 58, § 37) and Wisconsin (San & Ber. Stats., § 3804), the provision is that letters *cum testamento annexo* shall issue.

In Oregon (Hills An. Laws, p. 403, § 372) and Washington (Hills Stats. & Codes, vol. 2, § 709) the second executor has no authority to commence or maintain an action or proceeding relating to the estate of the testator of the first executor.

In Iowa such executor has no authority to act in the matter when his principal was merely an executor or trustee. R. C. 1888, § 2483.

And such executor may retain, for the benefit of the estate of the second testator, out of any funds of the first testator that may be in his hands, an amount sufficient to satisfy the claims held by the second estate against the first. *Lay v. Lay*, 10 S. C. 208.

The payment of a legacy is an executorial duty, and where the executor dies, it will devolve upon the administrator with the will annexed, and, therefore, the assets of the testator properly pass into the administrator's hands, upon his intestate's decease, although he cannot per-

form the will of the first testator. *Kilburn v. See*, 1 Dem. 353.

After the death of an executor, his administrator, and not the administrator with the will annexed, is entitled to the custody and payment of the securities for moneys belonging to the first estate which the executor had loaned not in his representative, but in his individual, capacity. *Caulkins v. Bolton*, 98 N. Y. 511.

But in New York there is no provision of law which authorizes the representatives of a deceased executor to institute and conduct proceedings for the accounting of their decedent in an estate whereof he was himself executor. *Estate of Ranney*, 66 How. Pr. 291.

(c) Bro. Abr. Administrator, pl. 7. Com. Dig. Administrator, (B. 6). 2 Bl. Comm. 506. See *In the Goods of Martin*, 3 Sw. & Tr. 1. *In the Goods of Bridger*, 4 P. D. 77. Thus it was held that the administratrix of an executrix could not sue for the double value of lands held over, after notice to quit under a demise from the testator, contrary to stat. 4 Geo. II. c. 28, without taking out administration *de bonis non*, even though the tenant had attorned to her: *Tingrey v. Brown*, 1 Bos. & Pull. 310.

2. *Hart v. Smith*, 20 Fla. 58; *Crafton v. Beal*, 1 Ga. 322; *Burch v. Burch*, 19 Id. 174; *Perry v. De Wolf*, 2 R. I. 103.

And the executor of an only surviving executor is the representative of the estate, notwithstanding the fact that a



original testator, being only commissioned to administer the effects of the intestate executor, and not of the original testator (*d*).

If the first executor should die, without having proved the will (*e*), the executorship is not transmissible to his executor, but is wholly determined, and an administrator *cum testamento annexo* must be appointed (*f*).<sup>3</sup> Hence it follows that if the person appointed executor dies before the testator there must be administration *cum testamento annexo* (*ff*).

the executor of the executor does not represent the first testator, unless the first executor proves the will.

portion of the will could not, by any possibility, be executed until the death of the original executor. *Burch v. Burch*, *ubi supra*.

And a second executor is answerable directly to a person to whom payment should have been made by the first executor. *Windsor v. Bell*, 61 Ga. 671. And in case of the death of an administrator, liable and chargeable to the estate of his intestate, his executor is chargeable and liable in the same manner that the administrator would have been had he not died. *Arline v. Miller*, 22 Id. 330.

Where M. bequeathed a legacy to B. and made J. his executor, and J. died, leaving an executor, B. cannot maintain suit against J.'s executor for the legacy.

*Gilliland v. Bredin*, 63 Pa. St. 393. If an administrator die before settlement of his account, his executor is entitled to recover from a bank the balance standing to the credit of a deposit account, which said administrator had opened in said bank in his representative capacity. *Slaymaker v. Farmers' National Bank*, 103 Pa. St. 616.

The final account of an executor is a suit instituted by him for discharge from liability on the basis of the claims made in such account, and it is the duty of his administrators, if such executor died pending the proceeding, to obtain a decree of approval and allowance of his final account as executor. *Jarnigan v. Frank*, 59 Miss. 393.

(*d*) 2 Bl. Comm. 506. However, the administrator *durante minore etate* of the executor of an executor is the representative of the first testator; for such an administrator is *loco Executoris*: *Anon.* 1 Freem. 287. *Contra*, *Limmer v. Every*, Cro. Eliz. 211, as cited by C. B. Gilbert, in Bac. Abr. Executors (B. 8). But see Mr. Smirke's note, in his valuable edition of Freeman.

(*e*) But if administration *cum testamento annexo* has been granted under his letter of attorney for his use or benefit to another, it is the same thing as if he had proved the will himself: In the Goods of Bayard, 1 Robert. 769. S. C. 7 Not. Cas. 117, and a grant to the attorney of an executor does not break the chain of

representation. In the Goods of Murguia, 9 P. D. 236.

(*f*) *Isted v. Stanley*, Dyer, 372 a. *Hayton v. Wolfe*, Cro. Jac. 614. *Wentw. Off. Ex.* 82, 14th edit. *Day v. Chatfield*, 1 Vern. 200. *Wankford v. Wankford*, 1 Salk. 308. *Anon.* 3 Salk. 21.

3. *Drayton's Will*, 4 McCord 46. Hence where a will was proved *per testes* and there was a decision in favor of the will, from which an appeal was taken, the grant of letters being suspended pending such appeal, and in the meantime the executor died, his executor cannot represent the first testator. *Id.* In order to constitute probate, letters testamentary must be granted on the will. *Id.*

(*ff*) *Brown v. Poynts*, Sty. 147. *Pullen v. Sergeant*, 2 Chan. Rep. 300.

A married woman, being executrix, might, even before the Married Women's Property Act, continue the chain of representation, by making her own executor (*g*).

In *Barr v. Carter* (*h*), Elizabeth Chapman, a married woman, made a will, merely executing a power given her by the marriage settlement, but she also went on to appoint Elizabeth Carter sole executrix of that her will: She died in the lifetime of her husband; and the Ecclesiastical Court granted probate of this will in the general form: the testatrix was herself the executrix of a former husband, Thomas Hawley: And it was held that the general probate of her will transmitted the representation to Elizabeth Carter, so as to make her the personal representative of the first testator Thomas Hawley (*i*).

If there are several executors appointed, and one of them dies, leaving one or more of his co-executors living, no interest in the executorship is transmissible to his own executor, but the whole representation survives, and will be transmitted ultimately to the executor of the surviving executor, unless he dies intestate.<sup>4</sup> Thus, if A. makes B. and C.

But where the authority is not necessarily connected with personal trust or confidence reposed in the executor, the duties of the executor will devolve on an administrator *cum testamento annexo*, *Farwell v. Jacobs*, 4 Mass. 634; *Prescott v. Morse*, 62 Me. 447, 449; and not upon the executor of an executor. *Prescott v. Morse*, 64 Me. 422. See also *Scott v. Fox*, 14 Md. 388.

(*g*) *Birkett v. Vandercom*, 3 Hagg. 750, *ante*, p. \*47.

(*h*) 2 Cox, 429.

(*i*) But a limited probate will not continue the chain of representation: In the Goods of Bayne, 1 Sw. & Tr. 132. The practice of granting limited probate in the case of wills of married women has since the Married Women's Property Act, 1882, been altered and probate in the general form will now be granted (see *ante*, p. \*53, note (*a*)), and it would seem, that in such case, the representation would be unbroken.

4. Where a testator appointed several executors, one only of whom qualified, and he died before having fully administered; if after his death, and within twelve months, in accordance with the statute, another comes forward and qualifies, he is entitled to administer the trust as against the administrator of the deceased executor. *Crafton v. Beal*, 1 Ga. 322.

Where the administrator of an executor takes out, jointly with another, letters of administration *de bonis non* on the estate of the testator, he does not exclusively represent both estates, and, as a consequence there can be no transfer, by operation of law, of the property in his hands as administrator to him as administrator *de bonis non*. *Thomas v. Wood*, 1 Md. Ch. Dec. 296.

When a testator devised lands to two of his sons and the survivor of them, in trust to be sold and by a subsequent clause appointed them executors, and provided.

executors, then B. makes J. S. executor and dies, and afterwards C. dies intestate, the executor of B. shall not be executor of A., because the executorship wholly and solely vested in C. by the survivorship; and so administration *de bonis non* shall be committed (*j*).

The law was formerly the same where there were several executors, and one alone proved the will, and the rest renounced before the Ordinary; there, upon the death of him who proved, no interest was transmitted to his executor, if any of those who refused were surviving (*k*). But the law is altered in this respect by the Court of Probate Act, 1857, s. 79 (*l*).

The conditions under which the chain of executorship is broken in law have been thus tersely enumerated in a recent edition of a Text-book on Probate Practice (*m*):—

1. When the immediate sole acting executor dies intestate or testate without appointing an executor.

2. When the survivor of the immediate acting executors dies intestate.

\*3. When the remote sole acting executor to whom an executorship has been transmitted downwards, *per catenam*, dies intestate.

4. When the survivor of the remote acting executors dies intestate.

5. When the remote executor or executors renounce the probate of their own testator's will or have been cited and do not appear.

6. When the remote executor or executors die without having proved their own testator's will.

7. When of two or more executors who have died after probate taken by them, it is impossible to show which survived the other or others.

8. When one of the executors, having renounced before 1 Jan., 1858, has survived the other executor or executors.

that, in case both of them should die before sale and conveyance, another person should sell and convey, and execute all the trusts of the will, and by a codicil appointed that other also executor; it was held that neither the substitution in the will, nor the appointment in the codicil, authorized that person to interfere in the sales of the lands, during the life of the

sons or either of them. *Worth v. M'Aden*, 1 Dev. & Bat. Eq. 199.

(*j*) *Wentw. Off. Ex.* 215, 14th edition. In the Goods of Smith, 3 Curt. 31.

(*k*) *Arnold v. Blencowe*, 1 Cox, 426.

(*l*) See *post*, p. \*233.

(*m*) *Tristram & Coote's Probate Practice*, 10th ed. p. 173.

## \*CHAPTER THE FIFTH.

### OF AN EXECUTOR DE SON TORT.

Having thus considered the appointment of executors by legal means, it remains to treat of a class who are in some sort regarded as executors, but who assume the office by their own intrusion and interference.

If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law, an executor of his own wrong, or more usually, an executor *de son tort* (a).<sup>1</sup>

(a) The definition of an executor *de son tort*, by Swinburne, Godolphin and Wentworth, is in the same words, *viz.*, "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the [Ecclesiastical] Court to administer;" Swinb. Pt. 4, s. 23, pl. 1. Godolph. Pt. 2, c. 8, s. 1. Wentw. Off. Ex. c. 14, p. 320, 14th edition. But the term is, in the older books, sometimes applied to a lawful executor, who mal-administers; as by the Lord Dyer, in *Stokes v. Porter*, Dyer, 167, *a*.

1. *Emery v. Berry*, 28 N. H. 473; *Brown v. Durbin*, 5 J. J. Marsh. 179; *Howell v. Smith*, 2 McCord 516; *Campbell v. Tousey*, 7 Cowen, 64; *Leach v. Pillsbury*, 15 N. H. 139; *Rutherford v. Thompson*, 14 Oreg. 236; *Estate of Power*, 14 Phila. 289; *Wilson v. Hall*, 67 Ga. 53; *Currie v. Currie*, 90 N. C. 553; *Alexander v. Kelso*, 1 Baxt. 5; *Clarke v. Goodrum*, 61 Miss. 731; *Bacon v. Parker*, 12 Conn. 212; *Bennett v. Ives*, 30 Conn. 329; *Barron v. Bur-*

ney, 38 Ga. 264; *White v. Mann*, 26 Me. 361.

An executor *de son tort* must always, necessarily, be a trespasser against the rightful executor. *Nass v. Vanswearingen*, 7 Serg. & R. 192, 196.

The rule imposing a personal responsibility upon an intermeddler with the estate of a deceased person, has its foundation in the desire of the law to preserve the estate by the hands of its authorized agents undiminished, so that 1st, creditors, 2nd, legatees, 3rd, heirs, may have what belongs to them, each class in the statutory order of precedence. Therefore, every unauthorized person who diverts any portion of the assets from either of these classes, or who appropriates them in any other order, is visited with the penalty. *Taylor v. Moore*, 47 Conn. 273.

An executor *de son tort* was regarded by the common law as an intermeddler and wrongdoer. He had no rights, and payments made by him, over and above the value of the assets which came into his hands, were entirely voluntary. He could not, by such payments, place

A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort*. Thus it is said in Dyer, *in margine* (b), that milking the cows, even by the widow of the deceased, or taking a dog, will constitute an executorship *de son tort*. So in one case the taking a Bible, and in another a bedstead (c), were held sufficient, inasmuch as

What acts constitute an executor *de son tort*.

himself in the position of a creditor of the estate. *De la Guerra v. Packard*, 17 Cal. 192.

The old common law doctrine of executor *de son tort* has been, in many of the United States, either by statutory enactment, or by construction, greatly modified. In some parts of the United States it is held that such an office as that of executor *de son tort* is wholly unknown, while in other parts of the country, although a person is so styled, the former common law liabilities have been done away with. Throughout the country, provision is made in various ways as to those who intermeddle with the property of decedents. And such persons are accountable for their acts, generally to the lawful administrator or executor of the estate, but, as before intimated, in many of the states, they are in no way accountable to the creditors of the estate, or to heirs and legatees as such.

Thus in California, it is said that under the scheme of probate jurisdiction prevailing in that state an executor *de son tort* is unknown. *Bowden v. Pierce*, 73 Cal. 459; *Valencia v. Bernal*, 26 Id. 335; *Estate of Hamilton*, 34 Id. 468; *Pryor v. Downey*, 50 Id. 388.

And under the probate statute of Missouri, there is no such thing as an executor *de son tort*, but a suit is maintainable against the intermeddler by the executor *de jure*, *Rozelle v. Harmon*,

29 Mo. App. 569; but this would seem to be practically a distinction without a difference, as it is said that an intermeddler is liable to an action, not only by the rightful executor or administrator, but to be sued, as executor, by a creditor or legatee, *Swift v. Martin*, 19 Mo. App. 488; and he is liable for costs *de bonis propriis*. *Lewis v. McCabe*, 16 Id. 398. See *post*, p. 311, n. 10. And it is said that, under the present system in Texas, the introduction of an executor *de son tort*, with his rights and liabilities, would mar the intended symmetry of that system. *Ansley v. Baker*, 14 Tex. 607. And under the peculiar system of administration laws in Arkansas it is inconsistent with the tenor and policy of the laws to hold that anyone can make himself an executor *de son tort*. *Barasien v. Odum*, 17 Ark. 122; *Rust v. Witherington*, Id. 129. And it is said, in Kansas, that there can be no such person as an executor *de son tort*, with such liabilities as attached to that office, at common law. *Fox v. Van Norman*, 11 Kans. 214. And in Vermont, the question has been raised as to whether the common law doctrine is applicable. *Shaw v. Hallihan*, 46 Vt. 389; *Blodgett's Estate v. Converse's Estate*, 60 Id. 410, 419. And by 2 R. S. 449, § 17, in New York, the liability as an executor *de son tort* is taken away. *Thomas v. N. Y. Life Insurance Co.*, 50 N. Y. Supr. 225. Statutory provision on the subject of

(b) P. 166, b

(c) Robin's Case, Noy, 69.

they were the *indicia* of the person so interfering being the representative of the deceased (*d*). So if a man kills the cattle (*e*), or uses or gives away, or sells any of the goods (*f*), or if he takes the goods \*to satisfy his own debt or legacy (*g*) : or if the wife of the deceased takes more apparel than she is entitled to, she will become executrix *de son*

executors *de son tort* has been made in various states of the American Union as follows : In *Alabama*, it is provided that no person shall be liable as executor *de son tort* to action ; but he is liable to the executor or administrator for the value of all property taken, and for damages caused to the estate by his act ; but this provision shall not prevent a creditor from bringing an action against a person in possession of property fraudulently transferred to him by the decedent. Code 1886, § 2271. In *Georgia*, it is provided that such executor shall be liable in double the value of the property possessed or converted by him, and that he shall not be permitted to offset any debt due to him. Code 1882, § 2441. In *Iowa*, it is provided that any person who, without being regularly appointed executor, intermeddles with property of the decedent, is responsible to the regular executor, when appointed, for the value of all property taken or received by him, and for all damages caused by his acts to the estate of the deceased, but his liability extends no further. R. C. 1888, § 2484. And in *Maine*, an executor *de son tort* is by statute made liable to actions by creditors and other persons aggrieved, and also to the rightful executor or administrator for the full value of goods or effects taken, and all damages caused by his acts ; and he shall not retain any part of the goods or

effects, except for such funeral expenses, debts of decedent, or other charges, actually paid by him, as the rightful executor or administrator would have had to pay. R. S. 1883, c. 64, § 37. The statutory provisions in *Massachusetts* as to an executor *de son tort* are the same as those in *Maine*. P. S. 1882, c. 132, §§ 17, 18. It is provided in *Minnesota* that no person shall be liable to an action as an executor *de son tort* for having taken, received or intermeddled with the property of a deceased person ; but he shall be responsible to the executor, as general or special administrator of such deceased person, for the value of all property so taken and received, and for all damages caused to the estate by his acts. Stats. 1891, § 5580. In *Mississippi*, the provision as to an executor *de son tort* seems to leave the common law liability in force ; but it is provided that an executor *de son tort* in another state may be sued in *Mississippi*. Code 1892, § 1927. In *New Hampshire*, the statutory provision as to an executor *de son tort* is that he shall be liable to creditors and persons aggrieved, to double the value of the estate. P. S. 1891, c. 188, § 16. In *New Jersey*, such executor is chargeable so far only as the property coming to his hands will satisfy ; and he may deduct therefrom any debt upon good consideration and without fraud owing

(*d*) Toller, 38.

(*e*) Godolph. Pt. 2, c. 8, s. 4.

(*f*) Read's Case, 5 Co. 33, *b*. Padget v. Priest, 2 Term Rep. 97. Godolph. Pt. 2, c. 1, s. 1. Swinb. Pt. 4, s. 23 :

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So if he gives them away to the poor : Dyer, 166, *b*. in marg.

(*g*) Godolph. Pt. 2, c. 8, s. 1. Swinb. Pt. 4, s. 23.

*tort* (*h*). So there may be a *tort* executor of a term for years : as where a man enters upon the land leased to the deceased, and takes possession, claiming the particular estate (*i*) : though with respect to a term of years in reversion there can be no executorship of this nature, because it is incapable of entry (*k*). And if he that has from the Ordinary letters *ad colligendum*, sell or dispose of any goods, though otherwise subject to perishing, it makes him executor of his own wrong ; even though, by the letters *ad colligendum*, he be warranted thereunto ; for the judge himself may not do so (*l*).<sup>2</sup>

to him at the time of the death, and he shall be allowed for all payments which rightful executors or administrators might and ought to have and pay under the law. Rev. p. 396, § 3. In *New York*, such executor is liable to account, for the full value of any assets taken into his possession, to every person entitled thereto, and he cannot retain or deduct from such assets any debt due to him. R. S. 81, § 60. In *North Carolina*, an executor *de son tort* is chargeable as far as the debts and goods coming into his hands will satisfy, deducting all just debts owing to him by the decedent and all payments made by him. Code 1883, § 1494. In *Oregon*, it is enacted that an executor *de son tort* is not liable to an action, but is responsible to the executor or administrator for the value of the property taken and for any injury caused by his intermeddling. Hill's Laws, § 375. The provision of the *South Carolina* statute as to executors *de son tort* is the same as the provision of the New Jersey statute, *supra*. G. S. 1882, § 1902. In *Vermont*, an executor *de son tort* is liable to the lawful executor or administrator in double the value of any property embezzled or alienated, to be recovered for the benefit of the estate. R. L. 1880, § 2159. In *Washington*, it is enacted that no person is liable to an action as executor *de son tort* for having intermeddled ; but is responsible to the lawful executor or administrator

for the value of all property taken or received, and for all injury caused by his interference. Code of Pro., § 708.

(*h*) Wentw. Off. Ex. c. 14, p. 325, 14th edition. Godolph. Pt. 2, c. 8, s. 1. Swinb. Pt. 4, s. 23.

(*i*) Godolph. Pt. 2, c. 8, s. 5. And see 2 Prest. on Convey. p. 319 *et seq.* Where the entry of the wrongdoer is general, he is a disseisor of the fee-simple, and not an executor *de son tort* : *Ibid.* See also Bac. Abr. Executors (B. 3), 1.

(*k*) Kenrick v. Burgess, Moor. 126.

(*l*) Anon. Dyer, 256, *a*. Wentw. Off. Ex. c. 14, p. 324, 14th edition. Godolph. Pt. 2, c. 8, s. 1. Swinb. Pt. 4, s. 23. In what cases the mere taking possession of the goods of the deceased will or will not create an executorship *de son tort*, see Read's Case, 5 Co. 33, *b*. 1 Roll. Ab. 918, pl. 5. Wentw. Off. Ex. 327, 14th edition. Swinb. Pt. 6, s. 22, pl. 2. Serle v. Waterworth, 4 M. & W. 9, *post*, p. \*213. Some possession is colorable, and still none in law to charge, &c., as in the case of an overseer or supervisor (see *ante*, pp. \*193, \*194), or one who is made executor by a will, which is afterward disproved by the proving of one later ; Dyer, 166, *b*.

2. Where a party assumes to intermeddle at all with goods, of which the intestate died possessed, he renders himself liable as an executor *de son tort*.

Again, if a man demands the debts of the deceased, or makes acquittance for them, or receives them (*m*), he will become executor *de son tort*. In the case of *Padget v. Priest* (*n*), it was held, that if a man's servant sells the goods of the deceased, as well after his death as before, by the directions of the deceased given in his lifetime, and pays the money, arising therefrom, into the hands of his master,

*Alexander v. Kelso*, 1 Baxt. 5; *Emery v. Berry*, 28 N. H. 473; *Brown v. Durbin*, 5 J. J. Marsh, 170; *Wilson v. Hall*, 67 Ga. 53; *Estate of Power*, 14 Phila. 289. *Wilson v. Hudson*, 4 Harr. (Del.) 168.

Where, at the request of the widow of the decedent, her father sold some of the property, and paid the proceeds to the widow, he thereby became executor *de son tort*, neither the widow, nor he, having administered. *Bryant v. Helton*, 66 Ga. 477.

In North Carolina, the mere act of taking possession of the property of a decedent, and converting it to his own use, may constitute one an executor *de son tort*, and subject him to the demands of the creditors of the estate, *Currie v. Currie*, 90 N. C. 553; but it will not render him liable to the penalty provided in § 1522 of the Code, *viz.*: "No person shall enter upon the administration of any decedent's estate, until he has obtained letters therefor, under a penalty of \$100." *Id.*

In a case in which a son of the person charged as executor *de son tort* died in California, having previously forwarded certain moneys to his father, there being nothing disclosed showing the purpose for which the money was sent, or that anyone in California or elsewhere had any right to its legal control, the possessor of the money may be charged by a creditor as an executor *de son tort*. *Emery v. Berry*, *ubi supra*.

Where a widow, after the death of

her husband, kept and used a horse which belonged to him, for about one year, and then suffered him to stray, whereby he was lost, she was held liable as executrix *de son tort*. *Hubble v. Fogartie*, 3 Rich. 413. So if the widow continue in possession of, and use the goods, she will be liable. *Hawkins v. Johnson*, 4 Blackf. 21.

When a creditor of an intestate, knowing that no administration had been granted upon the estate, presented his claims to the widow, who paid them, it was determined that the lawful administrator could recover such payments from the creditor in an action against him as executor *de son tort*. *Mitchell v. Kirk*, 3 Sneed 319.

By the retention of a promissory note, the property of the decedent, and the concealment of his will (both of which had been intrusted to him), a party becomes executor *de son tort*, and liable to be proceeded against as such. *Clarke v. Goodrum*, 61 Miss. 731.

And where one takes possession of decedent's property, without taking out letters, although he have in his possession, at the time, the will of the decedent, he becomes thereby executor *de son tort*. *Morrow v. Cloud*, 77 Ga. 114.

And where a person, named as executor in the will, refuses to qualify and renounces the trust, but who becomes the *de facto* executor, and assumes the entire management of the estate, he will become liable *as executor* for the assets actually received by him. *Pulliam v.*

(*m*) *Godolph.* Pt. 2, c. 8, s. 1.  
*Swinb.* Pt. 4, s. 23.

(*n*) 2 T. R. 97.



\*this makes the master, as well as the servant, executor *de son tort*. And it seems to be established that the agent of an executor *de son tort* collecting the assets, with a knowledge that they belong to the testator's estate, and that his principal is not the legal personal representative, may himself be treated as an executor *de son tort* (o).

So if a man *pays* the debts of the deceased, or the fees about proving his will, this will constitute him executor *de son tort* (p); but it is otherwise if he pays the debts or fees with his own money (q).

Living in the house, and carrying on the trade of the deceased (a victualer), was held a sufficient intermeddling to make the defendant executor *de son tort*, notwithstanding his wife (the daughter of the deceased) proved the will after the action was commenced, and she and her husband were acting together, and were in the house before the death of the testator (r).

Likewise, if a man sue as executor, or if an action be brought against him as executor, and he pleads in that character, this will make him executor *de son tort* (s).<sup>3</sup>

With respect to fraud, by the statute 43 Eliz. c. 8, after reciting

Pulliam, 10 Fed. Rep. 53. And where one who is appointed administrator enters into bond with one surety only, such bond is void, and, therefore, the letters are void, and one acting under them becomes executor *de son tort*. Bradley v. The Commonwealth, 31 Pa. St. 522.

But where a widow received the estate, in Texas, she was held liable to creditors. Kauffman v. Wooters, 79 Tex. 205. But where the widow is sole devisee, with full control, and she makes a gift of part of the estate to her son, he will not be liable to creditors. Id.

Where the heirs of a mortgagee of land, upon his death, entered and took all steps to foreclose the mortgage for breach of condition, needful, if they had been lawfully entitled to foreclose, and held open and public possession of the land for more than eight years, it was held that by thus intermeddling, they became executors *de son tort* in re-

spect to what they had received, and that creditors were entitled to treat them as such. Haskins v. Hawkes, 108 Mass. 379, 381.

(o) Sharland v. Mildon, 5 Hare 468.

(p) Godolph. Pt. 2, c. 8, s. 1. Swinb. Pt. 6, s. 22.

(q) Ibid. Went. Off. Ex. 326, 14th edition.

(r) Hooper v. Summersett, Wightw. 16.

(s) Godolph. Pt. 2, c. 8, s. 1. Com. Dig. Administrator (C. 1).

3. Davis v. Connolly's Executors, 4 B. Mon. 136, 140. Before the adoption of the Code and the Revised Statutes in New York, a foreign executor who came into that jurisdiction and intermeddled with assets there could be sued as executor *de son tort*. The law regarded him not as a foreign executor, but as a domestic executor, having made himself such by his own wrongful act. Hopper v. Hopper, 125 N. Y. 400, 404.

that "forasmuch as it is often put in ure to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed unto them, if they require it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves or others by their means do take deeds of gifts and authorities by letter of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to pay any debts owing by the same intestate, and so the creditors for lack of know\*ledge of the place of habitation of the administrator, cannot arrest him nor sue him; and if they fortune to find him out, yet for lack of ability in him to satisfy of his own goods the value of that he hath conveyed away of the intestate's goods, or released of his debts by way of wasting, the creditors cannot have or recover their just and due debts," it is enacted "that every person and persons that hereafter shall obtain, receive and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate upon any fraud as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in or toward satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate, at the time of his decease,) shall be charged and chargeable as executor of his own wrong (*t*); and so far only as such goods and debts coming to his hands, or whereof he is released or discharged by such administrator will satisfy, deducting nevertheless to and for himself allowance of all just, due, and principal debts upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm."

So, if in his lifetime the deceased made a deed of gift, or bill of sale, of all his goods and chattels to another, in fraud of his creditors, and the donee after the death of the donor disposes of these goods and chattels, by these means he shall be executor in his own wrong (*u*).<sup>4</sup>

(*t*) See Godolph. Pt. 2, c. 8, s. 2. Swinb. Pt. 4, s. 23. Kitchen *v.* Dixon, Goldsb. 116, pl. 12. 2 H. Bl. 26, n. (*b*).

(*u*) Godolph. Pt. 2, c. 8, s. 1. 1 Sid. 31, pl. 9. 1 Roll. Abr. 549. (C. 1), pl. 3. Stamford's Case, 2 Leon. 223.

Hawes *v.* Leader, Cro. Jac. 271. Edwards *v.* Harben, 2 T. R. 587.

4. A fraudulent donee is liable as an executor *de son tort*. Bailey *v.* Miller, 5 Ired. 444; Sturdivant *v.* Davis, 9 Id. 365; Tucker *v.* Williams, Dudley L. 329;

When the will is proved, or administration granted, and another person then intermeddles with the goods, this shall \*not make him executor *de son tort*, by construction of law, because there is another personal representative of right against whom the creditors can bring their actions; and such a wrongful intermeddler is liable to be sued as a trespasser (x). But, though there be a lawful executor or adminis-

Densler v. Edwards, 5 Ala. 31. Therefore where slaves were fraudulently given to an infant child, and the grandfather of such child took possession for his use and benefit, he became executor *de son tort*. Bailey v. Miller, *ubi supra*. And an administrator who holds property of the intestate, under a conveyance fraudulent as to creditors, is liable to them as an executor *de son tort*. Norfleet v. Riddick, 3 Dev. 221. And under such circumstances he is liable to the full extent of the property transferred. Dorsey v. Smithson, 6 Harr. & J. 61. And where one receives a fraudulent bill of sale of personal property from an intestate, in his lifetime, and takes possession thereof and sells it, after the death of the intestate, such fraudulent purchaser is chargeable to a prior creditor as executor *de son tort*. Allen v. Kimball, 15 Me. 116.

One who administers upon the estate of a fraudulent assignee and takes possession of the goods assigned, may, upon the death of the fraudulent assignor, be sued as executor *de son tort* by creditors of the latter, and this, although administration may have been granted upon his estate. M'Morine v. Storey, 4 Dev. & Bat. 189.

And if one in his lifetime make a fraudulent conveyance of his property, his grantee may, after his death, be charged as executor *de son tort*, although there is a lawful representative, because the latter, being bound by the fraud of his testator or intestate, cannot be charged in his representative capacity.

Simonton v. McLane's Adm'r, 25 Ala. 353.

One who holds property under color of a fraudulent gift or sale from a person who dies, may be sued as executor *de son tort*, wherever found with the property in his possession. Hopkins v. Towns, 4 B. Mon. 124.

But it seems that one who sets up a claim, under a fraudulent conveyance, to goods of an intestate, and injures the sale of them, does not thereby render himself liable as an executor *de son tort*. Barnard v. Gregory, 3 Dev. 223.

But one who holds property under a fraudulent bill of sale, and therefore has become liable to creditors as executor *de son tort*, cannot discharge himself by delivering the thing given to one who afterward obtains letters of administration. Morrison v. Smith, Busbee L. 399.

The heirs-at-law of a decedent cannot maintain a bill in equity against one as executor *de son tort*, for property conveyed to him by their ancestor during his life, it being alleged that the deed was obtained by fraud; but it is otherwise where the complainants are creditors and there was no administration. Davis v. Davis, 56 Ga. 37.

(x) Anonymous, 1 Salk. 313. Godolph. Pt. 2, c. 8, s. 3: but one who gets the goods of the testator into his hands may be sued as executor *de son tort*, although afterward and before the writ brought, administration be legally granted to another: *Ibid.* Kellow v. Westcombe, 1 Freem. 122.

trator, yet if any other take the goods *claiming them as executor*, or pays debts or legacies, or intermeddles *as executor*, in this case, because of such express claiming to be executor, he may be charged as executor of his own wrong, although there were another executor of right (y).

But there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship ;<sup>5</sup> such as locking up the goods for preservation (z), directing the funeral, in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects (a), making \*an inventory of

What acts do not  
make a man ex-  
ecutor *de son tort*.

(y) Read's Case, 5 Co. 34, a. Went. Off. Ex. 326, 14th edition. Godolph. Pt. 2, s. 1. Swinb. Pt. 4, s. 23. Com. Dig. Administrator (C. 1). However, this was denied at N. P. in Hall v. Elliott, Peake, N. P. C. 87, by Lord Kenyon, who said it was impossible there should be a lawful executor, and an executor *de son tort*, at the same time. Observations to the same effect were also made by Sir T. Plumer, M. R., in Tomlin v. Beck, 1 Turn. & R. 438, where his honor held, that a person who was permitted by an executor to possess himself of part of the assets of a testator, and who, after the executor's death, and when there was no legal representative, either of the testator or the executor, retained the assets, and acted in the execution of the trusts of the will, was not executor *de son tort* to the original testator.

5. Intermeddling with the real estate of the decedent will not make one an executor *de son tort*. King v. Lyman, Root 104 ; Pryor v. Downey, 50 Cal. 388 ; Johnson v. Johnson, 80 Ga. 260.

Acts of necessity or humanity, which do not evince any legal control over the property of the deceased, will not make a person executor *de son tort*. Emery v. Berry, 28 N. H. 473 ; Bacon v. Parker, 12 Conn. 212 ; Bennett v. Ives, 30 Id. 329.

The fact that a trustee may be indebted to his *cestui qui trust*, at the time of her death, will not render him liable

as an executor *de son tort*. Wilson v. Hall, 67 Ga. 53.

Where a son purchased land of his insolvent mother, in fraud of her creditors, he cannot on that account be held as executor *de son tort*. Johnson v. Johnson, 80 Ga. 260.

The mere possession of the chattels of a deceased person does not make one liable for the payment of his debts, as an executor *de son tort*. Dilts v. Parke, 1 South. 219, 220.

In a case where a widow paid the last expenses of her husband and gave property of small value to the brother of the decedent, who left no other property, it was held that she was not liable as executrix *de son tort* to a creditor. Taylor v. Moore, 47 Conn. 278.

In a case where no administration has been taken, distributees of the estate are not unlawfully in possession of its assets, and those in possession are not chargeable, even by their co-distributees, as executors *de son tort*, for intermeddling with such assets. Haley v. Thames, 30 S. C. 270, 273.

(z) Godolph. Pt. 2, c. 8, s. 6. So if one do but take a horse of the deceased, and tie him in his own stable : Godolph. Pt. 2, c. 8, s. 3. Wentw. Off. Ex. 385, 14th edition.

(a) Dyer, 166, b. in margin. Fitzh. Executors, pl. 24. 1 Roll. Abr. 918, Executors (C. 2), pl. 4. Wentw. Off. Ex. c. 14, p. 323, 14th edition. Go-

his property (*b*), feeding his cattle (*c*), repairing his houses, or providing necessaries for his children (*d*) : for these are offices merely of kindness and charity (*e*).<sup>6</sup>

In the case of *Serle v. Waterworth* (*f*), the widow of a hairdresser, one Joseph Waterworth, who died in October, 1836, continued to reside in his house and keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold : In December, she received notice of a bond debt of 100*l.* due from him, and had his goods valued : On January 3d, 1837, on the application of a creditor, to whom Joseph Waterworth, at the time of his death, owed 24*l.* for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date : In March, she took out administration : It was held, in an action against her on the promissory note, that this was not evidence to charge her as executrix *de son tort* (*g*).<sup>7</sup>

dolph. Pt. 2, c. 8, s. 6. *Harrison v. Rowley*, 4 Ves. 216. So where a party receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort* ; unless he receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased ; which is a question for the jury : *Camden v. Fletcher*, 4 Mees. & W. 378.

(*b*) Godolph. Pt. 2, c. 8, s. 6.

(*c*) Godolph. Pt. 2, c. 8, s. 8.

(*d*) Godolph. Pt. 2, c. 8, s. 6.

(*e*) Swinb. Pt. 2, s. 23. Bac. Abr. tit. Executors (B. 3), 1 Toller, 40.

6. One who takes possession of the property of a deceased person in good faith, and believing that he has a right to do so, will not be deemed an executor *de son tort*, if there be any colorable ground for his claim, and good faith in his assertion. *Baumgartner v. Haas*, 68 Md. 32.

(*f*) 4 Mees. & W. 9.

(*g*) The defendant had pleaded that one Joseph Waterworth, before and at the time of his death, was indebted to the plaintiff in 24*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the note in the declaration mentioned ; that the plaintiff, after the death of Joseph, applied to the defendant for payment ; whereupon in compliance with his request, the defendant, after the death of Joseph, for and in respect of the debt so remaining due to the plaintiff as aforesaid, and for no other consideration whatever, made and delivered the note to the plaintiff ; and that Joseph died intestate, and that at the time of the making and delivery of the note, no administration had been granted of his effects, *nor was there any executor of his estate*, nor any person liable for the debt so remaining due to the plaintiff as aforesaid ; and the plea then averred that there never was any consideration for the said note ex-

7. Where one was requested, by the decedent, to assist the widow, in settling his affairs : he collected certain

notes and paid certain debts, all of which appeared to have been done in good faith, and for the benefit of the

\*If another man takes the goods of the deceased, and sells or gives them to me, this shall charge him as executor of his own wrong, but not me (*h*). Accordingly, where a lessee died intestate during the term, and his widow entered, without taking administration, and paid rent, and afterward her son-in-law took the premises, with her concurrence and with the assent of the landlord, and paid rent and continued to occupy during the remainder of the term; it was held that he could not be considered as assignee in law of the lease; for though

cept as aforesaid: The Barons of the Exchequer held, after verdict for the defendant, that the plea was no answer to the declaration, inasmuch as it did not negative every consideration for the promissory note, for that it did not allege there were no assets; and the effect of giving the note was, at all events, to preclude the plaintiff, for a year, from suing the defendant, in case she should afterward take out administration, which was a sufficient consideration for the giving of the note: But this decision was afterward overruled in the Exchequer Chamber: *Nelson v. Serle*, 4 Mees. & W. 795.

(*h*) Godolph. Pt. 2, c. 8, s. 1. Com. Dig. Administrator (C. 2). It might be otherwise, if a case of collusion could be made out, and possibly he might be sued in equity. *Hill v. Curtis*, L. R. 1 Eq. 90. See also stat. 43 Eliz. c. 8, ante, pp. \*210, \*211. The executor of an *executrix de son tort* is not liable for a breach of contract committed by the person with whose property the *executrix de son tort* has intermeddled: *Wilson v. Hodson*, L. R. 7 Ex. 84; unless indeed the *executor de son tort* was guilty of a devastavit so as to bring the case within, 30 Car. II. c. 7, s. 2, *ib*.

estate, it was held that it was not such interference as to render him liable as executor *de son tort*. *Portman v. Klemish*, 54 Iowa, 198.

So where one, as agent of the widow, in good faith, sells perishable property of the estate of the husband, and accounts for the proceeds, he is not liable to an administrator afterward appointed. *Perkins v. Ladd*, 114 Mass. 420, 424.

Nor can a widow be made liable as *executrix de son tort*, where her husband died leaving property amounting to \$100 and claims of the value of \$16, and she took the property and the claims, and paid debts of the decedent to the amount of \$197. *Bogue v. Watrous*, 59 Conn. 247. Nor will the mere circumstance that the widow has posses-

sion of some of the effects of the estate of her deceased husband render her personally liable as *executrix de son tort*. *Chandler v. Davidson*, 6 Blackf. 367. Nor where the wife sold the property of the husband, to pay debts then existing, before she knew of his death, was she held liable as such *executrix*. *Brown v. Benight*, 3 Id. 39.

Nor can a husband be treated as executor *de son tort*, where his wife died, and in a short time her *executrix* died, and no steps having been taken to prove the will, in the meantime he held her estate in his hands; the delay in probating the will, however, was not owing to any fault of his. *Blodgett's Estate v. Converse's Estate*, 60 Vt. 410.

the widow might have been chargeable as executrix *de son tort*, he had not made himself executor *de son tort* by taking the premises from her (i).<sup>8</sup>

Again, if a person sets up in himself a colorable title to the goods of the deceased, as where he claims a lien on them, though he may not be able to make out his title completely, he shall not be deemed an executor *de son tort* (k). So if a man lodge in my house, and die there, leaving goods therein behind him, I may keep them, until I can be lawfully discharged of them, without making myself chargeable as executor in my own wrong (l). Or if I take \*the goods of the deceased by mistake, supposing them to be my own, this will not make me executor of my own wrong (m).<sup>9</sup>

. Likewise, a man who possesses himself of the effects of the deceased, under the authority of and as agent for the rightful executor, cannot be charged as executor *de son tort* (n). But, although a person cannot, therefore, be charged as such while he acts under a power of attorney, made by one of the several executors who has

(i) Paull v. Simpson, 9 Q. B. 365.  
Comp. Williams v. Heales, L. R. 9 C. P. 177.

8. To fix the character of executor *de son tort*, the act of the intermeddler must be such as manifests a right to control and take possession of the effects of the deceased person. Merely acting as agent or servant of another, and doing what was done by the procurement and direction of the plaintiff, would not be enough to render a person liable as executor *de son tort*. Rutherford v. Thompson, 14 Oreg. 236, 241; Giles v. Churchill, 5 N. H. 341; Magner v. Ryan, 19 Mo. 197; Givens v. Higgins, 4 McCord 286; Reagan v. Long, 21 Ind. 264.

(k) Flemings v. Jarrat, 1 Esp. N. P. C. 336.

(l) Godolph. Pt. 2, c. 8, s. 3. Swinb. Pt. 4, s. 23. Com. Dig. Administrator (C. 2).

(m) *Ibid*.

9. Where one takes possession of goods of the deceased, without color of title, he is constituted by such act

executor *de son tort*; it is otherwise if there is a color of title. Johnston v. Duncan, 3 Litt. 163; Densler v. Edwards, 5 Ala. 31.

(n) Hall v. Elliott, Peake, N. P. C. 87. A person who deals with the goods of a testator, as agent of executors who afterward prove the will, cannot be treated as executor *de son tort*. Sykes v. Sykes, L. R. 5 C. P. 113. It has been held, however, to be no defense that the goods were taken by consent of a person to whom administration was afterward granted: Parsons v. Mayesden, 1 Freem. 152. But in Hill v. Curtis, L. R. 1 Eq. 90, it was held by Wood, V.-C., that where A. took possession of goods as the agent of B. and by his order, and B. afterward took out administration, the agency and order prevented the act of A. from being the act of an executor *de son tort*; for that the tort of B. was purged by his becoming administrator, and his order became rightful *ab initio*, so that the agent's act was also purged. But see *post*, p. \*219, note (k).

proved the will, yet if he continues to act after the death of such executor, he may be charged as executor *de son tort*, though he act under the advice of another of the executors, who has not proved or administered (o).

In *Beavan v. Lord Hastings* (p), an Englishman having died intestate in Belgium, possessed of real and personal property there, his brother went over from England and obtained representation to him *pur et simple*, which by the Belgian law imposed upon him a personal obligation to pay all the debts of the intestate independently of the amount of the assets: The intestate's brother afterward returned to this country, but did not take possession of any property in England belonging to the intestate: A creditor of the intestate obtained letters of administration to him in England: And it was held by Wood, V.-C., that he could \*not sue the intestate's brother in equity in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law. His honor held also that the intestate's brother, as he had not taken possession of any of the English property of the intestate, was not an executor *de son tort*.

The question whether executor *de son tort*, or not, is a conclusion of law, and not to be left to a jury: whether the party did certain acts is indeed a question for a jury; but when these facts are established, the result from them is a question of law (q).

Question whether man is executor *de son tort* one of law; whether he did certain acts question of fact.

When a man has so acted, as to become in law an executor *de son tort*, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased (r),

Liability of executor *de son tort*;

(o) *Cottle v. Aldrich*, 4 Maule & Selw. 175. But see *Tomlin v. Beck*, *ante*, p. \*212, note (y).

(p) 2 Kay & J. 724.

(q) *Padget v. Priest*, 2 T. R. 99.

(r) *Godolph. Pt. 2, c. 8, s. 2*. On this ground, in a case where the defendant acted as executor, but did not take out probate till sixteen years after the testator's death, the Lord Chancellor (Eldon) allowed a plea of the Statute of Limitations; because he might have been sued as executor *de son tort*: *Webster v. Webster*, 10 Ves. 93. See also

*Coote v. Whittington*, L. R. 16 Eq. 534, from which case it appears that an executor *de son tort* is liable to an account in equity for such assets as he has received, and so far as you can state that he has received a particular asset, but he is not liable to a general account unless he has received everything. In such an action the personal representative is not a necessary party. As to the personal representative being a necessary party in an administration action, see *post*, Pt. V. Bk. II. Ch. 12.



or by a legatee (s):<sup>10</sup> for an executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor (t).

In an action by a creditor he shall be named executor \*generally (u); for the most obvious conclusion which strangers can form from his conduct is, that he has a will of the deceased, wherein he is appointed executor, but has not yet proved it (v).<sup>11</sup> And accordingly it has been

in an action or suit by a creditor of the deceased or a party beneficially interested in his estate.

(s) 1 Roll. Abr. 910, Executors (F.), pl. 1. Bac. Abr. Executors (B. 3), 3.

10. It is said that generally an executor *de son tort* is executor only for the purpose of being sued or made liable for the assets with which he has intermeddled. *Pryor v. Downey*, 50 Cal. 388.

And if, in an action, the claim of the possession of the property be urged as a ground to hold the defendant as an executor *de son tort*, he must be sued in that character or the action will not lie. *Dilts v. Parke*, 1 South. 219, 220; *Durie v. Blauvelt*, 20 Vr. 114, 115.

But in Missouri, no single creditor can maintain an action of trover against an intermeddler, and so appropriate the whole assets to the payment of his debt. *Rozelle v. Harmon*, 103 Mo. 339.

See *ante*, p. 298, n. 1.

But in Arkansas no action will lie against him at the suit of either a creditor or a legatee, although he is responsible to the rightful executor or administrator. *Barasien v. Odum*, 17 Ark. 122; *Rust v. Witherington*, Id. 129. Nor, in Texas, can an heir who takes possession of the estate be held liable in the nature of an executor *de son tort* at the suit of a creditor. *Ansley v. Baker*, 14 Tex. 607. Nor can an action be maintained, in New York, against any person in the character of an executor *de son tort*. *Babcock v. Booth*, 2 Hill 185; *Vermilyea v. Beatty*, 6 Barb. 431; *Metcalf v. Clark*, 41 Id. 49; *Field v. Gibson*, 20 Hun 276.

In a case in Indiana, where one made a contract to board and care for the decedent for life, in consideration of his entire estate, and, upon his death, such party took possession of the entire estate, except notes for six hundred and seventy-five dollars, held by one appointed administrator; in an action between such administrator and the party to the contract, he was sued as executor *de son tort*; the recovery was against the administrator for six hundred and seventy-five dollars. *Fessler v. Crouse*, 73 Ind. 64.

(t) *Carmichael v. Carmichael*, 2 Phill. C. C. 103, *per* Lord Cottenham. *Rayner v. Koehler*, L. R. 14 Eq. 262; *Coote v. Whittington*, L. R. 16 Eq. 534. But see *Cary v. Hills*, L. R. 15 Eq. 79. Notwithstanding the above dictum of Lord Cottenham, an executor *de son tort* can discharge himself by accounting to the rightful executor, although one executor cannot discharge himself by accounting to a co-executor, *Hill v. Curtis*, L. R. 1 Eq. 90-98.

(u) *Coulter's case*, 5 Co. 31, *a.* *Godolph. Pt. 2*, c. 8, s. 2. 1 Saund. 265, note (2) to *Osborne v. Rogers*.

(v) 2 Black. Comm. 507, 8. The possession and occupation, or meddling with the goods, is that which gives notice to creditors whom they are to sue as executor; By the Lord Dyer, *Wentw. Off. Ex. c. 14*, 322, 14th edition.

11. In an action against an executor *de son tort*, the declaration should be in the same form as if the action were against

held (*x*), that if a man be sued as the executor of an executor for a debt of the original testator, it is no answer to the action, that he is only executor *de son tort* to the original rightful executor. If there should be also a lawful executor, they may be joined in the suit, or sued severally: but it is otherwise, if there be a lawful administrator, for he cannot be joined in a suit with the executor *de son tort* (*y*).

Lawful executor and executor *de son tort* may be sued jointly or severally: lawful administrator cannot be joined with executor *de son tort*.

And if the executor *de son tort*, being sued by a creditor, should plead *ne unques executor*, on which issue should be joined, this issue, on proof of acts by the defendant, such as constitute in law an executorship *de son tort*, would be found against him, and the judgment thereon would be, that the plaintiff do recover the debt and costs, to be levied out of the assets of the testator if the defendant have so much, but if not, then *out of the defendant's own goods* (*z*).<sup>12</sup>

However, though an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts not for his own benefit, which a rightful executor may do. And, accordingly, if he pleads properly, he is not liable beyond the extent of the goods which he has

Executor *de son tort* protected in all acts not for his own benefit which rightful executor may do.

a rightful executor. *Sawyer v. Thayer*, 70 Me. 340, 341. And, generally, such actions do not vary in form from actions brought against the proper representative of the estate. *Brown v. Leavitt*, 26 N. H. 493, 495; *Shaw v. Hallihan*, 46 Vt. 389; *White v. Mann*, 26 Me. 361; *Lee v. Chase*, 58 Id. 432. So, if it is sought to charge one in equity as executor *de son tort*, action should be brought as against a rightful executor. *Pleasants v. Glasscock*, 1 Sm. & M. Ch. 17.

A judgment against an executor *de son tort* should be in the ordinary form, as against a rightful executor. *Hill v. Henderson*, 13 Sm. & M. 688.

(*x*) *Meyrick v. Anderson*, 14 Q. B. 719.

(*y*) *Wentw. Off. Ex.* p. 328, 14th edition. *Godolph. Pt. 2, c. 8, s. 2. Com. Dig. Administrator (C. 3)*. There cannot be an administrator *de son tort*: the

law knows no such appellation: *Godolph. Pt. 2, c. 8, s. 2*.

(*z*) *Wentw. Off. Ex. c. 14*, pp. 331, 332, 14th edition. 1 *Saund.* 336, *b. note* (10) to *Hancock v. Prowd.* *Hooper v. Summersett*, *Wightw.* 19, by *Thompson, B.*

12. In an action where one is sued as executor *de son tort*, where the pleas are the general issue and *ne unques executor* only, the recovery against such person as executor *de son tort*, is for the whole debt, and not merely for the value of the assets proved to have been intermeddled with. *Hubble v. Fogartie*, 3 *Rich.* 413. But, on the other hand, it has been held that such executor is liable only for what came into his hands. *Mitchell v. Lunt*, 4 *Mass.* 654; *Kinard v. Young*, 2 *Rich. Eq.* 247; *Leach v. House*, 1 *Bailey* 42; *Blake v. Hawkins*, 98 *U. S.* 315.

administered (a). Therefore, in an action by a creditor of the deceased, under a plea of *plene administravit*, he shall not be charged beyond \*the assets which came to his hands (b): and in support of this plea, he may give in evidence the payments by himself of just debts of the deceased, of equal or superior degree to that on which the action is brought, which have exhausted such assets (c).<sup>13</sup> So even after action brought, he may apply the assets, which are in his hands, to the payment of a debt of superior degree, and plead such payment in bar of the action (d).<sup>14</sup> So he may give in evidence, under the same plea, that he has delivered the assets to the rightful executor or administrator *before* action brought (e). An executor *de son tort*

(a) Godolph. Pt. 2, c. 8, s. 2. Wentw. Off. Ex. 331, 14th edition.

(b) Dyer, 166, b. in margin. 1 Saund. 265, note (2) to Osborne v. Rogers. Hooper v. Summersett, Wightw. 21, *per curiam*. Yardley v. Arnold, Carr. & M. 434.

(c) Wentw. c. 14, pp. 333, 334, 14th edition. Mountford v. Gibson, 4 East, 454, in the judgment of Le Blanc, J., 2 Black. Comm. 508. Bac. Abr. Executors (B. 3), 2.

13. If an executor *de son tort* plead *plene administravit*, he must show that he applied the assets as the rightful executor could have lawfully done. Gay v. Lemle, 32 Miss. 309. Such plea is good in Connecticut. Davis v. Weed, 44 Conn. 569, 578. Under the statute of New Hampshire, upon *plene administravit* pleaded, such executor might show a recovery against him, by a creditor, or the rightful executor or administrator, to the amount of the assets in his hands, and this would support his plea. Neal v. Baker, 2 N. H. 477.

(d) Oxenham v. Clapp, 2 Barn. & Adol. 309. See further, *post*, Pt. III. Bk. II. Ch. II. § III.

14. But if an action be brought against such executor, if the estate with which he has intermeddled be insolvent, it is no defense that he has paid

debts to double the amount of the assets by him received, because he has no right to elect whom he will pay. Neal v. Baker, 2 N. H. 477.

But if a voluntary purchaser from an executor *de son tort* be sued in trover by the rightful administrator, he cannot show, in mitigation of damages, that, since his purchase, the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration. Carpenter v. Going, 20 Ala. 587; Keith v. Ham, 89 Id. 590, 595.

(e) Anon. 1 Salk. 313. Padget v. Priest, 2 T. R. 97, in the judgments of Ashurst, J., and Buller, J. Curtis v. Vernon, 3 T. R. 590, in Lord Kenyon's judgment. Hill v. Curtis, *post*, p. \*219, note (k). In Samuel v. Morris, 6 C. & P. 620, which was an action of trover, the plaintiff had pledged the goods in question to a parish pauper for a debt: On the pauper's death, the defendants, who were the parish overseers, took the goods, together with those of the pauper, in order to pay the expenses of his funeral; When the bill for the coffin was brought in by one Joseph, who had made it by their order, they proposed that he should have all the goods, to make what he could of them, if he would pay the rent due to the landlord of the house in which the

may well plead *ne unques executor* and also *plene administravit*, and, although on the former issue he should be unsuccessful, he may have a verdict on the latter (*f*).

But it is no defense either under a plea of *plene adminis\*travit*, or a special plea, that *after* action brought, and before plea pleaded, the defendant delivered over the assets to the rightful executor or administrator (*g*): not even, though, in fact, no administration was granted to anyone till after the action was brought (*h*). So payments made by an executor *de son tort*, pending a suit in equity for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, were not allowed (*i*).

And it has been said that a man who is sued in equity as executor *de son tort*, jointly with the rightful executor, cannot set up as a defense that he had, even *before* the bill was filed, accounted for his receipts and payments to his co-defendant, and paid over the balance; for that an executor *de son tort* cannot, by settling with the personal representative, discharge himself from liability to the parties beneficially interested in the testator's estate (*k*). So the agent of an executor *de son tort*, who has, by collecting the assets, made himself also liable as executor *de son tort*, cannot discharge himself by showing

pauper had lived, and all the funeral expenses: To this proposal Joseph assented, and took the goods and sold them: And Parke, B., held, that although the defendants, by taking the goods on the death of the pauper, had made themselves executors *de son tort*, yet as the jury found that the agreement with Joseph amounted to a transfer of the office, and not to a sale of the goods to him by the defendants, they were not liable to the plaintiff, because, he being a pawnor of the goods, a mere seizure of them did not amount to conversion.

(*f*) *Hooper v. Summersett*, Wight. 20, by Wood, B.

(*g*) *Curtis v. Vernon*, 3 T. R. 587. S. C. affirmed in Error, 2 H. Black, 18. The reason seems to be that the creditor would thereby be put into a worse situation; he would have to bring a second action against the rightful executor: *Oxenham v. Clapp*, 2 B. & Adol. 315. .

(*h*) *Curtis v. Vernon*, 3 Tr. 587. 2 H. Bl. 18.

(*i*) *Layfield v. Layfield*, 7 Sim. 172. But see *Hill v. Curtis*, L. R. 1 Eq. 90, Seton on Decrees, 4th ed. 886.

(*k*) *Carmichael v. Carmichael*, 2 Phill. C. C. 101, *per* Lord Cottenham. But this *dictum* was doubted by Wood, V.-C., in *Hill v. Curtis*, L. R. 1 Eq. 90: Lord Cottenham appears to have been influenced by the reasoning that even the rightful executor cannot discharge himself by settling accounts with a co-executor: But Wood, V.-C., pointed out the reason for this, viz., that a rightful executor is bound to *administer* the assets which he receives, and it is not enough simply to hand them over to his co-executor: But an executor *de son tort* is not so bound; and may discharge himself by showing that he has delivered the assets to the rightful executor before action brought. *Ante*, pp. \*215, \*218.

that he has duly accounted for his receipts to his principal ;<sup>15</sup> for the rule that the receipt of the agent is the \*receipt of the principal does not apply to the case of a wrongdoer (*l*).

An executor *de son tort* cannot give in evidence, under *plene administravit*, or specially plead, a retainer for his own debt : for otherwise the creditors of the deceased would be running a race to take possession of his goods, without taking administration to him (*m*). And it will make no difference though the debt due to the executor *de son tort* be of a superior degree to that of the creditor who brings the action against him (*n*) : Nor though the rightful executor or administrator has assented to such retainer (*o*).<sup>16</sup> If the executor *de son tort* should plead the retainer to satisfy his own debt, the plaintiff, though he had sued the defendant as executor generally, may reply, that he is executor *de son tort* (*p*). If he attempts to give the retainer in evidence, under *plene administravit*, the plaintiff must show the will, and who are the rightful executors (*q*).

Executor *de son tort* cannot plead a retainer for his own debt :

even though debt is of superior degree :

or though rightful executor or administrator assent to retainer :

Yet if an executor *de son tort* afterward, even *pendente lite*, obtains administration, he may retain ; for it legalizes those acts which were tortious at the time (*r*).<sup>17</sup> And, therefore, if subsequently to the replication that he is

but he may retain if afterward he obtain administration.

15. Where an attorney, whose client is without authority, takes possession of the personal property of a decedent, and converts it without administration, he is liable to the lawful administrator for the value of the property so converted, without reference to whether he accounts to the person for whom he acts or not. *Stevenson v. Valentine*, 27 Neb. 338, 344 ; *Peckinbaugh v. Quillin*, 12 Id. 586.

(*l*) *Sharland v. Mildon*, 5 Hare, 469. Unless the executor *de son tort* subsequently become administrator, *Ibid.*: *Hill v. Curtis*, L. R. 1. Eq. 90, 100.

(*m*) *Coulter's Case*, 5 Co. 30, *a*. S. C. Cro. Eliz. 630. Wentw. Off. Ex. c. 14, p. 333, 14th edit.

(*n*) *Curtis v. Vernon*, 2 T. R. 587. 2 H. Bl. 18.

(*o*) *Ibid*.

16. And this rule of the common law is based on sound policy, and it cannot be considered as a penalty. *Baumgartner v. Haas*, 68 Md. 32.

(*p*) *Alexander v. Lane*, Yelv. 137.

(*q*) *Arnold v. Arnold*, Buller, N. P. 143.

(*r*) *Pyne v. Woolland*, 2 Ventr. 180. *Williamson v. Norwitch*, Sty. 337. 1 Saund. 265, note (2), to *Osborne v. Rogers*. But if administration be granted to one after he hath inter-meddled wrongfully with the deceased's goods, this will not purge the wrong done before ; and, therefore, a creditor may sue him as executor *de son tort*, or as a lawful administrator, at his election : *Laury v. Aldred*, 2 Brownl. 185. *Godolph. Pt. 2*, c. 8, s. 2. Com. Dig. Administrator, C. 1.

17. If an executor *de son tort* obtain

executor *de son tort*, he obtains administration, he may rejoin that fact by way of plea *puis darrein continuance*; for it is consistent with the retainer in the plea (s).

\*With respect to the liability of an executor *de son tort* at the suit of the lawful representative of the deceased, there are several authorities to show, that if the rightful executor or administrator bring an action of trover or trespass, the executor *de son tort* may give in evidence, under the general issue, and in mitigation of damages, payments made by him in the rightful course of administration (t): upon this ground, that

His liability in an action by the rightful executor.

letters of administration *pendente lite*, that legalizes his previous tortious acts. The general rule is that the letters, by operation of law, make valid all the acts of the administrator, in the settlement of the estate, from the time of the death. They become, by relation, lawful acts of administration, for which he must account. *Head v. Sutton*, 31 Kans. 616; *Alvord v. Marsh*, 12 Allen 603; *Rattoon v. Overasker*, 8 Johns. 126; *Matter of Falkner*, 7 Hill 182.

It seems that an executor *de son tort* may discharge himself from his liability by taking out letters of administration. *Emery v. Berry*, 28 N. H. 473.

Where an executor *de son tort* takes out lawful letters of administration, such letters relate back to the death of the testator, so far as to compel the executor *de son tort* to account for anything received by him, *Dearborn v. Mathes*, 128 Mass. 194, 196; therefore all acts performed by the executor *de son tort*, become, by relation, acts of administration for which he must account, and this liability to account involves a validity in his acts, which is a protection to those who have dealt with him. *Hatch v. Proctor*, 102 Mass. 351, 354.

In one case where a judgment was obtained against an executor *de son tort*, and he afterward took out administration, and settled the estate as an insol-

vent estate, and no assets remained in his hands for the payment of debts, it was held that this constituted a good defense against an action of debt on the judgment. *Olmsted v. Clark*, 30 Conn. 108.

It is certain that an executor *de son tort*, in the character of lawful administrator, can ratify and make valid, by relation, all those acts which would have been valid had he been the rightful administrator. *Outlaw v. Farmer*, 71 N. C. 31, 35. The subsequent grant of letters legalizes all the acts of an executor *de son tort*. *Magner v. Ryan*, 19 Mo. 196.

If, before qualification, an executor intermeddle with the estate, his subsequent qualification legalizes his acts, and protects the party with whom he deals. *McDearmon v. Maxfield*, 38 Ark. 631; *Stagg v. Green*, 47 Mo. 500; *Alvord v. Marsh*, 12 Allen 603; *Hatch v. Proctor*, 102 Mass. 351; *Rattoon v. Overasker*, 8. Johns. 125; *Priest v. Watkins*, 2 Hill 225.

(s) *Vaughan v. Browne*, 2 Stra. 1106. S. C. Andr. 328. 1 Saund. 265, note (2) to *Osborne v. Rogers*; but see *Whitehead v. Sampson*, 1 Freem. 265.

(t) *Padget v. Priest*, 2 T. R. 100, by Buller, J. *Mountford v. Gibson*, 4 East 454, by Le Blanc, J., 2 Black. Comm. 508. Bac. Abr. Exors. (B. 3),

the payments which are thus, as it is termed, *recouped* in damages, were such as the lawful executor or administrator would have been bound to make ; and, therefore, it cannot be considered as any detriment to him, that they were made by an executor *de son tort* (u).<sup>18</sup> But

1. *Fyson v. Chambers*, 9 M. & W. 468, *per* Lord Abinger. It is said in Bull, N. P. 48, that perhaps in trover he could not give in evidence payment of debts to the value of such goods as were still in his custody ; but only for such as he had sold : *sed quære*.

(u) By Lawrence, J., in *Mountford v. Gibson*, 4 East, 451.

18. This rule of pleading and evidence in cases of this kind prevails in Pennsylvania, where it is held, that if such executor be sued in trover for the goods of the decedent, he may, under such plea, give in evidence in mitigation of damages, payment of debts to the value of the goods for which the action is brought, *Saam v. Saam*, 4 Watts 432 ; but it seems that he cannot plead specially the payment of the debts, but is only allowed to recoup in mitigation of damages under the plea of the general issue. *Roumfort v. McAlarney*, 82 Pa. St. 193, 197. So, too, in Massachusetts, in an action in trover, such executor may recoup payments of debts made by him, *Carey v. Guillow*, 105 Mass. 18, 21; and he may discharge himself even against the demand of the rightful administrator, by proving that he has paid debts equal to the amount of the goods received by him. *Weeks v. Gibbs*, 9 Mass. 74, 77. So in Maryland, such executor cannot plead payment of the debts, or that he has given any satisfaction of the debt, but he may give evidence under the general issue of such payments, and they will be recouped in mitigation of damages, if they be such payments, as the rightful executor would have been bound to have made, and there is no deficiency in the assets. *Glenn v. Smith*, 2 Gill & J. 493. But in

Maine, it is held that in an action of trover by the rightful administrator, such executor cannot file an account in set-off for the intestate's debts, paid by him since the death, but by virtue of R. S. c. 64, § 32, he may "retain" whatever sums were actually paid by him, which, if withdrawn from his hands, the rightful administrator or executor would be compelled to pay. *Tobey v. Miller*, 54 Me. 480 ; *McLean v. Weeks*, 65 Me. 411, 425.

By the Indiana statute (2 R. S. 1876, p. 495, § 15) it is provided that an executor *de son tort* shall be liable to "the extent of the damages" caused by his intermeddling with the estate. Under such statute, the liability of such an executor is not to the creditors of the decedent, but to his estate, and to his personal representative, and a creditor cannot recover a personal judgment for his debts against the executor *de son tort*, but can only compel him to account for the full value of the property of the decedent with which he intermeddled, and ten per cent. damages. *Goff v. Cook*, 73 Ind. 351 ; *McCoy v. Payne*, 68 Id. 327. And, under § 2258 R. S., 1881, to a suit by an executor, an answer that the executor *de son sort* had been appointed by the clerk, but that his appointment had not been confirmed by the court, is bad on demurrer. *Collier v. Jones*, 86 Ind. 342.

An executor *de son tort* is liable to the special administrator of the estate, although he paid over the proceeds to the clerk of the decedent, who turned them over to the widow. *Brennan v. Pardridge*, 67 Mich. 449.

The Statute of Limitations does not

the executor *de son tort* cannot *plead*, in bar to an action by the rightful executor or administrator, payments of debts, &c., to the value of the assets, or that he has given the goods in satisfaction of the debts (*x*); and, although the payments proved, under the general issue, to have been made by the executor *de son tort* amount to the full value of the goods sought to be recovered in the action of trespass or trover, the lawful executor or administrator shall not be non-suited, but will still be entitled to a verdict for nominal damages (*y*).<sup>19</sup> And

begin to run, as against claims against an estate, until qualification of a lawful executor or administrator; therefore an executor *de son tort* cannot rely upon the Statute of Limitations to protect him from accountability for the property of the decedent, to his distributees or legatees. *Hansford v. Elliott*, 9 Leigh 79. So the promise of an executor *de son tort* in South Carolina to pay the debt of the decedent will not bind him, and prevent the bar of the Statute of Limitations to a suit for the debt brought against him, afterward, as the lawful administrator, *Haselden v. Whitesides*, 2 Strobbh. 353; and it appears that in New Hampshire an action may be brought against the executor *de son tort* for a cause of action existing against the debtor at the time of his death, until action is barred, by the lapse of two years, after the grant of administration, to a lawful administrator. *Brown v. Leavitt*, 26 N. H. 493.

The Massachusetts statute giving equity jurisdiction "in cases of trusts, arising in the settlement of estates" does not apply to the settlement of the estate by an executor *de son tort*. *Campbell v. Sheldon*, 13 Pick. 8, 24.

Where the administrator proceeds against the executor *de son tort*, his remedy is at law; he cannot file a bill in equity for an accounting. *Graveley v. Graveley*, 84 Va. 145.

Nor can such executor be cited to ac-

count before the Register, or the Probate Court. *Estate of Power*, 14 Phila. 289.

The heirs cannot be joined with the administrator as plaintiffs; the action should be brought in the name of the rightful administrator alone. *Nease v. Capeheart*, 8 W. Va. 95; *Graveley v. Graveley*, *ubi supra*.

Where a person takes possession of property in one state so as to become liable as executor *de son tort*, and sells and removes the proceeds beyond the jurisdiction, he may be proceeded against as executor *de son tort*, wherever he may be found. *Densler v. Edwards*, 5 Ala. 31.

(*x*) *Whitehall v. Squire*, Carth. 104, by Holt, C. J., 2 Black. Comm. 508. *Elworthy v. Sandford*, 3 Hurl. & C. 336.

(*y*) *Anon.* 12 Mod. 441. 2 Phillipps on Evid. 234, n. 6, 7th edit. The contrary is laid down as to the action of trover, in Buller's *Nisi Prius*, 48; but the authority cited for this position does not support it, and it is, as it seems, incorrect. See *Mountford v. Gibson*, 4 East, 447, by Lord Ellenborough. *Roscoe on Evidence*, 15th edit. 1110.

19. But one cannot be held as an executor *de son tort* at all, unless property of the decedent actually come into his possession. *Roumfort v. McAlarney*, 82 Pa. St. 193, 197. And it must be property belonging to the decedent *at the time of his death*; therefore when there was a voluntary conveyance from a father to his son,



in the case of *Woolley v. Clark* (z), a will was proved \*by the executor named in it, who, after probate, sold the goods of the testator: At the time of the sale he had notice of a subsequent will, which was afterward proved, and the probate of the former will revoked on citation: whereupon the executor, under the latter will, brought trover against the executor under the former, for the goods sold: and it was holden, that the action was sustainable to recover the full value, *and that the defendant was not entitled, in mitigation of damages, to show that he had administered assets to the amount (a).*

Again, this recouping in damages can only be allowed to the executor *de son tort* in cases where there are sufficient assets to satisfy all the debts of the deceased; <sup>20</sup> for otherwise the rightful executor or

and the son sold and disposed of the property in the lifetime of his father, although the transaction was in fraud of creditors, the son could not be held as executor *de son tort*. *Morrill v. Morrill*, 13 Me. 415.

(z) 5 B. & A. 744.

(a) It must be observed, that the authorities in favor of the right of an executor *de son tort* to recoup, in damages, payments made in a due course of administration, were not cited in the argument of this case, nor was the point mentioned: *Ideo quære*, whether it must be understood as overruling them.

20. Taking possession of the assets of a deceased person and paying his debts out of them, will make a person executor *de son tort*, and upon an action by the administrator, duly appointed, for such assets, such disbursements will not be allowed in discount. *Howell v. Smith*, 2 McCord 516.

Where the widow and heirs have appropriated all the assets of the estate, upon the appointment of an administrator who is without means for the payment of debts, each is liable as executor *de son tort* to the extent of the property which came into their hands. Code, § 2484; *Madison v. Shockley*, 41 Iowa 451; *Elder v. Littler*, 15 Id. 65.

An executor *de son tort* holds the proceeds of the property wrongfully sold by him as a trustee, and he can properly be called to account for it in Chancery, *Gentry v. Jones*, 6 J. J. Marsh. 148, 154.

And the judgment against such executor must be special, not general. *Parker v. Thompson*, 1 Vr. 311, 312.

A creditor of an intestate having recovered judgment against an executor *de son tort*, cannot levy his execution, issued upon such judgment, upon lands of which the intestate died seized. *Mitchel v. Lunt*, 4 Mass. 654; *Nass v. Van Swearingen*, 7 Serg. & R. 192.

On the other hand, where one has obtained judgment against the executor of a decedent, he cannot hold goods, in the hands of decedent's donee, which were the property of the decedent in his lifetime. If the creditor seeks to subject them he must charge the donee as executor *de son tort*. *Bayner v. Robertson*, 3 Dev. 439.

Where a bill in equity seeks to charge one as an executor *de son tort*, and the answer denies all the material allegations, and the evidence sustains the answer, it is error to direct the sheriff to take possession of the effects. *Seay v. Schue's Administrator*, 83 Va. 838.

An executor *de son tort* may discharge

administrator would be precluded, not only from giving preference to one creditor over others of equal degree, which is one of the privileges of his office, but also from satisfying his own debt, in priority to all those of equal degree, by way of retainer (*b*).

It remains to be considered, what effect the acts of an executor *de son tort* may have on the goods of the deceased, with relation to the rightful executor or administrator and the alienee of the executor *de son tort*.<sup>21</sup>

What effect the acts of an executor *de son tort* shall have on goods aliened by him.

It is laid down in Coulter's Case (*c*), that "it is clear that all lawful acts, which an executor *de son tort* doth, are good." So it was said in Graysbrook *v.* Fox (*d*), by Walsh, *quod alii duo Justiciarii concesserunt*, that if an administrator under a grant which is void (by reason of there being a will and executor) aliens the goods of the deceased to pay the funeral, or debts, the sale is good and indefeasible. And \*Lord Holt, in Parker *v.* Kett (*e*), laid down that

himself, by proving the payment of debts to the amount of the goods received by him, as against the rightful executor, if the estate be solvent. McConnell *v.* McConnell, 94 Ill. 295; Weeks *v.* Gibbs, 9 Mass. 74; Reagan *v.* Long, 21 Ind. 264; Tobey *v.* Miller, 54 Me. 480.

(*b*) Wentw. Off. Ex. c. 14, p. 335, 14th edit. Mountford *v.* Gibson, 4 East, 453, in the judgment of Lawrence, J. 2 Black. Comm. 507, 8. Elworthy *v.* Sandford, 3 Hurl. & C. 330.

21. An executor *de son tort* cannot sell the chattels of a decedent and pass good title to the purchaser, as against an after lawfully appointed administrator, such purchaser not being a creditor and not taking the property in discharge of any debt due him. Rockwell *v.* Young, 60 Md. 563. But if such sale was with the advice and consent of the person afterward made administrator, the latter cannot maintain an action in trover for the value of the goods sold. If the estate turn out to be insolvent, perhaps the administrator could recover from the defendant what he received in excess of his share of the estate. Giles *v.* Churchill, 5 N. H. 337, 341. And such a sale, while it will

charge the seller, will not change the title to the goods, even though the person selling should afterward administer. Wilson *v.* Hudson, 4 Harr. (Del.) 168.

A sale, by an administrator, without authority of the court, vests in the purchaser no title which is available against an administrator *de bonis non*. Wyatt's Admr. *v.* Rambo, 29 Ala. 510, 519.

A voluntary sale by an executor *de son tort*, without any legal compulsion, confers upon his purchaser no better title than he himself had. Carpenter *v.* Going, 20 Ala. 587.

A *bona fide* purchaser, for a valuable consideration, at a public sale by an executor *de son tort*, acquires, at least, a possession and right of possession, which he can maintain against all the world except the legal representative of the decedent, and as against him an actual possession of which he can be deprived only by a suit. Woolfork's Admr. *v.* Sullivan, 23 Ala. 548.

(*c*) 5. Co. 30 b.

(*d*) Plowd. 282.

(*e*) 1 Lord Raym. 661. S. C. 12 Mod. 471.

a legal act done by an executor *de son tort* shall bind the rightful executor, and shall alter the property ; and that the reason is, because the creditors are not bound to seek further than him who acts as executor ; therefore, if an executor *de son tort* pays 100*l.* of the testator's in a bag to a creditor the rightful executor shall not have trover against the creditor (*f*).<sup>22</sup>

But when it is thus generally laid down, that payments made in the due course of administration, by one who is executor *de son tort*, are good, that must be understood of cases where such payments are made by one who is proved to have\* been acting at the time in the character of executor, and not of a mere solitary act of wrong, in the very instance complained of, by one taking upon himself to hand over the goods of the deceased to a creditor. Thus in *Mountford v. Gibson* (*g*), the goods in question had originally been sold by the defendant to the intestate in his lifetime ; on his death, they not having been paid for, on application to the intestate's widow for that purpose, she delivered them back to the defendant in satisfaction of his demand : No other acts appeared to have been done by the widow, to show that she had before taken upon herself to act as executrix : The administrator brought trover for the goods against the creditor ; on whose behalf it was contended, that he had a right to protect himself in the action under such payment by the widow as executrix *de son tort* : But the Court of King's Bench held, on the ground above stated, that this was no defense. Accordingly in *Thomson v. Harding* (*h*), it was laid down in the judgment of the same court that the law is not that as against the true representative every payment from the assets of the deceased shall be valid, if made by a person \*who has so inter-meddled with the property of the deceased as to render himself liable to be sued as executor *de son tort* : But that where the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor and shall alter the property.

It must further be observed that the act of an executor *de son tort*

(*f*) See also the judgment of Le Blanc, J., in *Mountford v. Gibson*, 4 East, 454, and of Littledale, J., in *Oxenham v. Clapp*, 1 B. & Ad. 313.

22. As a general proposition, whatever is done by one acting as executor *de son tort*, and which is not contrary to law,

is binding between the parties. A settlement made, in good faith, with such an executor is valid. *Camp v. Elliott*, 38 Ill. App. 337 ; *Riley v. Loughrey*, 22 Ill. 99.

(*g*) 4 East, 441.

(*h*) 2 E. & B. 630.

is good against the true representative of the deceased only where it is lawful, and such an act as the true representative was bound to perform in the due course of administration (*i*).<sup>23</sup>

Where a man has acted as executor *de son tort*, and afterward obtains letters of administration, a question may arise, how far is he bound, in his character of rightful administrator, by his own acts done while executor *de son tort*. This subject will be considered hereafter, together with the question as to what may be done by an administrator before letters of administration are granted (*k*).

How far an administrator is bound by his own acts as executor *de son tort*.

(*i*) Buckley *v.* Barber, 6 Exch. 164.  
23. Such executor cannot deal with and dispose of the estate in a manner strictly forbidden to the lawfully ap-

pointed representative. Rockwell *v.* Young, 60 Md. 563.

(*k*) *Post*, Pt. I. Bk. V. Ch. I. § II.

## \*CHAPTER THE SIXTH.

### OF THE EXECUTOR'S REFUSAL OR ACCEPTANCE OF THE OFFICE.

#### SECTION I.

##### *When and how the office may be refused.*

The office of executor being a private one of trust, named by the testator, and not by the law, the person nominated may refuse, though he cannot assign the office (*a*) ; and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede (*b*).<sup>1</sup>

Executors cannot be compelled to accept the office:

But though the executor cannot be compelled to accept the executorship, whether he will or not, yet by stat. 21 Henry VIII. c. 5, s. 8, the Ordinary might convene before him (*c*) any person made and named executor of any testament, "to the intent to prove or refuse the testament," and if he neglected to appear, he was, previous to the stat. 53 Geo. III. c. 127, punishable by excommunication for a contempt (*d*) ; and might subsequently be dealt with in the mode substituted by that statute, s. 2, for excommunication (*e*). This power of citation to take or refuse probate was, it is apprehended, transferred to the Court of Probate by the 23rd section of the Court of Probate Act, 1857, and now to the probate division of the High Court of Justice, and a neglect to appear to the citation may be punished as for a contempt of the court under the 25th section.

but might be convened by the Ordinary to accept or refuse.

(*a*) Bac. Abr. Exors. (E.) 9. See *Douglas v. Forrest*, 4 Bingh. 704, in the judgment of Best, C. J.

(*b*) *Doyle v. Blake*, 2 Scho. & Lef. 239.

1. It is contrary to public policy to allow persons standing in the position of trustees to use their relations with the trust property to their personal advantage. Therefore, an agreement for a consideration to renounce an executorship is illegal, because against public policy. *Ellicott v. Chamberlin*, 11 Stew. (N. J.) 604; *Staunton v. Packer*, 19

Hun 55. So, too, is an agreement to relinquish the right of administration for a pecuniary consideration against public policy, and void. *Bowers v. Bowers*, 26 Pa. St. 74. *Owings v. Owings*, 1 Gill & H. 484.

(*c*) See stat. 1 Edw. VI. c. 2, as to the form of the citation.

(*d*) Wentw. Off. Ex. 88, 14th edit. Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 4.

(*e*) See stat. 2 & 3 W. IV. c. 93. (Act for enforcing process upon contempts in the Courts Ecclesiastical.)

\*The time allowed to the person named executor, to deliberate whether he will accept or refuse the executorship, is uncertain, and left to the discretion of the judge, who has used, at his pleasure, not only within the year, but within a month or two, to issue his citation (*f*).

If he appear, either on citation or voluntarily, and pray time to consider whether he will act or not, the Ordinary might, though the practice seems now obsolete, grant letters *ad colligendum* in the interim (*g*). But if he appear, and refuse to act or fail to appear to the above-mentioned process, administration *cum*

*testamento annexo* will be granted to another (*h*).<sup>2</sup>

And by stat. 21 and 22 Vict. c. 95, s. 16, "whenever

an executor appointed in a Will survives the testator but dies without having taken probate, and whenever an executor named in a Will is cited to take probate and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor" (*i*).<sup>3</sup>

(*f*) Swinb. Pt. 6, s. 4. Godolph. Pt. 2, c. 19, s. 1.

(*g*) Broker v. Charter, Cro. Eliz. 92. Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 4. Toller, 41.

(*h*) Swinb. Pt. 6, s. 1, pl. 3, s. 2, pl. 3, 4. See as to administration *cum testamento annexo*, generally, *post*, Pt. I. Bk. V. Ch. III. § I.

2. A trust power under a will does not pass to an administrator *cum testamento annexo*, even where the executor, in whom the trust was reposed, renounces, but such power remains in the executor and trustee, originally appointed. Treadwell v. Cordes, 5 Gray 341, 359; Tainter v. Clark, 13 Met. 220; Clark v. Tainter, 7 Cush. 567; Parker v. Sears, 117 Mass. 513.

(*i*) This enactment seems, in effect, to extend the 79th section of the stat. 20 & 21 Vict. c. 77 (*post*, p. \*233), to the case of a party cited, who will not

renounce or take any step. Therefore, where an executor to whom power has been reserved survives his acting co-executor, and does not appear to a citation, the case will stand as if his name had never appeared in the will, and the executor, if any, of the acting executor will be the representative of the original testator: In the Goods of Noddings, 2 Sw. & Tr. 15. So on the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased: In the Goods of Lorimer, 2 Sw. & Tr. 471. The section applies where the executor is cited to take probate of a *copy* of a will, and does not appear: Davis v. Davis, 31 L. J., P. M. & A. 216.

3. Yet an executor is not lightly, or by slight or indirect circumstances, to be precluded from the trust the testator

Although, as above stated, an executor has his election \*whether he will accept or refuse the executorship, yet he may determine such election, by acts which amount to an administration. For if he once administer, it is considered that he has already accepted of the executorship, and the court may compel him to prove the will (j).<sup>4</sup> And if an executor take possession of, and in any way administer, any part of the personal estate, without obtaining probate of the will within six months of the death of the testator, or within two months after the termination of any suit or dispute respecting the will, if there be any such, which shall not be ended within four months after the death of the testator, he is liable to a penalty of

In what cases an executor may refuse :

he cannot if he once administer.

Executor liable to penalty of double duty if he does not obtain probate within six months of testator's death :

or within two months of termination of probate suit.

intended to confide in him. *Matter of Maxwell*, 2 Gr. Ch. 611.

But the failure of an executor to take out letters is equivalent to a refusal of the office. *Jackson v. Jeffries*, 1 Marsh. 88.

So, too, the neglect to apply for letters within the proper time, or the acts or conduct of the party entitled may be taken to be a renunciation. *Pollard v. Mohler*, 55 Md. 284. And where an executrix duly qualified in Connecticut failed to qualify in Illinois for seven years, it was held that such failure amounted to a renunciation on her part. *Ives v. Jacksonville Bank*, 28 Ill. App. 563. And in Alabama, by statute (Code, 1876, §§ 2345-50 ; amended 1878-79, p. 59), if an executor does not apply within thirty days after probate, or the widow within forty days after the testator's death, it follows that they have surrendered and renounced ; and letters will be granted to a creditor. *Wheat v. Fuller*, 82 Ala. 572.

Where the widow of the testator was designated in his will as the sole executrix, she can decline to act in that capacity, and yet might be appointed administratrix *cum testamento annexo*, and might act jointly with another ad-

ministrator in that capacity. Acceptance of the appointment would not make her executrix in fact, but would rather be evidence of her renunciation. *Briscoe v. Wickliffe*, 6 Dana 157.

(j) *Godolph. Pt. 2, c. 19, s. 2. Swinb. Pt. 6, s. 2, pl. 6, s. 22, pl. 1. Bro. Exors. pl. 90. Long v. Symes, 3 Hagg. 774. Mordaunt v. Clark, L. R. 1 P. & D. 592.*

4. The probate of a will and qualifying as executor thereto, is an acceptance of a trust of personalty declared therein, and the executor cannot afterward refuse to perform that trust. *Worth v. M'Aden*, 1 Dev. & B. Eq. 199. A query is raised, however, in this case whether the executor can at the time of qualifying, by some solemn and authentic act, renounce the office of trustee for a trust of personalty declared in the will. It seems that he cannot. *Id.*

Where a trust is created by a will in a party who is also executor, the probate of the will and taking out of letters testamentary thereon by such party, are sufficient evidence of the acceptance of the trust. *Hanson v. Worthington*, 12 Md. 418.

double the amount of duty chargeable, which penalty becomes a debt due from him to the crown, recoverable by any of the ways or means in force for the recovery of probate, legacy or succession duties (*k*).

If an executor of an executor intermeddle in the administration of the effects of the first testator, he cannot refuse the administration of the effects of the latter : And it has now been decided in accordance with the practice of the Prerogative Court that he cannot take upon himself the latter and refuse the former (*l*).

Although there are old cases to the contrary, the law, it should seem, is now taken to be, that the court *may* (though perhaps it ought not) accept the executor's refusal, notwithstanding he has administered (*m*).<sup>5</sup> So if the executor has acted, and the court, not knowing it, commits administration to another, though the administration may be revoked, and the executor compelled to prove the will (*n*), yet the grant of administration *cum testamento annexo*, until so revoked, is valid ; and, consequently, in neither of these cases can a debtor to the testator, in answer to a suit by such administrator, set up the act in

(*k*) 55 Geo. III. c. 184, § 37, amended by the Customs and Inland Revenue Act, 1881. 44 Vict. c. 12, § 40.

(*l*) Brooke v. Haymes, L. R. 6 Eq. 25. In the Goods of Perry, 2 Curt. 655.

(*m*) 1 Roll. Abr. Exor. (C.) 2, p. 907. Wentw. Off. Ex. 91, 14th edit. 2 Scho. & Lefr. 237. *Factum valet*, says Wentworth, *quod fieri non debuit*. See also Jackson v. Whitehead, 3 Phillim. 577.

5. However, in some of the states, it is held that the court cannot accept the refusal of the executor to act, after he has administered. Thus in Massachusetts, it is said that an executor, after the probate of the will, accepting the trust and giving bonds for its faithful execution, cannot renounce, Sears v. Dillingham, 12 Mass. 358 ; and in North Carolina, it is held that an executor who has entered upon the discharge of his trust, cannot thereafter resign it,

Washington v. Blount, 8 Ired. Eq. 253 ; and it is also said that the Court of Probate may accept his refusal at any time before he has intermeddled with the effects of his testator, although it be after he has proved the will. Mitchel v. Adams, 1 Ired. 298. An executor who has taken the oath, but has not administered or in any way intermeddled with the effects, may renounce, and his renunciation may at such time be accepted by the court. Miller v. Meetch, 8 Pa. St. 417. However, in a later case, it was held that the taking of the oath is a full and conclusive act, and it is evidence that the executor has made his election to accept the office, and that, after the oath taken, he cannot divest himself of the office. Bowman's Appeal, 62 Pa. St. 166, 169.

(*n*) Wentw. Off. Ex. 91, 14th edit. Godolph. Pt. 2, c. 31, s. 3.



*pais* of the executor against his renunciation, in order to delay or prevent a recovery by the administrator (*o*).

If one of several executors, after intermeddling with the effects, renounces, his renunciation is invalid, and the record of it on the probate granted to his co-executors ought to be canceled (*p*).

Renunciation of one of several executors after intermeddling invalid.

The only sense in which the committing of the administration under such circumstances can now be said to be void, is, as far as respects the protection of the executor: for if he has once administered, he will remain liable to be sued as executor, both at law and in equity, in spite of his renunciation, and the consequent appointment of an administrator (*q*). So if an executor administer to part of the assets, he shall be charged with the receipts, as executor, though he renounced the executorship, and paid the money to the other executor who proved the will (*r*).

The executor is liable to be sued, although administration be granted to another, if he has administered.

The general question as to the liability, to creditors and legatees, of an executor who renounces after an act of administration, or who proves the will, and then professes to renounce his representative character, will be considered at large in a subsequent part of this treatise (*s*).

Question of liability to creditors and legatees of executor renouncing after acts of administration.

With respect to what acts will amount to an administering, such as to render an executor compellable to take probate, two general rules may be laid down: 1st, That whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon him the executorship, will regularly amount to an administration. 2ndly, That whatever acts will make a man liable as an \*executor *de son tort* (*t*), will be deemed an election of the executorship (*u*).

What amounts to an administration.

Hence, it has been adjudged, that if the executor takes possession of the testator's goods, and converts them to his own use, or disposes

(*o*) *Doyle v. Blake*, 2 Scho. & Lefr. 237.

(*r*) *Read v. Truelove*, Amb. 417.

(*s*) *Post*, Pt. IV. Bk. II. Ch. II. § II.

(*t*) See *ante*, Ch. V. p. \*208, *et seq.*, as to what acts will constitute a man *executor de son tort*.

(*u*) *Godolph. Pt. 2, c. 8, s. 1, and s. 6. Bac. Abr. tit. Executors (E.) 10. Toller, 43. Rayner v. Green*, 2 Curt. 248; but see *Wentw. Off. Ex. c. 3, p. 94, 14th edit.*

(*p*) In the *Goods of Badenach*, 3 Sw. & Tr. 465, in which case one of several co-executors who had renounced after intermeddling was allowed, notwithstanding section 79 of 20 & 21 Vict. c. 77, to retract his renunciation on the ground that the renunciation was invalid after intermeddling.

(*q*) *Wentw. Off. Ex. 92, 14th edit.*

of them to others, this is an administration (*x*). So if he takes the goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration (*y*). As where the testator being tenant at will of certain goods, his executor seized the goods, supposing them to belong to the testator, with an intent to administer; it was holden, that his intention appearing, this made him executor in law (*z*).

Where a man who was named as one of several executors, in answer to an inquiry who were the executors, wrote a letter, saying, that he and others were executors, this was held to afford sufficient evidence that he had acted as executor (*a*).

But if an executor seizes the testator's goods, claiming a property in them himself, though afterward it appears that he had no right, yet this will not make him executor; for the claim of property shows a different view and intention in him than that of administering as executor (*b*).

If an executor receives debts due to the testator, and, especially if he gives acquittances for such debts, this amounts to an election of the executorship; so, if he releases a debt due to the testator (*c*).

\*So, if there are two executors, and one of them hath a specific legacy devised to him, and he takes possession of it, without the consent of his co-executor, this amounts to an administration; for a devisee cannot take a personal chattel devised to him, without the assent of the executor (*d*).

In the case of *Long v. Symes* (*e*) the insertion of an advertisement calling on persons to send in their accounts, and to pay money due to the testator's estate, to A. and B. "his executors in trust," was held to make them compellable to take probate, and to subject them personally to the cost occasioned by their resistance: the estate being small, and left for two years and a half without a representative.

An executor who has not proved is not to be considered as acting by assisting a co-executor, who has proved, in writing letters to collect debts, nor by writing directly to a debtor of the testator, and requir-

(*x*) Wentw. c. 3, p. 93, 14th edit.: or even take them into his hands, some say, without converting them: *Ibid.*

(*y*) 1 Roll. Abr. 917, pl. 12. Bac. Abr. tit. Executors (E.) 10.

(*z*) 1 Roll. Abr. 917, pl. 13. Bac. Abr. tit. Executors (E.) 10.

(*a*) *Vickers v. Bell*, 10 Jur. N. S. 376. 3 N. R. 624.

(*b*) Bac. Abr. tit. Executors (E.) 10.

(*c*) Wentw. Off. Ex. 94, 14th edit. Swinb. Pt. 6, s. 22, pl. 2. 1 Roll. Abr. 917, pl. 7, 8. *Pytt v. Fendall*, 1 Cas. temp. Lee, 553.

(*d*) 1 Roll. Abr. 917, tit. Exor. (B.) pl. 9. Bac. Abr. tit. Exor. (E.) 10. See *infra*, Pt. III. Bk. III. Ch. IV. § III.

(*e*) 3 Hagg. 771.

ing payment (*f*). But in *Harrison v. Graham (g)*, Barbara Graham by will appointed her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died: Margaret alone proved the will, and acted chiefly as executor, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock: Robert, by virtue of another letter of attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. stock, received the money, and paid it over the same day to Margaret: After this she and the mother died, making Robert their executor: It did not appear that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other: But Lord Hardwicke held that this was such an act of administration in Robert, as should make him chargeable as to his own estate (*h*).

Taking the oath as executor is not to be considered as an intermeddling such as to preclude renunciation (*i*).<sup>6</sup> In a case indeed, decided 31 Car. II., the executor named in the will had taken the usual oath, and then refused (but after a *caveat* entered); and another endeavored to obtain letters of administration: the executor came afterward to desire the will under probate, and contested the granting of administration: and it was adjudged against him, supposing that he was bound by the refusal: But after an appeal to the delegates, a *mandamus* was prayed, and granted by the Court of King's Bench: for that, having taken the oath, he could not be admitted to refuse, and the Ecclesiastical Court had no further author-

An executor may renounce after he is sworn.

(*f*) *Orr v. Newton*, 2 Cox. 274. See also *Stacey v. Elph*, 1 M. & K. 195.

(*g*) 3 Hill's MSS. 239. 1 P. Wms. 241, note (*g*) to 6th edit.

(*h*) The judgment in this case will be found fully stated, *post*, Pt. IV. Bk. II. Ch. II. § II.

(*i*) *Macdonell v. Prendergast*, 3 Hagg. 216. But he cannot renounce after he has taken probate: In the Goods of *Veiga*, 32 L. J., P. M. & A. 9.

6. An executor has an absolute right of refusal at any time before he undertakes the office or intermeddles with the estate, and he does not definitely as-

sume the office by propounding the will for probate. *Sawyer v. Dozier*, 5 Ired. 97. It is said, in New Hampshire, that such a trust may be revoked under any circumstance with the consent of the executor, when it shall appear to the judge to be proper. *Morgan v. Dodge*, 44 N. H. 255, 258.

But where a party has once fixed himself with the acceptance of a trust, he cannot afterward, by disclaimer, renounce or repudiate the duties and responsibilities of the office. *Hanson v. Worthington*, 12 Md. 418.

ity (*k*). However, if he has not administered, the court will now, upon his own application dismiss him, and allow him to renounce probate, even after the usual oath, and an appearance given as executor. Such a renunciation was permitted in the case of *Jackson v. Whitehead* (*l*), in order that the executor might be examined as a witness; and Sir John Nicholl, in giving his judgment, seemed to doubt the correctness of the report of the former case, and said, that at most it only decided that a voluntary renunciation is not so binding as to exclude an executor from the duties of the executorship.

With respect to the mode of refusal by the executor, it is laid down that refusal cannot be verbally, or by word, but it must be by some act entered or recorded in the Spiritual Court; <sup>7</sup> and therefore must be done before some judge spiritual, and not before neighbors in the country (*m*). But if the executor send a letter to the Ordinary, by which he \*renounces, and the refusal be recorded, it is sufficient. As

How an executor  
may renounce:

the refusal must  
not be in *pais*,  
but in the Spirit-  
ual Court:

(*k*) Anon. 1 Ventr. 335.

(*l*) 3 Phillim. 577. See also *Long v. Symes*, 3 Hagg. 774.

7. However, the refusal of the executor to act as such, may be presumed. It will be presumed, by the court, after the lapse of a long time, during which the executor has failed to qualify. *Marr v. Peay*, 2 Murph. (N. C.) 84. In one case where the judge of probate was named executor with others, and the other executors appeared before him, he received the will, allowed it to be proved before him and approved it, and took bonds from his co-executors and took jurisdiction of the settlement of the estate, it was held that these acts sufficiently evinced a renunciation and were equivalent to an express refusal to accept the office. *Ayres v. Weed*, 16 Conn. 291. In another case where an executrix, upon presentment to her, in the state of her residence, of claims against the estate, refused to pay them, although she paid all other claims and divided the remaining estate among the

heirs, taking the property into the foreign state for that purpose, and omitted for eight years to prove the will in the state of the residence of the testator, or to give any opportunity therein to creditors to appropriate the estate through her, in her representative capacity, for the satisfaction of debts, the Probate Court found an intentional refusal by her to execute the will, and it was held that such finding was proper. *Lawrence's Appeal*, 49 Id. 411, 421. So where one of the executors was a son of the testator, and a legatee under his will, and the will was proved by the other executor, who at once proceeded with the settlement of the estate, and the time limited by law for the proof of wills had expired, and he had never interfered with the settlement, or claimed his office, he was regarded as having refused to act, after full knowledge of his appointment. *Solomon v. Wixon*, 27 Id. 520. From this, it follows, as a matter of course, that the refusal to accept, may, under certain

(*m*) Wentw. Off. Ex. 88, 14th edit. *Long v. Symes*, 3 Hagg. 776.

in a case where Sir Ralph Rowlet made the Lord Keeper Bacon, C. J. Catlin and the master of the rolls, executors; they wrote a letter to the Ordinary, that they could not attend the executorship, and therefore wished him to commit administration; who did so, making every one of their refusals to be recorded; and this was held good (*n*). And accordingly it has been held that the renunciation need not be under seal (*o*).<sup>8</sup>

circumstances, be implied, Smith's Appeal, 61 Conn. 420, 428; for such refusal need not be expressed or formal, need not be by word or in writing; the court, being called upon to determine its existence, may find it in silence and inaction. Lawrence's Appeal, *ubi supra*; Ayres v. Weed, *ubi supra*.

In Illinois, it is held that the granting of letters testamentary is a ministerial act, and it is competent to prove by other than record evidence that some of the persons named in the letters testamentary refused to act as executors. Ayres v. Clinefelter, 20 Ill. 465; Wardwell v. McDowell, 30 Id. 364, 369.

The filing of a caveat against the probate of a will by one of the executors named therein, is not an implied renunciation of the executorship; and if the will be admitted to probate, letters testamentary may be granted to such executor. Matter of Maxwell, 2 Gr. Ch. 611.

It is held in Virginia that there may be a valid renunciation of executorship of a will by matter *in pais*, Thornton v. Winston, 4 Leigh 152; Gaddy v. Butler, 3 Munf. 345; and the same rule prevails in North Carolina, Wood v. Sparks, 1 Dev. & B. 389; and also in Tennessee, Robertson v. Gains, 2 Humph. 367, 381.

Where executors are appointed to sell and convey lands, the neglect to qualify is *prima facie* evidence of a

refusal to act. Uldrick v. Simpson, 1 S. C. 283, 286; Robertson v. Gains, *ubi supra*.

Where, in the same will, one is appointed executor and trustee also, and has given bonds as executor, he will be deemed to have declined the appointment as trustee, unless he give bond in that capacity also. Williams v. Cushing, 34 Me. 370; Groton v. Rugles, 17 Id. 137; Rounds v. Bangor, 46 Id. 541, 542; Deering v. Adams, 37 Id. 264.

Where one is appointed executor and trustee he may disclaim the trust as effectually by words or acts without deeds as by deed. Green v. Green, 4 Redf. 357.

But the act of one qualifying as administrator is no renunciation of his right to qualify as executor. Taylor v. Tibbatts, 13 B. Mon. 177.

(*n*) Broker v. Charter, Cro. Eliz. 92. S. C. Owen, 44. Moor, 272. 1 Leon. 135. Wentw. Off. Ex. 88, 14th edit. Godolph. Pt. 2, c. 19, s. 4.

(*o*) In the Goods of Boyle, 3 Sw. & Tr. 426.

8. In Pennsylvania, it is held that the refusal of the executor to act can only be by some writing filed in the register's office, Miller v. Meetch, 8 Pa. St. 417; Bowman's Appeal, 62 Pa. St. 166, 169; but it is held that it is not necessary that it should be any formal document, it may be a letter written to the officer by the executor, or by someone for the executor, and in his name. Miller v.

Until the refusal is recorded, no person can take administration (*p*).

until refusal recorded no one can take administration: before whom, when the Ordinary himself is executor:

form of renunciation:

In case the Ordinary himself were made executor, then he might refuse before his own commissary (*q*).

If a party renounce in person, he takes an oath that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors. But he may renounce by

proxy, and then the oath is dispensed with (*r*).

executor declining the usual oath:

If the executor refuse to take the usual oath, or being a Quaker to make the affirmation, this amounts to a refusal of the office, and shall be so recorded (*s*).

An executor cannot in part refuse. He must refuse \*entirely, or not at all (*t*). An exception has been supposed to exist in the case of his testator being executor to another person; for there, it has been said, he might well assent to be executor to the one testator, and refuse for the other. But it has now been

Meetch, *ubi supra*; Commonwealth v. Meteer, 16 Serg. & R. 416.

In Arkansas, where there are two or more executors named, the refusal or renunciation of one cannot be evidenced by acts *in pais*, but must be shown by matter of record. Newton v. Cocke, 10 Ark. 169.

But the provision of the Maryland Code, that the right may be waived in writing, does not preclude its being waived otherwise. Edwards v. Bruce, 8 Md. 387; Pollard v. Mohler, 55 Id. 284.

When a party who is entitled writes a letter to the Orphans' Court, saying that he would ask the appointment of Mr. J. S. D. as administrator, this paper amounts to a written renunciation, and such renunciation is final and irrevocable. And it avails nothing that the writer pleads a misapprehension of the law. Carpenter v. Jones, 44 Md. 625; McColgan v. Kenny, 68 Id. 258.

(*p*) Long v. Symes, 3 Hagg. 776. And until the refusal has been recorded,

it can be withdrawn. In the Goods of Morant, L. R. 3 P. & D. 151. Administration will not be granted on the consent of the executor. The executor must either renounce probate or fail to appear to citation under stat. 21 & 22 Vict. c. 95, sect. 16, *ante*, p. \*226. Garrard v. Garrard, L. R. 2 P. & D. 238.

(*q*) Wentw. Off. Ex. 89. Bro. Ordinary, pl. 13. The usual practice of the Registry has been to require renunciation to be under the hand of the party entitled to the grant. But where he is out of England, an authority to renounce by power of attorney may suffice: In the Goods of Rosser, 3 Sw. & Tr. 490.

(*r*) Toller, 42.

(*s*) Rex v. Raines, 1 Lord Raym. 363, *per* Holt, C. J. Toller, 41. As to the effect of an executor not appearing when cited to take probate, see *ante*, p. \*226.

(*t*) Paule v. Moodie, 2 Roll. Rep. 132. 11 Vin. Abr. 139, pl. 10.

decided in accordance with the established practice of the Prerogative Court that he cannot do so (*u*).

It was the practice of the prerogative office of Canterbury not to receive the renunciation of a party, unless it be accompanied by the original will of the deceased, probate of which it purports to renounce (*v*).

the renunciation will not be received unless accompanied by the will.

## SECTION II.

### *The consequence of renunciation by an executor.*

Prior to the passing of stat. 20 & 21 Vict. c. 77, s. 79, it had been established, by the practice of the Prerogative Court and the decided cases, that the renunciation of an executor might be retracted at any time before administration granted, and that where there was a sole executor who renounced or several who all renounced and administration was granted, the renunciation could never be retracted;<sup>9</sup> but that where there were several executors and some renounced and others proved the will the renunciation was not peremptory, but might be retracted at any time before any actual grant of administration *de bonis non*, but not afterward (*x*).<sup>10</sup>

Former practice as to retraction by executor of renunciation.

(*u*) *Brooke v. Haymes*, L. R. 6 Eq. 25. In the Goods of Perry, 2 Curt. 655. *Ante*, p. \*227, note (l).

(*v*) In the Goods of Fenton, 3 Add. 35.

9. In respect to executors, a retraction of renunciation is not an unusual proceeding, and according to the custom of the ecclesiastical courts, the renunciation may be withdrawn at any time before the grant of administration. Notwithstanding opposition be made, still if the retraction be interposed "before the grant, the court must allow that retraction." *Casey v. Gardiner*, 4 Bradf. 13, 14.

(*x*) See as to the practice and authorities prior to 20 & 21 Vict. c. 77, s. 79, the former editions of this work: Pt. I. Bk. III. Ch. VI. § II.

10. The renunciation may be retracted by executors at any time before the

grant of administration. This is more a matter of right than a privilege within the discretion of the court. Renunciation of the right to administer is governed by the same rule. *Casey v. Gardiner*, 4 Bradf. 13; *Davis v. Inscoe*, 84 N. C. 396; *Robertson v. McGeoch*, 11 Paige 640; *Taylor v. Tibbatts*, 13 B. Mon. 177.

Any intermeddling with the estate is evidence of such retraction. *Davis v. Inscoe*, *ubi supra*.

In a case where an executrix declined to qualify as such, and agreed that her daughter might become administratrix *cum testamento annexo*, reserving the right to qualify as executrix after the death of her daughter, it was held that such renunciation was absolute and perpetual, and could not be retracted after administration and the death of the

But now by stat. 20 & 21 Vict. c. 77, s. 79, "where any person, after the commencement of this Act, renounces probate of the Will of which he is appointed executor, or one of the executors, the rights of such person in respect of the \*executorship shall wholly cease,<sup>11</sup> and the representation of the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor" (y).

Modern practice under stat. 20 & 21 Vict. c. 77, s. 79.

Rights of an executor renouncing probate to cease as if he had not been named in the will.

"By rule 50, P. R. (non-contentious business), no person who

administratrix. *Thornton v. Winston*, 4 Leigh 152.

11. Where a testator nominates two executors, one of whom renounces, because it is deemed unnecessary that two executors should act, and subsequently the qualifying executor dies, the executor having renounced will be allowed to retract his renunciation, and letters *de bonis non* will issue to him. *Dempsey's Will*, Tuck. 51. Where there are several executors, and one renounces before the register, and the others prove the will, he who renounced may at any time thereafter come in and administer. *Petition of Taggart*, 1 Ashm. 321. But where all the executors renounce and administration goes, they cannot retract, at least, during the life of the administrator. *Robertson v. McGeoch*, 11 Paige 640.

But where, upon his own petition, he has been released from his office as executor, and has formally renounced, he cannot, after letters *de bonis non, cum testamento annexo* have been issued, by the surrogate, to another, retract his renunciation and be restored. *Trow v. Shannon*, 59 How. Pr. 214.

But where one of two executors fails to act, the effect is that the other is authorized to act as if he had been

named sole executor. *Bennett v. Kiber*, 76 Tex. 385.

Where one of two executors has renounced and his co-executor has been removed for cause, pursuant to the statute, he may retract his renunciation, and thereupon have letters testamentary issued to him. *Codding v. Newman*, 3 Th. & C. 364. *Judson v. Gibbons*, 5 Wend. 224; *Perry v. DeWolf*, 2 R. I. 103. But previously to granting such letters in Rhode Island, notice must be issued by the Court of Probate to all parties interested. *Perry v. DeWolf*, *ubi supra*.

(y) See In the Goods of Noddings and In the Goods of Lorimer, *ante*, p. \*226, note (i). There is nothing in this enactment to prevent the court from allowing a retraction of the renunciation according to the old practice in a case fit for it, *e. g.*, where it has taken place after an intermeddling: In the Goods of Badenach, 3 Sw. & Tr. 465. But such retraction will not be allowed unless it can be shown that it will be for the benefit of the estate or of those interested under the will: In the Goods of Gill, L. R. 3 P. & D. 113. In the Goods of Loftus, 3 Sw. & Tr. 307. This section does not apply to an executor who renounced before the act came into force: In the Goods of Whitham, L. R. 1 P. & D. 303.



renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the deceased in another character" (z).<sup>12</sup>

Rule 50, P. R.  
No person renouncing in one character to take representation in another.

It is said by very eminent writers, that where a power is given to executors, they may exercise it, although they renounce probate of the will (a). But with the greatest deference to their authority, it may be doubted whether the position is true, unless when the power is given them in their proper names, and without reference to their office as executors (b).<sup>13</sup>

Whether executors may, after renouncing, exercise a power.

(z) See *In the Goods of Loftus*, 3 Sw. & Tr. 307, from which it appears that this rule is capable of modification by the court. See also *In the Goods of Wheelwright*, 3 P. D. 71. In the case of *In the Goods of Russell*, L. R. 1 P. & D. 634, the court allowed one who had been appointed executor and renounced that office, to take administration *test. annexo* as attorney of the other executors notwithstanding rule 50. A renunciation may be retracted at any time before it is filed and recorded in the registry: In the *Goods of Morant*, L. R. 3 P. & D. 151. As to renunciation by a next of kin, see *post*, Pt. I. Bk. V. Ch. III. § I.

12. Where one, after accounting as executor, and who resides in a foreign state, is removed by the surrogate, without prejudice to his co-executors, and ceases to act in any capacity toward the estate, he may be presumed to have renounced as trustee, without any discharge by the court. *Earle v. Earle*, 48 N. Y. Super. 18.

See also *Bowden v. Pierce*, 73 Cal. 459.

(a) 1 Sugden on Powers, 138, 6th edit. 2 Prest. on Abstr. 264.

(b) See *Perkins*, No. 548, where the distinction is thus taken: "If a man will that A. and B., his executors, shall sell, &c., and they refuse before the Ordinary, yet it seems they may sell,

because they are certainly named, so that it appears the Will of the testator is, that they shall sell, whether they refuse or not. But otherwise it shall be (as it seems) if he will that his executors shall sell, without expressing their names, and they all refuse before the Ordinary, they cannot sell." See also the cases of *Yates v. Compton*, 2 P. Wms. 309, and *Keates v. Burton*, 14 Ves. 434 (which is cited by Sir E. Sugden). In the latter case, a power was given to "my said trustees and executors," and one of the executors died and the other renounced, without exercising it: Sir W. Grant observed, "The power is given to the executors, but they have not exercised it, and they have renounced the only character in which it was competent to them to exercise it." The view taken by the author in the text has been confirmed by the decision of the Court of Appeal in *Crawford v. Forshaw* [1891], 2 Ch. 261: in which case it was held (reversing the decision of *Kekewich, J.*) that an executor, who had renounced probate, could not act in the exercise of a power of selecting charities and distributing a residue amongst them: and that the power was given to the executor in the character of executor, and that the two who had proved could exercise it alone.

13. In New York where one is named executor and trustee in the same will, he

\*If a power has been conferred on a party to a deed, his executors, administrators and assigns, and he dies, having appointed several executors, one of whom renounces, the others who act may well exercise the power (c).<sup>14</sup>

If a debtor makes his creditor and another his executor, and the creditor neither intermeddles, nor proves the will, he may bring an action against the other executor (d).

An executor who renounces may sue his co-executor.

will not become such trustee, if he renounces as executor, for having refused to accept the executorship, the estate never vested in him as trustee. He could not be compelled to take the title against his will. *Dunning v. Ocean National Bank*, 6 Lans. 296, 298; S. C. 61 N. Y., 497; *Depeyster v. Glendenning*, 8 Paige 295; *Burritt v. Silliman*, 13 N. Y. 93; *Beekman v. Bonser*, 23 Id. 305; *McCosker v. Brady*, 1 Barb. Ch. 329; *Matter of Robinson*, 37 N. Y. 261.

But, in Massachusetts, where an executor is, by will, authorized to sell such of the testator's property as in his judgment would be best, and the executor declined to act, and an administrator *cum testamento annexo* was appointed and sold the land, it was held, that the administrator *cum testamento annexo* had no power to sell real estate of the testator, and that sales and conveyances thereof, made by him, were void as against the heirs. *Tainter v. Clark*, 13 Met. 220; and it seems that such power cannot be exercised by an administrator *cum testamento annexo* even after the death of the executor, *Conklin v. Egerton's Administrator*, 21 Wend. 430; but where such executor, after administration granted, accepted the office of trustee under the will, it was held that he did not, by renouncing the office of executor, lose his power to sell as trustee, under the will; and sales

and conveyances so made by him, afterward, were valid, as against the heirs and devisees. *Clark v. Tainter*, 7 Cush. 567.

(c) *Granville (Earl) v. M'Neile*, 7 Hare, 156.

14. It was formerly held that where there are several executors, they must all join in the prosecution of a suit, even though some of them had renounced, *Bodle v. Hulse*, 5 Wend. 313; *Executor of Hill v. Smalley*, 1 Dutch. 374, 380; *Mitchell v. Rice*, 6 J. J. Marsh. 623; *Moore v. James*, 4 Munf. 194, 195; but this has been altered by statute. Laws 1838, c. 149, New York. *Codding v. Newman*, 3 Th. & C. 364, 366.

But it was not so in equity, the rule in that court being that an executor who had renounced need not join; but the action was well brought if brought in the names of those who had qualified. *Rinehart's Executors v. Rinehart*, 2 McCart. 44.

But where an action is brought against an executor, after his resignation, for specific performance of a contract of sale by the testator, and the heirs were not joined in the action, a judgment against such executor will not bind the heirs. *Luco v. Commercial Bank*, 70 Cal. 339.

(d) *Dorchester v. Webb*, Sir W. Jones, 345. *Rawlinson v. Shaw*, 3 Term Rep. 557.

## \*BOOK THE FOURTH.

### OF PROBATE.

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#### CHAPTER THE FIRST.

OF THE NECESSITY OF OBTAINING PROBATE IN THE PROBATE DIVISION OF THE HIGH COURT OF JUSTICE, AND OF THE JURISDICTION AND AUTHORITY OF THAT COURT: AND THEREWITH OF THE ACTS AND LIABILITIES OF AN EXECUTOR BEFORE PROBATE.

#### SECTION I.

##### *The will must be proved in the Probate Division.*

It appears to have been a subject of much controversy, whether the probate of wills was originally a matter of exclusive ecclesiastical jurisdiction (*a*). But whatever may have been the case in earlier times, it is certain that, at the time of the passing of the Court of Probate Act (stat. 20 & 21 Vict. c. 77), the Ecclesiastical Court was the only court in which the validity of wills of personalty, or of any testamentary paper whatever relating to personalty, could be established or disputed (*b*). An exception to this general rule was to be found in the case of certain Courts Baron that had had probate of wills time out of mind, and had always continued that usage.

\*Regularly the court in which the testament of a deceased person ought to have been proved was the Court of the Ordinary of the place wherein the testator dwelt, *i. e.*, generally speaking the bishop of the diocese.

The Ecclesiastical Court was formerly the only court in which the validity of a will of personalty could be established or disputed.

In which of the Ecclesiastical Courts the will was to be proved.

But if the deceased, at the time of his death, had effects to such an amount as to be considered notable goods, usually called *bona nota-*

(*a*) Bac. Abr. Exors. (E) 1. Dyke v. Walford, 5 Moo. P. C. 434.

(*b*) Fonblanq. Treat. on Eq. Pt. 2, c. 1, s. 1, note (*a*). Bac. Abr. Exors. (E) 1. *Post*, Pt. I. Bk. V. Ch. I. Gascoyne

v. Chandler, 2 Cas. temp. Lee, 241. See *post*, Pt. I. Bk. IV. Ch. II. § IX. as to the general question, of what instruments probate is necessary.

*bilis*,<sup>1</sup> within some other diocese or peculiar (*c*) than that in which he died, then the will must have been proved before the metropolitan of the province by way of special prerogative (*d*); whence the courts where the validity of such wills was tried, and the offices where they

1. "*Bona notabilia* :—A term technically used in England only." 8 Dane Ab. 79.

In the United States there has been no such doctrine as the doctrine of *bona notabilia* as it is known in England, as observed by Dane, *supra*. As technically applied, this expression is purely English.

It is said in Massachusetts<sup>2</sup> that the courts of that state are not aware that any particular amount of property has ever been held requisite to sustain the grant of original administration in Massachusetts. The more recent statutes give jurisdiction to the probate courts in each county to grant administration on the estates of persons deceased, being inhabitants or residents in the same county at the time of their decease; or having died without the commonwealth and leaving *estate of any kind* to be administered within the same. Pinney v. McGregory, 102 Mass. 186, 189. From this it appears that even as late as the decision just quoted, it had not been requisite, in order to give jurisdiction, that there should be goods to any given amount in value. The mere fact of there being any property of a decedent within the territorial limit of the jurisdiction of the Probate Court, was held to be sufficient; and this is the prevailing doctrine throughout the United States.

In Harrington v. Brown, 5 Pick. 521, it was indeed said by the court that anything corresponding with *bona nota-*

*bilis* in England would be sufficient to give jurisdiction to the judge of probate, but the question as to whether any particular amount of property was necessary was neither discussed nor decided.

So, without regard to the value of the debt, it has been held, in Massachusetts, that a debt due to the decedent in the county where application is made for probate, is sufficient to give jurisdiction to the court of that county. Emery v. Hildreth, 2 Gray 228, 230; Picquet, Appellant, 5 Pick. 66.

In New Hampshire, it was said that if there are *bona notabilia* in each of several jurisdictions, administration must be granted in each. Taylor v. Barron, 35 N. H. 484, 494. But this expression, as used in this case, seems to be rather vaguely used, as it does not appear that there was then, or is now, anything within the statutes or practice of New Hampshire that corresponded to the *bona notabilia* of the English practice. In Vaughn v. Barret, 5 Vt. 333, 337, it was said that the jurisdiction, or right of administration, in respect to debts due a deceased person, never follows the residence of a creditor. Such debts are always *bona notabilia*, unless they happen to fall within the jurisdiction where the decedent resided. And this classification of *bona notabilia* is then made. Judgments are *bona notabilia*, where the record is; specialties where they are at the time of the creditor's decease;

(c) "Peculiars" were certain districts exempt from the jurisdiction of the Ordinary of the diocese in which they lay, and were so called because they

had a *peculiar* and special Ordinary of their own.

(d) 4 Inst. 335.

were registered, were called the Prerogative Courts and the Prerogative Offices of Canterbury and York (e).

But by stat. 20 & 21 Vict. c. 77 (entitled *An Act to amend the Law relating to Probates and Letters of Administration in England*), after reciting that "it is expedient that" 20 & 21 Vict. c. 77, s. 3.

all jurisdiction in relation to the grant and revocation of probates of Wills and letters of administration in England should be exercised in the name of her Majesty in one court," it is enacted by sect. 3, that "the voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial and other courts and persons in England, now having jurisdiction or authority to grant or revoke probate of Wills or letters of administration of the effects of deceased persons, shall, in respect of such matters, absolutely cease; and no jurisdiction or authority in relation to any matter or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall belong to or be exercised by any such court or person."

Testamentary and other jurisdictions of Ecclesiastical and other courts abolished.

And by sect. 4, "The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of Wills and letters of administration of the effects of the deceased (f) persons now vested in or which can be exercised by any court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary (g), shall belong to and be vested in her Majesty, and shall, except as hereinafter is mentioned,

S. 4. Testamentary jurisdiction to be exercised in the Queen's name by a court of probate.

simple contracts, where the decedent resides.

Negotiable notes are *bona notabilia* in the jurisdiction of the testator's domicile, when left there at the time of his death. *Goodlett v. Anderson*, 7 Lea 286. Shares of stock are such where the stock books are kept. *Arnold v. Arnold*, 62 Ga. 627.

(e) With regard to the jurisdiction and authority exercised prior to the passing of the Court of Probate Act by the Ecclesiastical Courts, see the former editions of this work: Pt. I. Bk. IV. Ch. I. § I.

(f) By the interpretation clause, sect.

2, "'Will' shall comprehend 'Testament,' and all other testamentary instruments of which probate may now be granted, and 'Administration' shall comprehend all letters of administration of the effects of deceased persons, whether with or without the Will annexed, and whether granted for general, special or limited purposes."

(g) By the interpretation clause, sect. 2, "'Matters and causes testamentary' shall comprehend all matters and causes relating to the grant and revocation of probate of Wills or of administration."

be exercised in the name of her Majesty in a court to be called the Court of Probate, and to hold its ordinary sittings, and to have its principal registry at such place or places in London and Middlesex as her Majesty in council shall from time to time appoint."

And by sect. 23, "The Court of Probate shall be a Court of Record,

S. 23. The court to have throughout all England the same powers as the Prerogative Court within the province of Canterbury.

and such Court shall have the same powers, and its grants and orders shall have the same effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants

and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary, and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court; and all duties which by statute or otherwise are imposed on or should be performed by Ordinaries generally, or on or by the said Prerogative Court, in respect of probates, administrations or matters or causes testamentary within their respective jurisdictions, shall be performed by the Court of Probate; provided that no suits for legacies, or suits for the distribution of residue, shall be entertained by \*the Court or by any Court or person whose jurisdiction as to matters and causes testamentary is hereby abolished."

Hence it appears that the exclusive jurisdiction in the probate of

Court of Probate substituted for the Ecclesiastical Courts universally.

wills and granting of administration, which formerly belonged to the Ecclesiastical Courts, was completely and universally throughout England transferred to the newly created Court of Probate (*h*).

Now by the Supreme Court of Judicature Act, 1873 [which com-

36 & 37 Vict. c. 66.

Court of Probate to form a division of High Court of Justice.

menced on Nov. 1, 1875], the existing courts therein named (of which the Court of Probate was one) were united and consolidated together as one Supreme Court of Judicature in England (sect. 3).

This Supreme Court consists of two divisions :—

(*h*) By sect. 23, all suits pending at the time of the act, in any court in England, respecting any grant of probate or administration shall be transferred to the Court of Probate (but this enactment is not to apply to the Privy Council). And by stat. 21 & 22 Vict. c. 95, s. 14, in the same way all non-contentious business also shall be deemed to

have been transferred to the Court of Probate, and all oaths and bonds sworn and executed as required by any Ecclesiastical Court in reference to such business, prior to Jan. 11, 1858 (the day when the Court of Probate Act, 1857, came into operation) shall be as effectual as if sworn or executed in pursuance of the Court of Probate Act or this act.

(1.) "Her Majesty's High Court of Justice," exercising original jurisdiction.

(2.) "Her Majesty's Court of Appeal," exercising appellate jurisdiction (sect. 4).

The "High Court of Justice" is a Superior Court of Record, and to it is transferred and in it is vested, amongst other jurisdictions, that which was vested or capable of being exercised by the Court of Probate at the commencement of the act. The jurisdiction so transferred to the High Court includes the jurisdiction which at the commencement of the act was vested in or capable of being exercised by the judge of the Court of Probate sitting in court, or chambers, or elsewhere, when acting as a judge in pursuance of any statute, law or custom, and all powers given to the Court of Probate \*or to the judge of that court by any statute, and also all ministerial powers, duties and authorities incident to any and every part of the jurisdiction so transferred (sect. 16).

Jurisdiction of Court of Probate transferred to High Court of Justice.

The jurisdiction of the Court of Probate which by the act was transferred to and vested in the High Court from and after the commencement of the act, ceased to be exercised except by the "High Court of Justice" as provided by the act (sect. 22).

The jurisdiction of the Court of Probate transferred to the "High Court of Justice" is exercised (so far as regards procedure and practice) in the manner provided by the act or by such rules and orders of court as may be made from time to time pursuant to the act, and where no special provision is contained in the act or in any such rules or orders of court with reference thereto, the jurisdiction is exercised as nearly as may be in the same manner as the same might have been exercised in the Court of Probate previously to the commencement of the act (sect. 23).

Jurisdiction of Probate Division: how exercised in procedure and practice.

The "High Court of Justice" consists of three divisions, of which one is the "Probate, Divorce, and Admiralty Division" (sect. 31; Order in Council, 16 December, 1880).

To the "Probate, Divorce, and Admiralty Division" are assigned all causes and matters which would have been within the exclusive cognizance of the Court of Probate if the act had not passed (sect. 34).<sup>2</sup>

Exclusive jurisdiction of Probate Division.

2. The Constitution of *Alabama* provides that the General Assembly shall have power to establish in each county

a court of probate, with general jurisdiction for the granting of letters testamentary. Const. Art. VI. § 9. In *Ar-*

Although all matters which prior to the passing of the Judicature Act would have been within the exclusive cognizance of the Court of Probate are assigned by that act to the Probate Division of the High Court, still inasmuch as all judges of the High Court by the powers given to them by that act have the same jurisdiction, it

*Kansas* circuit courts shall have original jurisdiction in all cases relating to the management and control of estates of deceased persons. R. S. 1874, §§ 1182, 1185. By the Code of 1885, in *California*, it is provided that the Superior Courts shall have original jurisdiction of all matters of probate. Code Civ. Pro. 1885, Pt. I. tit. I. c. IV. § 76. By constitutional provision in *Colorado*, the terms probate and probate judge, wherever occurring in the statutes of Colorado, shall, after the adoption of the Constitution, be held to signify the county courts and county judges. Const. Sched. § 9. In *Connecticut*, the statute provides that there shall be a court of probate in each probate district, before which wills must be presented for probate. G. S. 1888, §§ 430, 547. The Constitution of *Delaware* provides that there shall be an Orphans' Court in each county in that state, which shall be held by the chancellor and the associate judge residing in said county. Const. Art. VI. § 10. In *Florida*, the county judges' courts shall have jurisdiction to take probate of wills. R. S. 1891, § 1585. Under the Code of *Georgia*, courts of ordinary have authority to exercise original, exclusive and general jurisdiction of probate of wills. Code 1873, § 331. The provision in *Idaho*, is that there must be a probate court held in each of the counties of the state, which court shall have jurisdiction to open and receive proof of wills and to admit them to probate. R. S. 1887, §§ 3860, 3841. It is provided in *Illinois* that there shall be established in every county of seventy thousand in-

habitants a court to be known as the Court of Probate of such county, Stan. & Curt. Stats. p. 731, § 249; and this court has original and exclusive jurisdiction in all matters of probate, Stan. & Curt. Stats. p. 2472, § 11; except in cases where the county judge is a witness to the will, in which event, probate shall be made before the circuit court of the proper county. Stan. & Curt. Stats. p. 2469, § 5. In *Indiana*, the circuit courts of each county have exclusive, original jurisdiction in all matters of probate. R. S. 1888, § 2217. In *Iowa*, the district courts of each county shall have original and exclusive jurisdiction in all matters of probate. Code 1888, § 3509. Probate jurisdiction in *Kansas* is vested in a court to be known as the probate court, which is established in each county throughout the state. G. S. 1889, § 155. In *Kentucky*, the county court of each county is the court of probate. G. S. 1888, c. 113, § 26. In *Maine*, original jurisdiction in matters of probate is vested in the courts of probate in each county, R. S. 1883, c. 63, § 1; but the Supreme Court is also known as the Supreme Court of Probate, and has appellate powers in all matters of probate. R. S. 1883, c. 63, § 23. In *Maryland*, the Orphans' Courts have jurisdiction in all matters of probate. P. G. L. 1888, Art. 93, § 230. In *Massachusetts*, the probate courts for each county shall have jurisdiction in matters of the probate of wills. P. S. 1882, c. 156, § 2. Probate courts, in *Michigan*, have jurisdiction in matters of probate. G. S. 1882, § 5759. In *Minnesota*, it is



seems to follow that any judge, whether of the Queen's Bench or Chancery Division, may in his discretion exercise jurisdiction in any matter which is assignable to the Probate Division. But, although, according to this principle a judge in the Chancery Division has jurisdiction to grant probate of a will, it would appear for many

provided that there shall be established in each organized county of the state a probate court. Stats. 1891, § 5613. In *Mississippi*, the chancery court for each county is constituted a court of probate. Code 1892, § 1813. In *Missouri*, it is provided that the General Assembly shall establish in every county a probate court which shall have jurisdiction in all matters of probate. Constitution, 1875, Art. VI. § 34. In *Montana*, there shall be in each county a probate court, which shall have power to open and take proof of wills and admit them to probate. C. S. 1887, I. Div. §§ 706, 707. In *Nebraska*, it is provided that in each organized county there shall be a court to be known as the court of probate, which shall have exclusive jurisdiction of probate of wills. C. S. 1891, c. 20, §§ 1, 3. In *Nevada*, the district courts shall have power to open and receive proof of wills and to admit them to probate. G. S. 1885, §§ 2439, 2448. In *New Hampshire*, the probate courts of each county are courts of original jurisdiction in all probate matters. P. S. 1891, c. 182, §§ 1, 2. In *New Jersey*, the Prerogative Court and the Orphans' Courts of the various counties have jurisdiction in the matter of probate. Rev. p. 220, § 49; p. 755, § 14. In *New York*, the surrogates' courts have jurisdiction to take proof of wills and to admit the same to probate. Code Civ. Pro. § 2472. In *North Carolina*, the office of probate judge is abolished, and the duties of judge of probate shall be performed by the clerks of the superior courts. Code 1883, § 102.

In *North Dakota*, the probate court has jurisdiction to open and receive proof of wills and to admit them to probate. P. C. Tit. 1, c. 1, § 1. In *Ohio*, there is established in each county a probate court to have exclusive jurisdiction to take proof of wills. P. S. 1892, §§ 523, 524. In *Oregon*, the county court has jurisdiction in the first instance to take proof of wills. Hill's Laws, § 895. The Constitution of *Pennsylvania* provides that in all counties of one hundred thousand or more inhabitants, a separate Orphans' Court shall be, and in any other counties may be, established for matters of probate. Const. Art. V. § 22. The law in *Rhode Island* provides that the town councils shall be courts of probate in the respective towns, and that the Municipal Court of Providence shall be the Court of Probate for Providence. P. S. 1882, c. 179, §§ 1, 2. In *South Carolina*, a court of probate is established in each of the counties of the state, Code Civ. Pro. § 34; and every judge of probate shall have jurisdiction in all matters testamentary. Code Civ. Pro. § 37. The provisions for probate courts in *South Dakota* are the same as those in *North Dakota*, *ubi supra*. In *Tennessee*, the county courts have original jurisdiction in the matter of proof of wills. Code 1884, § 4980. In *Texas*, it is provided that the county courts shall have original jurisdiction as probate courts, Sayles Civ. Stats. § 1789; but it is also provided that the district courts shall have appellate jurisdiction and general control over the county courts in probate matters. Sayles Civ. Stats. § 1790. In *Vermont*, there

reasons to be so inconvenient that any judge \*except a judge in the Probate Division should grant probate, that the judge in the Chancery Division, if requested to exercise such jurisdiction, would use a sound discretion in refusing to do so, and in directing the parties to obtain probate in the division to which such matters have been assigned. This view that the Chancery Division has jurisdiction, if it thinks fit to exercise it, was adopted by Sir George Jessel, M. R., in the case of *Pinney v. Hunt* (*i*), and followed by Pearson, J., in *Bradford v. Young* (*k*). On the other hand, in the case of *Priestman v. Thomas* (*l*), Sir James Hannen in his judgment is reported to have said: "It is further contended that the plaintiff, if entitled to have the probate of the Will revoked, ought to have claimed it in the action in the Chancery Division. But I am of opinion that he could not properly have done so, as the granting or revoking of probates was within the exclusive cognizance of the Court of Probate, and is therefore now assigned to this Division." And this view seems to have met with the approval of Cotton, L. J., who in his judgment in the same case when before the Court of Appeal (*m*) said, that "The object sought by that action (to wit, a revocation of probate) was not within the jurisdiction of the Chancery Division."

It is to be observed that section 11 of the Judicature Act, 1875, 33 & 39 Vict. c. 77, s. II. which gives a person, commencing any action or matter in the high court, liberty, (subject to the rules of

is established a probate court in each district, which shall have jurisdiction over the probate of wills. R. L. 1880, §§ 2015-2018. In *Virginia*, jurisdiction as to the probate of wills is conferred upon the circuit, county and corporation courts. Code 1887, § 2533. Original jurisdiction in all matters of probate of wills, in *Washington*, is conferred upon the superior courts in the respective counties. Code of Pro. §§ 10, 11. In *West Virginia*, the code provides that the county courts shall have power and jurisdiction to hear proof of, and admit wills to probate. Code 1891, c. 77, § 22. The statutes of *Wisconsin* provide that the jurisdiction of the county courts shall extend to the probate of wills. Stats. 1889, § 2443. It is provided by the statutes of *Wyo-*

*ming* that a judge of probate shall be elected in each county, who is to keep a probate office at the county seat. R. S. 1887, §§ 1083, 1901.

In *Missouri*, circuit courts have appellate jurisdiction from decrees of the probate courts. *Purdy v. Gault*, 19 Mo. App. 191.

And in *Michigan*, circuit courts have no original jurisdiction in matters of this nature. *Patrick v. Howard*, 47 Mich. 40.

Chancery has no power to take administration out of the probate court. *Reinhardt v. Gartrell*, 33 Ark. 727.

(*i*) 6 C. D. 98.

(*k*) 26 C. D. 656.

(*l*) 9 P. D. 70, 210.

(*m*) 9 P. D. 210, 214.

court and the provisions in the Judicature Acts, and to the power of transfer) to assign the action to one of the divisions of the High Court "as he may think fit," goes on to provide that if he assign the action to a division to which, according to the rules of court or the provisions of the acts, it ought not to be assigned to, a judge of such division, even though application is made to him to direct a transfer of the action or matter to the division to which it ought to have been assigned, may retain the \*same, if he think it expedient so to do, in the division in which it was commenced. The section further provides that (subject to the rules of court) a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division, unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if the Judicature Act had not been passed. It will be noticed that the section is silent as to the converse proposition, *viz.*, the commencing, in a division other than the Probate Division, of an action or matter which, before the Judicature Acts, would have been commenced in the Court of Probate, and in that court alone; and it may reasonably be inferred that the act advisedly left open such a course of procedure, while specifically forbidding a person to commence an action or cause in the Probate Division, of such a nature as would not have come within the exclusive jurisdiction of the Court of Probate in former days.<sup>3</sup>

3. In *Alabama*, if the testator is an inhabitant at the time of his death, the probate of his will must be obtained in the county where he resided; if not a resident, then in a county where the testator died, leaving assets, or in a county where he left any assets, in case he did not die in that county; or if he left no assets in any county at the time of his death, then in any county into which assets came after his death. Code 1886, § 1976. In *Arkansas*, wills shall be proved before, and admitted to probate by, the court of probate of the county of the testator's residence; if the testator be a non-resident, and land is devised by the will, then in the county where the land devised, or the greater part of it, is situate; or if no

land is devised, then in the county where he died, or that wherein his estate, or the greater part of it, lies, or where any debt or demand is owing to him. Dig. 1884, § 6508. In *California*, the statutory provision is that the will shall be proved in the county of which the decedent was a resident at the time of his death, in whatever place he may have died; if he be a non-resident, in the county where he may have died, leaving estates therein; in case he died out of the state and was a non-resident thereof at the time of his death, in a county in which any part of his estate may be; if a non-resident, in any county in which any part of his estate may be, he not leaving any estate in the county in which he died; in all other

The executor cannot rely on his

The practical consequence is, that an executor cannot assert or rely on his right in any court

cases, in the county in which application is first made. 3 Deering's Codes and Stats. 1885, § 1294. The provision for probate, in *Colorado*, is that the will shall be probated in the county of the testator's residence; if he had no residence in the state, then in the county where he had lands; if he had no lands, then in the county where his death occurred, or the greater amount of his estate may be. Mill's Ann. Stats. 1891, § 4664. In *Connecticut*, the probate is to be made in the court of probate of the district where the testator last dwelt. G. S. 1888, § 547. In *Delaware*, the will shall be proved before the registrar of the county in which the testator resided at the time of his death; if he did not reside in the state, then before the registrar of any county, wherein are goods, chattels, rights or credits, lands or tenements of the testator. R. L. 1874, c. 89, § 1. In *Florida*, if the testator be a resident, the probate must be in the county where he had his residence or place of abode, if he had none such in the county where he died. R. S. 1891, § 1899. If he were a non-resident of the state, the probate must be, if he possessed at the time of his death any goods, chattels, or lands in the state, in any county in which any part of them may be; if he was possessed of no such property, but there were debts due him in the state, then in any county where such debts are due. R. S. 1891, § 1900. In *Georgia*, the Court of Ordinary has exclusive jurisdiction of probate of wills. Residence at the time of the death gives jurisdiction to the Ordinary of the county of residence. If the testator died out of the county of his residence, and a witness resided in the county where he died, the Ordinary of that

county may take proof in common form and transmit it to the Ordinary of the county of residence, who may thereupon admit it in common form there. Code 1882, § 2421. The provisions of the statute in *Idaho* are identical with the provisions of the California statute *supra*. R. S. 1887, §§ 5290, 5291. In *Illinois*, probate shall be obtained in the court of the county of the testator's residence, but in case he had no residence in the state, in the county where he had lands, or having no lands, then in the county where his death occurred or the greater amount of his estate may be. Stan. & Curt. Stats. p. 2472, § 11. In *Indiana*, probate must be obtained in the probate court of the county, where the testator, if an inhabitant of the state, resided immediately preceding his death; if he be a non-resident of the state, then in the county where he dies, leaving assets; or, if a non-resident, he dies without the state, then in the county where he leaves any assets, or leaving no assets, in any county into which any assets shall come after his death. R. S. 1888, § 2217. In *Kansas*, the provision of statute is simply that probate shall be made in the court of the county in which the decedent was a resident at the time of his death. G. S. 1889, § 2785. Probate in *Kentucky* must be obtained in the county court of the testator's residence; if he be a non-resident, and land is devised, then in the county where the land or a part thereof lies; if no land is devised, then in the county where he died, or that wherein his estate or a part thereof shall be, or where there is a debt or demand owing to him. G. S. 1888, c. 113, § 26. The statutory provision in *Maine* is that the wills of residents shall be probated by the probate court of the county of

without showing that he has previously established it in the Probate Division: the usual proof of title in any court without the pro-

residence, or if the testator be a non-resident, in the county where he died leaving assets to be administered on, or the county where estate of the testator is afterward found. R. S. 1883, c. 63, § 6. In *Maryland*, any will may be proved in any county or in Baltimore City. P. G. L. 1888, Art. 93, § 326. In *Massachusetts*, the will is to be admitted to probate in the county in which persons who, at the time of their decease, were residents or inhabitants, had their residence, and if persons die without the commonwealth, leaving estate to be administered in the commonwealth, in the county in which such estate is located. P. S. 1882, c. 156, § 21. In *Michigan*, the will is to be admitted in the county where the testator was resident at the time of his decease, or in the county where a decedent dying without the state leaves property to be administered. G. S. 1882, § 6759. In *Minnesota*, wills must be proved in the county where the testator was resident at the time of his death; if a non-resident, in the county where he may have died leaving estate therein; or if he died out of the state, being a non-resident, in the county in which any part of the estate was situate at the time of his death, or into which any estate shall thereafter come; or if he be a non-resident and he left no estate in the county in which he died, probate may be had in any county in which any part of the estate may be; in all other cases, in the county where application is first made. Stats. 1891, § 5615. In *Mississippi*, a will must be proved before the chancery court of the county in which the testator had a fixed place of residence. If he had no fixed place of residence and lands are devised, it must be proved before the court of the county

where the land, or some portion thereof, is situate; if he left only personal property and had no fixed place of abode in the state, the will may be proved before the court of the county where the testator died, or where some part of the property may be. Code 1892, § 1813. In *Missouri*, the proof of a will must be made in the county in which the mansion house or place of abode of the testator is situate, and in case he had no mansion house or place of abode, and had lands, then in the county where the lands, or the greater portion of them, are situate; if he leave only personal property, probate must be had in the county where he died, or the greater part of his estate may be; if a non-resident, and he died out of the state and left no lands, or mansion house, or place of abode, probate may be made in any county. R. S. 1889, c. 1, § 4. In *Montana*, probate is to be had in the county in which the testator was resident at the time of his death, wherever he may have died; but if he were a non-resident, then in the county where he may have died leaving estate therein; or, if a non-resident, and he died without the state, in the county in which any part of his estate may be; or, in case he have no residence within the state, and leave no estate in the county where he died, then in the county where there is any estate. In all other cases probate may be had in the county where the first application is made. C. S. 1887, II. Div. § 6. In *Nebraska*, probate is to be had in the county of the residence of the testator. C. S. 1891, c. 23, §§ 133, 134. In *Nevada*, wills are to be proved in the county of the residence, or, if the testator is not a resident, in the county where he died leaving property; or if, being a non-resident, he died without

duction of the which is, the production of a copy of the will by  
 probate. which he is appointed, certified under the seal of the

the state, in the county where any part of his estate may be, he having died in any other county; or in any county in which any part of his estate may be, he not being a resident and not leaving estate in the county where he died. In all other cases, in the county where application is first made. G. S. 1885, § 2668. In *New Hampshire*, probate shall belong to the judge of probate for the county in which the testator was last an inhabitant, but if he was a non-resident, to the judge of the county in which the testator had any estate. P. S. 1891, c. 182, § 8. In *New Jersey*, wills must be proved before the surrogate (who is clerk of the Orphans' Court) of the county where the deceased resided at the time of his death. Rev. p. 755, § 15; or before the Ordinary in the Prerogative Court for the will of any person dying within the state. Rev. p. 220, §§ 49, 50. In *New York*, a will must be proved before the surrogate's court of the county where the decedent was at the time of his death a resident, whether his death happened there or elsewhere; if a non-resident, in the county wherein he died, leaving personal property within the state, or leaving personal property which has, since his death, come into the state and remains unadministered; in case of a non-resident who dies without the state, in a county where he left personal property, or in a county where personal property has come since his death; and in case where the decedent was not at the time of his death a resident of the state, and no petition for probate has been filed in any surrogate's court, then in a county in which any real estate of the decedent to which the will relates is situate. Code Civ. Pro. § 2476. The provisions for the probate of

wills in *North Dakota* are exactly similar to the probate of wills in Nevada, *supra*. P. C. Tit. 1, c. 1, § 7. It is provided by the Revised Statutes of *Ohio*, that upon the decease of any inhabitant of Ohio, letters testamentary shall issue from the probate court of the county of which he was a resident at the time of his death. R. S. 1892, § 5994. In *Oregon*, the statute provides that wills shall be probated in the county of the residence of the testator, wherever he may have died; or if a non-resident, in the county where he died leaving assets therein, or in any county where there are assets, if a non-resident, and he died without the state, or in any county where assets may afterward have come; in case real estate is devised, in the county where such real estate is situate, and if there is no real estate, then in the county which has first gained jurisdiction. Hill's Laws, § 1083. The statute of *Pennsylvania* requires that letters shall be granted only by the register of the county (who is *ex-officio* the clerk of the Orphans' Court) within which was the principal residence of the decedent, or where his family was at the time of his decease; and if he had no such residence in the commonwealth at the time of his death, then by the register of the county where the principal part of his goods and estate was at the time of his death. Brightley's *Purd. Dig.* 11th ed. p. 509, § 13. The court of probate of the town in *Rhode Island* may and shall take proof of wills in the case of deceased persons who, at the time of death, were residents of such town, and of those persons who have no residence in said town, but die without the state, leaving assets to be administered in said town. P. S. ●

court.<sup>4</sup> This is usually called the probate, or the letters testamentary. In other words, nothing but the probate, The Probate.

4. If the facts are sufficient to support the jurisdiction, even if not brought to the notice of the judge of probate, the grant of administration is conclusive. *Pinney v. McGregory*, 102 Mass. 186, 189; *Harrington v. Brown*, 5 Pick. 519; *Emery v. Hildreth*, 2 Gray 228; *Decker v. Decker*, 74 Me. 465. But if the facts necessary to give jurisdiction did not exist, the grant of administration is wholly void. *Pinney v. McGregory*, *ubi supra*; *Crosby v. Leavitt*, 4 Allen 410; and see *American* note, p.\*486, *infra*. But the court may at any time discontinue proceed-

ings, if it appear that it is without jurisdiction. *Estate of Milliken*, Myrick's Prob. 88.

The averment of the petition, that the decedent had goods, within the jurisdiction, to be administered, implies that he had at least the amount of goods required to give jurisdiction. *Danby v. Dawes*, 81 Me. 30.

As the probate court has general jurisdiction in grant of letters, all jurisdictional facts will be presumed, though not appearing on the record. *Burke v. Mutch*, 66 Ala. 568; *Acklen v. Goodman*, 77 Id. 521; *Lee v. Templeton*,

1882, c. 179, § 3. The statute of *South Carolina* provides that probate shall belong to the judge of probate for the county in which the decedent was last an inhabitant; but if a non-resident, to the judge of probate in any county in which the greater part of his estate may be. Code Civ. Pro. § 39. In *Tennessee*, a will shall be probated in the county where the testator had his usual place of residence at the time of his death, or, if he had an established place of residence in more than one county, in either or any of said counties. Code 1884, § 3010. The provisions for probate of wills in *South Dakota* are the same as those in *North Dakota*, *ubi supra*. In *Texas*, wills must be proved in the county of residence, if the testator had a fixed place of abode; if he had no domicil, or fixed place of abode, then in the county where he died or where his principal property was at the time of his death; if he had no domicil and died without the state, then in the county where his nearest kin may reside; if he had no kindred, then in the county where the principal estate was at the time of his

death. Sayles Civ. Stats. § 1792. In *Vermont*, if the testator is an inhabitant of the state, his will shall be proved, and his estate settled in the probate court of the district in which he resided at the time of his death; but if he resided out of the state at the time of his death, his will shall be proved in the probate court of any district in which he had estate. R. L. 1880, §§ 2019, 2020. The provision for probate of wills in *Virginia*, is that they shall be proved in the county or corporation wherein the decedent had his mansion house or place of residence; if he had no such house or place of residence, then in the county or corporation where any real estate lies that is devised by the will, or was owned by the decedent; and if no such real estate, then in the county or corporation where he died, or a county or corporation where he has estate. Code 1887, § 2533. Under the Code of Procedure, in *Washington*, wills must be proved in the superior court of the county of which the deceased was a resident, or had his place of abode at the time of his death; or in the county where any

(or letters of administration with the will annexed, when no executor is therein appointed, or the appointment of executor fails), or other

73 Ind. 315; *Master's Ex'cr. v. Bienker*, 87 Ky. 1.

But the court alone can grant probate; it cannot be granted by a clerk or a judge. *Smith v. Estes*, 72 Mo. 310.

But it seems that the actual production of the paper before the surrogate is not essential to the exercise of his jurisdiction to grant or refuse probate. *Matter of Delaplaine*, 45 Hun 225.

In Alabama, a judge of probate who is a creditor of the estate is thereby disqualified as to the entire administration of the estate. *Thornton v. Moore*, 61 Ala. 347. And the same rule prevails in Massachusetts, even in a case where he does not intend to enforce his demand. *Sigourney v. Sibley*, 21 Pick. 101; *Gay v. Minot*, 3 Cush. 352; see also *Hall v. Thayer*, 105 Mass. 219. Formerly the amount of such claim was immaterial, but it was enacted (G. S. c. 119, § 4) that there should be no disqualification unless the claim, exclusive of interest, should exceed \$100.

estate may be, he having died out of the state, and not being resident thereof at the time of his death. Code of Pro. § 851. In *West Virginia*, the Code provides that wills shall be admitted to probate in the county where the mansion house or known place of residence of the testator was, at the time of his death; if he had none, then in the county where any real estate devised is situate; if there is no mansion house, and no real estate devised, then in the county where the testator died, or in a county where he had property at the time of his death; or if he be a non-resident of the state and died without the state, in any county where there is property devised or bequeathed. Code 1891, c. 77, § 22. In *Wisconsin*, wills

*Id.* And the disqualification exists if he be a creditor merely in his capacity of executor of another estate. *Bacon, Appellant*, 7 Gray 391. But the interest must be a legal or beneficiary interest, and not a mere general interest in property of the town in which he lives. *Northampton v. Smith*, 11 Met. 390. But a surrogate is not disqualified from sitting at the probate of a will because he is one of the wardens of a church, to "the rector and churchwardens" of which church a legacy is left by the will. *Hopkins v. Lane*, 6 Dem. 12.

And where the judge has written the will he is disqualified to sit upon the probate. *Moses v. Julian*, 45 N. H. 52. However, upon appeal, the will may be proved in the court above. *Id.* But a will so written and executed is not void. *Id.*

But, in New York, a surrogate is not disqualified on account of having been attorney for the testator, nor under the

must be probated in the county of which the testator was an inhabitant at the time of his death. The will of a testator dying without the state, having property to be administered in any county within the state, shall be admitted to probate in the county where such property is to be administered upon. Stats. 1889, § 2443. In *Wyoming*, the statutes provide that a will shall be probated in the county in which the mansion house or place of abode of the testator is situate; if he have no mansion house or place of abode, then in the county where he had lands; and in case he had neither mansion house, nor place of abode, nor lands, then in the county where he died, or the greater part of his estate



proof tantamount thereto of the admission of the will in the Probate Division is legal evidence of the will in any question respect-

Code (§ 2496) because he may be called as a witness by the contestant. *Kirk v. Weiant*, 30 Hun 475.

If the county judge is disqualified, for any reason, in Texas, the administration may be removed from the probate court to the district court. *Burks v. Bennett*, 55 Tex. 237.

But the fact that the father-in-law of the judge is a creditor of the estate will not disqualify the judge, if such creditor is not a party to the proceeding before him. *Aldrich*, Appellant, 110 Mass. 189. And a judge who has a demand against the estate of a decedent, is so interested, within the meaning of Stat. 1817, c. 190, § 5, as to be barred of jurisdiction, unless he relinquish such demand. *Cottle*, Appellant, 5 Pick. 483. And a judge of probate, in Massachusetts, is disqualified from appointing his wife's brother, *Hall v. Thayer*, 105 Mass. 219; and where a judge of probate

has been temporary administrator, and has not yet closed his accounts as such, *Burks v. Bennett*, 55 Tex. 240; and one who is executor of the will is disqualified. *Prendergass v. Beale*, 59 Id. 446.

But a surrogate is not disqualified because his wife is a witness to, and legatee under, the will. *Hopkins v. Lane*, 6 Dem. 12.

But in Maine, where the deceased husband of the testatrix was an uncle of the judge of probate, it was held that he was legally competent to appoint an administrator *cum testamento annexo*, the relationship not being such as to render the appointment void. *Russell v. Belcher*, 76 Me. 501. Nor is the authority of such judge, under the statute of Maine, to take proof of a will, affected by the fact that his aunt by marriage is a legatee. *Mars-ton et als. Petitioners*, 79 Me. 25.

In South Carolina, an Ordinary had jurisdiction to admit to probate a will,

may be; in other cases, in the county to the court of which application shall be first made. R. S. § 1984.

The probate court has no jurisdiction, in Kansas, to issue letters of administration on the estate of an intestate who is not an inhabitant or resident of the state at the time of his death, and who leaves no estate within the state, and has none come into the state after his death. *Perry v. St. Joseph & Western R. R. Co.*, 29 Kans. 420.

The Supreme Court of the District of Columbia, in special term, sitting as an orphans' court, has all the jurisdiction of the Orphans' Court, anterior to the Revised Statutes. *Estate of McIntire*, 5 Mackey 293.

In New Jersey, the Prerogative Court

has original, as well as appellate, jurisdiction in matters of probate and administration. *Perrine v. Applegate*, 1 McCart. 531; *Morris v. Morris*, 1 Harr. 527.

In New Jersey, the Orphans' Court can try the right of administration, after the grant by the surrogate. *Morris v. Morris*, 1 Harr. 527; *Lumpkins v. Gibbes*, Id. 529.

The jurisdiction of administration of a non-resident is in the first county granting it, if there be assets in such county. *Arnold v. Arnold*, 62 Ga. 627.

The exclusive jurisdiction of probate of wills and granting of administration, in Georgia, is in the Courts of ordinary. *Sperber v. Balster*, 66 Ga. 317; *Maybin v. Knighton*, 67 Id. 103.

ing personalty (n). The will of a deceased sovereign of the realm is no exception to this rule, \*notwithstanding (as it has already

disposing of both real and personal estate, prior to the passage of the act of 1858, by which act, the probate of a will was for the first time made evidence as to devises of realty. *Rumph v. Hiott*, 15 S. E. 235.

The jurisdiction of probate courts, in respect to the settlement and distribution of estates, necessarily includes the power, in the first instance, to construe the will of the person whose estate is being administered upon. *Brown v. Stark*, 47 Mo. App. 370.

In New Jersey, the Ordinary will assume jurisdiction upon application for the probate of a paper purporting to be a will of a decedent, where a caveat against the admission of such paper had been filed with the surrogate, and, subsequently, application was made to him for its admission to probate, but before a citation had issued and the Orphans' Court had taken action, such caveat was withdrawn. *Fisher's Will*, 24 Atl. 1019.

But the mere withdrawal of the caveat will not restore the jurisdiction of the surrogate. *Slocum v. Grandin*, 11 Stew. (N. J.) 485; 13 Id. 342.

The residence of a party at the time of his death, and not the situation of his estate, is the test of probate jurisdiction in California, but where, after the death of the testator, that part of the county in which the testator resided is set off into a new county, the court of the old county will retain jurisdiction of the administration. *Estate of Harlan*, 24 Cal. 182. However, it is said in Georgia that where

a part of a county is cut off and made another county, the testator residing in the part cut off, that will not *per se* deprive the original county of jurisdiction, nor will it, of necessity, transfer the case to the new county. The right to transfer such a case is a personal privilege, that can be availed of by any party interested in the case. Therefore, if no party in interest applies for a transfer, it is proper to allow the original court to remain undisturbed in its jurisdiction. *Knight v. Knight*, 27 Ga. 633.

Under the act of 1840, in Texas, mere temporary residence in any county did not give the court of that county exclusive jurisdiction upon the estate of a decedent; the residence must have been a fixed domicil. *George v. Watson*, 19 Tex. 354. In Mississippi, in order to justify the probate court of any particular county in granting administration of the estate of a deceased person, it must appear that the deceased, at the time of his death, had a mansion house there, or a known place of residence, otherwise that his estate, or the greater part of it, is in that county. *Cocke v. Evans*, 29 Miss. 127. But under Code 1857, p. 438, Art. 61, it may be granted in the county where the greater part of his personal property is, although he have a domicil in another county. *Weaver v. Norwood*, 59 Id. 665. So too, in Georgia, the court of the county of residence has jurisdiction, *McBain v. Winship*, 27 Ga. 259; and in Alabama, *Masterson v. Pullen*, 62

(n) If a will be made in a foreign country, and proved there, disposing of goods in England, the executor cannot have action on such probate, but ought

to prove the will here: *Lee v. Moore*. Palm. 165. *Tourton v. Flower*, 3 P. Wms. 370. See *post*, Pt. I. Bk. IV. Ch. II. § VI.

appeared (o) no probate of such a will can be granted by the court (p).

Ala. 145; so also, in Colorado, (G. S. § 2830). *Liddicoot v. Treglown*, 6 Col. 47; *Corrigan v. Jones*, 14 Id. 311.

And when letters are granted in a county where the decedent never had his residence they are void, *Collins v. Turner*, Taylor N. C. T. R. 105; *People's Savings Bank v. Wilcox*, 15 R. I. 258; and such letters being a nullity, a petition to set them aside will be dismissed. *Collins v. Turner, ubi supra*. And if the probate court has no jurisdiction to issue letters, its acts in so doing are void for all purposes. *Perry v. St. Joseph & Western R. R. Co.*, 29 Kans. 42. A surrogate cannot, even with the consent of all parties in interest, admit to probate the will of a citizen of the state not a resident of his county. *Matter of Zerega*, 58 Hun 505.

The authority to grant administration upon the estate of a deceased intestate, who was, at his death, an inhabitant of the commonwealth is vested exclusively in the judge of probate of the county where such deceased person dwelt at the time of his death, and the doings of any other judge of probate in such estate are void. *Cutts v. Haskins*, 9 Mass. 543.

It appears that one who is *non compos mentis* cannot change his domicile. So where one who was *non compos mentis*, at the death of her father removed from the county of M. to the county of S., and the Probate Court of the county of S., upon her death, granted administration upon her estate, it was held that her domicile was in the county of M., and that the letters so granted

were void. *Holyoke v. Haskins*, 5 Pick. 20.

And in a case where one had a summer residence in the county of S. and a winter residence in the county of M., it was held that the county of M. had jurisdiction; but the query was also raised, whether the other court had not jurisdiction as well. *Harvard College v. Gore*, 5 Pick. 370, 379. Acquiescence in a grant which was originally void cannot give validity to the grant: and the length of time of such acquiescence does not change this effect. *Holyoke v. Haskins*, Id. 20. Where a citizen and resident of France dies there intestate, leaving estates in Alabama, consisting of land only, administration on the estate is grantable by the probate court of the county where the lands are situate. *Bishop v. Lalouette*, 67 Ala. 197. A private act of the legislature removing the administration of a decedent's estate from the county of his residence at death to another county, violates no constitutional provision. *Wright v. Ware*, 50 Ala. 549.

The word "residence," used in the Pennsylvania statute relating to the granting of letters testamentary, in the matter of the testator's residence, is equivalent to "domicil." *Lewis's Estate*, 10 Pa. Co. Ct. 331.

In Oregon, the assumption and exercise by a county court of jurisdiction to appoint an administrator upon the necessary jurisdictional facts appearing of record is conclusive of the lack of jurisdiction of any other county court to make such appointment, and of the invalidity of such appointment if

(o) *Ante*, p. \*11.

(p) *Ryves v. Duke of Wellington*, 9 Beav. 579.

The probate is, however, merely operative as the authenticated evidence,<sup>5</sup> and not at all as the foundation, of the executor's title : for he derives all his interest from the will itself, and the property of the deceased vests in him

An executor derives his title from the will and not the probate :

made. *Oh Chow v. Brockway*, 28 Pac. 384.

It is for the register to determine where the principal part of the estate is situate, and he need not preserve the evidence upon which he founded his determination. *Shoenberger's Estate*, 139 Pa. St. 132.

The records of a probate court when introduced in evidence make a *prima facie* case showing that decedent died "leaving an estate of personal articles" within the jurisdiction. *Union Pacific Railway Co. v. Dundon*, 37 Kans. 1.

It was held that letters granted, by a probate court, in Alabama, during the late war, were of no validity after reconstruction, *Bibb v. Avery*, 45 Ala. 691 ; but that doctrine has been overruled and the authority of the *inter-bellum* courts established. *Nelson v. Boynton*, 54 Id. 368. Therefore new letters taken out after the war are a nullity. Id.

Where a citizen and resident of one state dies at his home in that state, owning property in a foreign state, and administration is taken out upon his estate in that foreign state, the courts of the state of his residence will refuse to authorize the administrator to act in that state, on the ground that the court of his domicil should have been the original court of probate, and that the acts of the court of probate in the foreign state cannot be recognized by the domestic probate court. *McAnulty v. McClay*, 16 Neb. 418.

5. Probate is simply a method of proving title in the legatees or devisees, and failure to probate a will will not preclude them from disposing of their interest in the estate. *Walton v. Am-*

*bler*, 29 Neb. 643 ; *March v. Huyter*, 50 Tex. 243.

There may be a partial probate of a will, as where certain property of which it disposes is properly subject to it, while other property of which it assumes to dispose is not. *Ogden v. Greenleaf*, 143 Mass. 349, 353 ; *Deane v. Littlefield*, 1 Pick. 239 ; *Holman v. Perry*, 4 Met. 492.

The statutes have prescribed certain requisites for the probate of wills. Courts cannot add conditions thereto. When the statute has been complied with, the will must be admitted. *Doran v. Mullen*, 78 Ill. 342.

An unprobated will is not available as evidence, *Ochoa v. Muller*, 59 Tex. 460 ; *Pitts v. Melser*, 72 Ind. 469 ; *Wilson v. Van Leer*, 103 Pa. St. 600 ; *Lagow v. Glover*, 77 Tex. 448 ; however, it may be used to show the good faith of a purchaser from a devisee. *Ochoa v. Muller*, *ubi supra*.

Courts will not take cognizance of testamentary papers, until properly probated. *Wood v. Mathews*, 53 Ala. 1.

Nor can rights under a testamentary paper be asserted, either at law or in equity, until it has been admitted to probate, *Trawick v. Davis*, 85 Ala. 342 ; *Pitts v. Melser*, *ubi supra* ; *Rogers v. Rogers*, 78 Ga. 688 ; nor until then can it be recognized in any forum. *Kinnebrew v. Kinnebrew*, 35 Ala. 628.

And an unprobated will is not admissible as evidence of a title to real estate. *Pettit v. Black*, 13 Neb. 142 ; *Fallon v. Chidester*, 46 Iowa 588. But partition before probate is valid and effectual, though subsequent probate is

from the moment of the testator's death (*q*). Hence the probate, when produced, is said to have relation to the time of the testator's death (*r*).<sup>6</sup>

relation of the probate to the testator's death.

It should further be observed that a court of equity considers an executor as trustee for the legatees in respect to their legacies, and, in certain cases, as trustee for the next of kin of the undisposed-of surplus: and as all trusts are the peculiar objects of equitable cognizance, courts of equity will compel the executor to perform these his testamentary trusts with propriety. Hence, although in those courts, as well in courts of law, the seal of the Court of Probate is conclusive evidence of the *factum* of a will (*s*), an equitable jurisdiction has arisen *construing* the will, in order to enforce a proper performance of the trusts of the executor. The courts of equity are consequently sometimes called courts of construction, in contradistinction to the Court of Probate.<sup>7</sup>

Courts of equity are courts of construction of wills:

indispensable to show title. *Doe ex dem Pope v. Pickett*, 65 Ala. 487. Nor will a deed from a devisee under a foreign will, not probated in the jurisdiction where the land is situate, give title. *Turner v. McDonald*, 76 Cal. 177.

And where probate is required by statute, it is as indispensable as evidence to the force of a devise as a bequest. *Goodman v. Winter*, 64 Ala. 410.

But probate is necessary before a will can be offered in evidence *as a revocation only*. *Ante*, p. 230, note 53, and cases there cited.

(*q*) *Smith v. Miles*, 1 T. R. 475, 480.

(*r*) *Went. Off. Ex.* 115, 14th edition. *Whitehead v. Taylor*, 10 A. & E. 210. *Ingle v. Richards*, 28 Beav. 366.

6. The title of a devisee vests at the death of the testator; and a division before probate vests in severalty. However, the probate is indispensable as evidence of title. *Goodman v. Winter*, 64 Ala. 410. And where a conveyance is made, by a devisee, before probate, a subsequent probate would

give vitality to such conveyance, except as against an innocent purchaser from the heir. *March v. Huyter*, 50 Tex. 243.

And when properly probated, the will is operative from the date of the death of the testator. *Pitts v. Melser*, 72 Ind. 469; *Sutphen v. Ellis*, 35 Mich. 446; *Richards v. Pierce*, 44 Id. 444. And upon probate, the title of the beneficiary relates back so as to make valid whatever had been previously done, which under the will, after probate, the beneficiary lawfully could have done. *Sutphen v. Ellis*, *ubi supra*.

(*s*) See *post*, Pt. I. Bk. VI. Ch. I.

7. The will of a *feme covert* having been duly admitted to probate, in a court of probate, and having thus been established as a testamentary paper, a court of equity will construe the will, as to whether the will is an instrument by which a *feme covert* can dispose of her property, *i. e.*, the course is for the Court of Probate to pronounce for the will on proof of the *factum*, and leave it to the Court of Equity to determine whether she had

It should be observed, that as long as the ecclesiastical courts had the exclusive testamentary jurisdiction, they were also courts of construction as well as courts of probate, because suits for legacies might have been brought therein. Indeed, the cognizance of legacies in former times belonged exclusively to the ecclesiastical jurisdiction; for the Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees (t). \*But the Court of Probate was not a court of construction; for, as it has already appeared (u), the 23rd section of the act by which it was created expressly prohibited it from entertaining any such suit.<sup>8</sup> The same observations would seem to apply to the Probate Division of the High Court of Justice, for by sect. 34 of the Judicature Act, 1873, all causes and matters which would have been within the exclusive cognizance of the Court of Probate are assigned to the Probate Division of the High Court, and by the same section all causes and matters "for the administration of the estates of deceased persons," and for "the execution of

such an interest or authority as she could dispose of, or execute, by will. *Whitfield v. Hurst*, 3 Ired. Eq. 242.

But the Court of Chancery cannot take cognizance of matters pertaining to the estates of deceased persons except upon some equitable ground. *Mock v. Pleasants*, 34 Ark. 63. Therefore that court will not interfere to correct appealable errors, nor irregularities without injustice, nor after long lapse of time, *Dyer v. Jacoway*, 42 Ark. 186; *Hankins v. Layne*, 48 Id. 544; even by consent, *McLeod v. Griffiths*, 45 Id. 505; but it will to correct fraud directly proved or inferred. *Dyer v. Jacoway*, *ubi supra*; *Hankins v. Layne*, *ubi supra*. But the jurisdiction of chancery ceases with the disposal of the special matter, and administration should then be remanded to the probate court. *Hankins v. Layne*, *ubi supra*. But a court of chancery should not ex-

ercise its jurisdiction in the matter of the construction of a will, where there is no special reason, further than to obtain its opinion. *Siddall v. Harrison*, 73 Cal. 560. On the other hand, a probate court may not administer equities, except as directly involved. *Hewitt's Appeal*, 53 Conn. 24.

(t) *Deeks v. Strutt*, 5 T. R. 690, 692.

(u) *Ante*, pp. \*238, \*239.

8. But the Probate Court has jurisdiction as a court of construction, so far as to determine who are the distributees, and what are their interests. *Estate of Crook*, *Myrick Prob.* 247; *Re York*, 1 How. Pr. N. S. 16; *Hill v. Bloom*, 14 Stew. (N. J.) 276; *Matter of Verplanck*, 27 Hun 609; *Danser v. Jeremiah*, 3 Redf. 130; *Byrne v. Hume*, 86 Mich. 546; *Curran v. Sears*, 2 Redf. 526; *Fowler v. Lockwood*, 3 Id. 465.

trusts charitable or private" are assigned to the Chancery Division of the High Court.

And by sect. 11 (sub-s. 3) of the Judicature Act of 1875, it was enacted that, subject to rules of court, a person com-  
 mencing any cause or matter shall not assign the same  
 to the Probate Division, unless he would have been entitled to com-  
 mence the same in the Court of Probate.

By section 24 of the Court of Probate Act, "The Court of Probate may require the attendance of any party in person, or  
 of any person whom it may think fit to examine or cause  
 to be examined in any suit or other proceeding in respect  
 of matters, or causes testamentary (x), and may examine,  
 or cause to be examined, upon oath or affirmation, as the case may  
 require, parties and witnesses by word of mouth; and may either  
 before or after, or with or without such examination,  
 cause them or any of them to be examined on interroga-  
 tories, or receive their or any of their affidavits or solemn affirmations,  
 as the case may be; and the court may by writs require such attend-  
 ance, and order to be produced before itself \*or otherwise any deeds,  
 evidence or writings, in the same form, or nearly as may be, as that  
 in which a writ of *subpoena ad testificandum*, or of *subpoena duces  
 tecum*, is now issued by any of her Majesty's Superior Courts of Law  
 at *Westminster*; and every person disobeying any such writ shall be  
 considered as in contempt of court, and also be liable to forfeit a sum  
 not exceeding one hundred pounds."

By section 25, "The Court of Probate shall have the like powers,  
 jurisdiction and authority, for enforcing the attendance  
 of persons required by it as aforesaid; and for punish-  
 ing persons failing, neglecting, or refusing to produce  
 deeds, evidences, or writings, or refusing to appear or to be sworn, or  
 make affirmation or declaration, or to give evidence, or guilty of con-  
 tempt, and generally for enforcing all orders, decrees, and judgments,  
 made or given by the Court under this Act, and otherwise in relation  
 to the matters to be inquired into and done by or under the Orders of

(x) Where an executor was desirous to propound in solemn form the last will of his testator, and cited certain next-of-kin, but was unable to ascertain what other persons were entitled in the distribution, the court, under this section, ordered a subpoena to issue for the

attendance of certain persons, to be examined as to their knowledge of the members of the family and the other next-of-kin of the deceased. *Shepherd v. Beetham*, L. R. 2 P. & D. 384. In the *Goods of Sweet*, [1891] P. 400.

the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court.”<sup>9</sup>

By stat. 21 & 22 Vict. c. 95, s. 17, “The Judge of the Court of Probate shall have and exercise the same power of altering and amending grants of probate and letters of administration, made before January 11, 1858 (*y*), as any Ecclesiastical Court had and exercised in respect of such grants.”<sup>10</sup>

21 & 22 Vict. c. 95, s. 17.  
Judge of the Court of Probate may amend grants made before Jan. 11, 1858.

In order to meet the case of grants made before the act, which

9. The power to commit for contempt for failure to make distribution as ordered, is vested in the Probate Court. *Haines v. People*, 97 Ill. 161; *Leach v. Peabody*, 58 Vt. 485.

So too, on disobedience of an order to show cause. *Matter of Pelton*, 32 N. Y. S. R. 924.

Such courts have authority to direct and control the official acts of executors and administrators, settle their accounts, and order the distribution of estates, and upon failure, omission, neglect or refusal those courts may, by proper orders, compel the performance of such duties. *Stratton v. McCandliss*, 32 Kans. 512.

The Orphans' Court may issue an attachment against an administratrix, although a woman, for not complying with an order to pay over money. *Klein's Estate*, 11 Phila. 34.

It is said by Coffin, S., speaking of the powers of probate courts: “On the whole, I am satisfied from a review of the history of, and the legislation relating to, these courts, in so far as my researches have extended, that from the days when ecclesiastics presided over them, down to our own day, they have always possessed, directly or indirectly, the power to punish parties by imprisonment, who have disobeyed their decrees directing the payment of legacies or distributive shares, and that too without regard to whether they had the

money under their control or not, and without reference to the power in this respect possessed by the Court of Chancery.” *People v. Marshall*, 7 Abb. N. C. 380.

A probate court has power to enforce a stipulation as to matters over which it has jurisdiction. *Grady v. Porter*, 53 Cal. 680.

The judgments and orders of probate courts are entitled to the same presumption of verity as is accorded to courts of general jurisdiction. *Rottman v. Schmucker*, 94 Mo. 139.

Probate courts have unlimited power and control over their own judgments during the term, *Rottman v. Schmucker, ubi supra*; *Lingle v. Cook's Admrs.*, 32 Gratt. 262; but an order setting aside a judgment at a previous term is void. *Wolf v. Banks*, 41 Ark. 104.

(*y*) The day when the Court of Probate Act, 1857, came into operation.

10. The acts of a judge of probate are absolutely void in cases in which he is forbidden by statute to sit or act as judge, and also in cases where his jurisdiction over a case is, for special reasons, conferred upon another judge. *Stearns v. Wright*, 51 N. H. 600, 608; *Waldron v. Berry*, 51 Id. 136.

Where a judge of probate acts as counsel in a case, in which he also acts



were void or voidable by reason of the courts not having jurisdiction (z), and also of grants which, though not void or voidable, were not sufficiently extensive by reason of not reaching property situate out of the jurisdiction of the court that made the grant, provision is made by sections 86, 87 and 88 of the Probate Act, 1857 (20 & 21 Vict. c. 77).

By stat. 21 & 22 Vict. c. 95, s. 20, "All second and \*subsequent grants of probate or letters of administration shall be made in the Principal Registry, or in the District Registry where the original Will is registered or the original grant of letters of administration has been made, or in the District Registry to which the original Will or a registered copy thereof, or the record of the original grant of administration, have been transmitted by virtue of a requisition issued in pursuance of section 89 of 'The Court of Probate Act,' and for and in respect of such second or subsequent grants of probate or letters of administration to be made in a district registry, it shall not be requisite that it should appear by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made."

County courts have jurisdiction in all *contentious* business, *i. e.*, grants or revocation of grants of probate or letters of administration, provided (1) the deceased had at the time of his death his fixed place of abode in the district of the county court to which application is made; and (2) the personal estate of the deceased (exclusive of property possessed by him as trustee and debts due from him) was at his death under the value of 200*l.*, and his real estate to which he was beneficially entitled was under 300*l.* (a), for by stat. 21 & 22 Vict. c. 95, s. 10, it was enacted that where "it appears by affidavit to the satisfaction of a registrar of the principal registry, that the testator or intestate, in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for, had at the time of his death his fixed place of abode in

Cases of grants void or voidable by reason of *bona notabilia* made before the Probate Act.

21 & 22 Vict. c. 95, s. 20.

Second and subsequent grants to be made where the original Will or the original letters of administration are deposited.

Jurisdiction of county courts in contentious business.

Stat. 21 & 22 Vict. c. 95, s. 10.

Where personalty is under 200*l.*, county court to have distribution.

as judge, it seems that his acts as judge are not absolutely void, but are voidable on appeal. *Stearns v. Wright, ubi supra.*

Letters issued by a probate judge in a case where there is no judicial determination as to the death and the per-

son is still alive, are void. See American note, p. \*486, *infra*.

(z) See *ante*, p. \*237.

(a) *i. e.*, the actual value of the property free from mortgages or other charges. *Davies v. Brecknell*, L. R. 2 P. & D. 177.

one of the districts specified in Schedule (A.) to the said 'Court of Probate Act,' and that the personal estate in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting any\*thing on account of the debts due and owing from the deceased, was at the time of his death under the value of 200*l.*, and that the deceased at the time of his death was not seized or entitled beneficially of or to any real estate of the value of 300*l.* or upward, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the Will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."

The Probate Division has power in cases where, in any contentious business arising out of an application for probate or administration, it is shown that the state of property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, to send the cause to such County Court, and the judge of such County Court shall proceed therein as if such application and cause had been made to, and arisen in, his court in the first instance (*b*). See 20 & 21 Vict. c. 77, s. 59 [extended to applications for the *revocation* of a grant of probate or administration, 21 & 22 Vict. c. 95, s. 12].

Sections 55, 56, 57 and 59 of the Probate Act [stat. 20 & 21 Vict. c. 77], and sects. 10, 12 and 13 of the amending act [stat. 21 & 22 Vict. c. 95] relate to the jurisdiction of county courts in contentious business. The rules of practice regulating applications in respect of such contentious business in county courts are contained in order XLIX. of the county court rules, 1889, and it is provided by rule 12 of this order that in proceedings under this order, for which no rules are hereby provided, the rules and practice of the High Court shall be followed as far as they are applicable. \*It should be observed that the above jurisdiction given to county courts, in instances to which it extends, is concurrent with

Stat. 20 & 21 Vict.  
c. 77, ss. 55, 56,  
57, and 59.

Stat. 21 & 22 Vict.  
c. 95, ss. 10, 12,  
and 13.

County Court  
Rules, 1889, Ord.  
XLIX.

(*b*) See *Slater v. Alvey*, L. R. 2 P. & D. 154. As to the discretion of the court to direct a trial of a probate cause in the County Court against the wish of

all parties, see *Dunn v. Dunn*, 1 Sw. & Tr. 521, and *Bull v. Bull*, 30 L. J., P. & M. 40 n.

[\*247]

[\*248]

that of the Probate Division of the High Court, and not exclusive. See 20 & 21 Vict. c. 77, s. 59, and 21 & 22 Vict. c. 95, s. 12.

By sect. 58 of the Probate Act [stat. 20 & 21 Vict. c. 77] it was enacted, that "any party who shall be dissatisfied with the determination of the judge of the County Court in point of law or upon the admission or rejection of any evidence in any matter or cause under this Act, may appeal from the same to the Court of Probate in such manner and subject to such regulations as may be provided by the Rules and Orders to be made under this Act, and the decisions of the Court of Probate on such appeal shall be final" (c).

Stat. 20 & 21 Vict.  
c. 77, s. 58.

Appeals from  
County Court :

The appeal from the County Court under this section is now to a Divisional Court of the Probate, Divorce and Admiralty Division of the High Court of Justice. R. S. C. 1883, order LIX., rule 4.

to Divisional  
Court.

R. S. C., 1883,  
Ord. LIX., r. 4.

As to the probate jurisdiction of county courts in *non-contentious business*, it has been enacted by stat. 36 & 37 Vict. c. 52, that—

Jurisdiction of  
county courts in  
non-contentious  
business.

"Where the whole estate and effects of an intestate shall not exceed in value the sum of 100*l.*, his widow or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the Registry of the Court of Probate having jurisdiction in the matter, may apply to the Registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said Registrar shall fill up the usual papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit \*the said papers by post to the Registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate, and transmit them by post to the said Registrar of the County Court, to be by him delivered to the party so applying for the same, without the payment of any fee for the same, save as is provided by this Act" (sect. 1).

Stat. 36 & 37 Vict.  
c. 52, s. 1.

"The Registrar of the County Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant" (sect. 2).

s. 2:

(c) And see *Zealley v. Veryard*, L. R. 1 P. & D. 195. *Macleur v. Macleure*, L. R. 1 P. & D. 604.

"If the Registrar of the County Court has reason to believe that the whole estate and effects of which the deceased died possessed exceeds in value 100*l.*, he shall refuse to proceed with the application until he is satisfied as to the real value thereof" (sect. 3).

By sect. 4, Registrars of County Courts may exercise the powers of Commissioners of the Court of Probate.

Stat. 38 & 39 Vict. c. 27. "And the Act of 1875 (stat. 38 & 39 Vict. c. 27), which is to be read and construed along with and as part of the above recited Act (sect. 2), extends the provisions of the above Act to the surviving children of poor *widows* who die intestate" (sect. 1).

## SECTION II.

### *What the executor may do before probate.*

Upon the principles stated in the course of the preceding section (p. \*243) it has been held that the executor, before he proves the will, may do almost all the acts which are incident to his office, except only some of those which relate to suits (*e*).<sup>11</sup> Thus he may seize and take

(*e*) Godolph. Pt. 2, c. 20, s. 1. Wentw. Off. Ex. 81, 14th edition. Treat. on Eq. B. 4, Pt. 2, c. 1, s. 2. Wankford *v.* Wankford, 1 Salk. 301. Humphreys *v.* Ingledon, 1 P. Wms. 753.

11. An executor derives all his power from the will, and not from the probate thereof. Mitchell *v.* Rice, 6 J. J. Marsh. 623; Shirley *v.* Healds, 34 N. H. 407, 411; Hill *v.* Tucker, 13 How. (U. S.) 458, 466; Strong *v.* Perkins, 3 N. H. 517.

Hence, he could do many acts before probate: however, he could not declare in an action at law, because it would be necessary for him to make profert of his letters testamentary, to show his legal authority. He could, however, commence an action at law, before probate, and if probate were taken after the commencement of the action, before the filing of the declaration, the proceeding

would be regular. Mitchell *v.* Rice, *ubi supra*. But in New Hampshire, profert of letters testamentary is never made. Strong *v.* Perkins, *ubi supra*. The interest of the executor, being derived from the will, vests from the death of the testator, whatever forms may be required to be observed, by law, before the executor enters upon the discharge of his duties. Hill *v.* Tucker, *ubi supra*.

However, in many of the states, the contrary doctrine prevails; as in Alabama, where it is held that the power of the executor is derived from the act of the court, and not from the will, Gardner *v.* Gantt, 19 Ala. 666; Carpenter *v.* Gonig, 20 Id. 587; Perkins *v.* Lewis, 41 Id. 649, 663; Wood *v.* Cosby, 76 Id. 557; so too, in Maine, Stearns *v.* Burnham, 5 Me. 261; McKeen *v.* Frost, 46 Id. 237, 248; and in Indiana, Callo-

into his hands any \*of the testator's effects (*f*), and he may enter peaceably into the house of the heir for that purpose, and to take specialties and other securities for the debts due to the deceased (*g*). He may pay or take releases of,

What executor  
may do before  
probate.

way *v. Doe*, 1 Blackf. 372; *Lucas v. Tucker*, 17 Ind. 41, 44; and in Missouri, also, the common law rule is changed as to the powers of an executor before probate, and it is said that, in Missouri, all the power of the executor is derived, not so much from the will as from the appointment of the court and compliance with the law. *Stagg v. Green*, 47 Mo. 500; *Lamb v. Helm*, 56 Id. 420, 431; *Stagg v. Linnenfeller*, 59 Id. 336, 341; *Chandler v. Stevenson*, 68 Id. 450, 453; *O'Howell v. Kirk*, 41 Mo. App. 523, 527; and it is also said that the powers of an executor are strictly statutory, and he cannot do anything with the property, except as provided by law. *Boeger v. Langenberg*, 42 Mo. App. 7, 12.

If an executor can take possession of the goods or effects of his testator in the hands of a bailee in another state, by the voluntary act of such bailee, or if he can collect a debt due from a debtor in another state without the necessity of commencing a suit, he has authority to do so, and may give a good acquittance and discharge. *Hutchins v. State Bank*, 12 Met. 421, 425. And an executor, before qualifying, may, at the maturity of a note due his testator, send the note to a notary and have demand and notice properly made, although he has no right to collect the note. *Taylor v. Woburn*, 130 Mass. 494, 497. And it seems that a father who has the right of administration of the estate of his son, whose death

was caused by a defect in a highway in a town, may give to the town the notice required by the statute, before letters are issued. *Taylor v. Woburn*, *ubi supra*.

The common law rule allowing an executor, before probate, to do nearly everything, except to institute suits, is not consistent with the statutes of Alabama, and does not prevail in that state. *Brock's Administrator v. Frank*, 51 Ala. 85.

However, if an executor, before his qualification, intermeddle with the estate, his subsequent qualification legalizes his tortious acts, making him liable to those interested in the estate, and protecting parties with whom he deals. *McDearmon v. Maxfield*, 38 Ark. 631; *Stagg v. Green*, 47 Mo. 500; *Alvord v. Marsh*, 12 Allen 603; *Hatch v. Proctor*, 102 Mass. 351; *Rattoon v. Overasker*, 8 John. 125; *Priest v. Watkins*, 2 Hill 225.

Although the general rule is that where an executor makes a promise after the death of his testator, and before probate, he becomes, thereby, individually liable, and judgment will be rendered against him, and not *de bonis testatoris*, yet there are exceptions to this rule, and it is held that the case of the funeral expenses of the deceased is always an exception to this rule. In the case of such obligations, entered into by the executor, he can be charged in his representative character, and judgment be rendered *de bonis tes-*

(*f*) Godolph. Pt. 2, c. 20, s. 1.  
Wentw. Off. Ex. 81, 14th edition.

(*g*) Godolph. Pt. 2, c. 20, s. 3.  
Wentw. Off. Ex. 81, 14th edition.

debts owing from the estate (*h*) ; and he may receive or release debts which are owing to it (*i*) ;<sup>12</sup> and distrain for rent due to the testator (*k*). And if, before probate, the day occur for payment upon bond made by, or to, the testator, payment must be made to, or by, the executor, though the will be not proved, upon like penalty as if it were (*l*). So he may sell, give away or otherwise dispose, at his discretion, of the goods and chattels of the testator, before probate (*m*) ; he may assent to, or pay, legacies (*n*) ; he may enter on the testator's terms for years (*o*), and he may gain a settlement by residing in the parish where the land lies (*p*).

And although he should die, after any of these acts done, without

*tatoris*. *Luscomb v. Ballard*, 5 Gray 403, 405 ; *Kingman v. Soule*, 132 Mass. 285, 289 ; *Sweeney v. Muldoon*, 139 Mass. 304, 305.

(*h*) *Godolph. Pt. 2, c. 20, s. 3, Wentw. Off. Ex. 81, 14th edition.*

(*i*) *Co. Litt. 292, b. Graysbrook v. Fox, Plowd. 281. Middleton's Case, 5 Co. 28, a. Godolph. Pt. 2, c. 20, s. 1. Wentw. Off. Ex. 81, 14th edition. Wankford v. Wankford, 1 Salk. 306, 307. Wills v. Rich, 2 Atk. 285.*

12. *Mitchell v. Rice*, 6 J. J. Marsh. 623 ; *Rand v. Hubbard*, 4 Met. 252, 256 ; *Monroe v. James*, 4 Munf. 194, 195 ; *Shirley v. Healds*, 34 N. H. 407, 411.

And a payment made before probate to one named as executor in the will, if made *bona fide*, must operate as a discharge of the debtor ; and payment by him of a debt which the deceased owed would be a valid act, for which he might retain if the estate were solvent. *Kittredge v. Folsom*, 8 N. H. 98, 110.

The power of an executor to release, before probate, a debt due to the deceased, results from the fact that the absolute interest of the debt is vested in himself, although he cannot have an action to recover it before probate. *Shirley v. Healds*,

*ubi supra*. But he is not authorized to collect demands due his testator, until he shall be legally appointed executor. *Tappan v. Tappan*, 30 N. H. 50.

(*k*) *Whitehead v. Taylor*, 10 A. & E. 210.

(*l*) *Godolph. Pt. 2, c. 2, s. 3. Wentw. Off. Ex. 18, 14th edition.* The penalty is now saved by bringing the principal and interest and costs into court, under stat. 4 Ann, c. 3, 16, Ruff. § 13.

(*m*) *Godolph. Pt. 2, c. 20, s. 3. Wentw. Off. Ex. 82, 14th edition.* He may release or assign any part of the personal estate before probate : By *Lord Macclesfield, 1 P. Wms. 768, Comber's Case*. It is consequently no objection to the title of an assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of the assignment ; *Elwood v. Christy*, 17 C. B., N. S. 754.

(*n*) *Godolph. Pt. 2, c. 29, s. 1. Wentw. Off. Ex. 82, 14th edition.*

(*o*) *Rex v. Stone*, 6 T. R. 298. *Dyer, 367, a.* And the executor of the grantee of the next avoidance of a church may grant the advowson before probate : *Smithley v. Chomeley, Dyer, 135, a.*

(*p*) *Rex v. Stone*, 6 T. R. 295.

proving the will, yet do these acts so done stand firm and good (q). Where a termor devised his term to another whom he made his executor and died; and the \*devisee entered and died without any probate; it was held that the term was legally vested in the executor by his entry, and an execution of the devise, without any probate (r). So if an executor assents to a legacy, and dies before probate, yet the assent is good enough (s). So all payments made to him are good, and shall not be defeated, though he dies and never proves the will (t). In a word, the executor's not proving the will does, upon his death, determine the executorship, but not avoid it (u).

These acts stand good, though he die without proving the will:

It must, however, be carefully observed in this place, that although an executor may, before probate, by assignment of a term for years, or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee; yet, if it be necessary to support that title by deducing it from the assignment or assent, it also becomes requisite to show the right to make the assignment or give the assent; which can only be effected by producing the probate, or other evidence of the admission of the will in the court: for, as it has already appeared, the fact of a particular person having been appointed executor to another can be proved by no other means, either in courts of law or equity (x). If the executor died after the assignment or assent, without having obtained probate, letters of administration *cum testamento annexo* must be produced instead (y).

If acts done by an executor before probate are relied on for title or sought to be enforced, a subsequent probate must be shown.

Again, although an executor can before probate, make an assignment and give a receipt for purchase money, which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because, till the evidence of title exists, the executor cannot give a complete indemnity (z).

(q) Wentw. Off. Ex. 82, 14th edit. *Brazier v. Hudson*, 8 Sim. 67.

(r) Dyer, 367, *a. Rex v. Stone*, 6 T. R. 298. *Fenton v. Clegg*, 9 Exch. 680.

(s) *Johnson v. Warwick*, 17 C. B. 516.

(t) *Wankford v. Wankford*, 1 Salk. 306, 507.

(u) By Lord Holt, in *Wankford v. Wankford*, 1 Salk. 309. *Quære*, whether, 'when a debtor makes a cred-

itor his executor, who dies after having intermeddled with his goods, but before probate, and before any election made to retain, the executor of the executor may retain; see *Croft v. Pyke*, 3 P. Wms. 182, and *post*, Pt. III. Bk. II. Ch. II. § VI.

(x) See *ante*, p. \*242.

(y) *Johnson v. Warwick*, 17 C. B. 516.

(z) *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 583.

An executor cannot maintain actions before probate unless such as are founded on his *actual* possession: for in actions where he sues in his representative character, he may be compelled, by the course of pleading, to produce the letters testamentary at the trial, or in some cases, by an application to the court, at an earlier stage of the cause (a); and in those actions where he sues in his individual capacity, relying on his *constructive* possession as executor, although he does not name himself as executor in his declaration, nor make any profert, yet, generally speaking, it will be necessary for him to prove himself executor at the trial (b), which he can only do by showing the probate.<sup>13</sup> For example, where an executor brings trespass *de bonis asportatis*, or trover, upon his testator's possession, and a conversion in his lifetime, he necessarily describes himself as executor in his declaration, and his character as such may be traversed: And where the goods were taken or converted after the testator's death, although, since the property in the goods draws to it a possession in law, he may declare on this *constructive* possession of his own, notwithstanding he has never had actual possession without naming himself executor, still, if his \*title to the property should be put in issue by the pleadings, he must show that title as executor at the trial by producing the probate, in order to prove his *constructive* possession (c).

In cases, indeed, where the executor has *actually* been possessed of

(a) Webb v. Adkins, 14 C. B. 401. This case was approved and followed in the late case of Tarn v. Commercial Bank of Sydney, 12 Q. B. D. 294, where a testatrix having indorsed and delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, and her executors, before probate of the will was granted, issued a writ against the bankers for the return of the bill or its value. The bankers were always willing to pay over the proceeds of the bill to the executors upon production of probate. Upon the defendants taking out a summons for an order that all proceedings in the action should be stayed on the ground that the same was frivolous, vexatious, and an abuse of

the process of the court, it was held that all proceedings in the action ought to be stayed until the plaintiffs obtained probate.

(b) Blainfield v. March, 7 Mod. 141, by Holt, C. J. 2 Saund. 47, z. note to Wilbraham v. Snow.

13. But, in Missouri, if a will be proved before the clerk and recorded, but the probate is not formally confirmed by the Probate Court, such will cannot be admitted in evidence for any purpose. Barnard v. Bateman, 76 Mo. 414.

(c) Hunt v. Stevens, 3 Taunt. 113: And any defect in the probate, e. g., the want of a proper stamp, will be as fatal as the non-production: *Ibid.*



the property which is the subject of the action, before it came to the hands of the defendant, such possession is, according to the general principle, of itself sufficient, without showing any title, to establish a *prima facie* case, either in replevin, trover or trespass, when the property has come to the defendant's hands, or been converted, by tort (*d*),<sup>14</sup> or in debt or assumpsit, when the defendant has acquired it by a contract with the executor (*e*). In such case it is evident that the actual possession of the plaintiff is a *prima facie* title, without reference to the circumstances under which such possession has been obtained, whether as executor or by any other means (*f*). Accordingly, in the case of *Oughton v. Seppings* (*g*), a sheriff's officer had seized and sold a pony claimed by the plaintiff, a widow, under an execution against a third party, who lodged with her: The action was brought against the officer for money had and received, to recover the amount of the sale money: It appeared that the pony had been bought by the lodger for the plaintiff with money provided \*by her, but at that time, and for several months afterward, her husband was alive: After his death, however, the plaintiff fed the pony, and paid bills for its hay and shoeing, though it was used as generally by the lodger as by her: No probate of will or letters of administration were produced: It was objected, that assuming even that the plaintiff might have maintained trespass for the taking of the pony, she could not maintain this action, which was founded on a contract; and that the

except where he  
has had actual  
possession:

(*d*) *Wentw. Off. Ex.* 84, 14th edit. Plowd. 281, in *Graysbrook v. Fox*. See *Elliott v. Kemp*, 7 M. & W. 306, 312, 314.

14. *Shirley v. Healds*, 34 N. H. 407, 411; *Rand v. Hubbard*, 4 Met. 252, 256; *Monroe v. James*, 4 Munf. 194, 195.

In an action in replevin, the fact that the will under which the plaintiff claims was not probated until after suit brought, is no objection to its admission. *Barnard v. Bateman*, 76 Mo. 414.

(*e*) *Wentw. Off. Ex.* 84, 85, 14th edition.

(*f*) On this principle in a case, where three out of four executors made a sale of the goods of their testator, it

was held that the three might sue without naming themselves executors, and without joining the fourth executor; although the goods were sold as the goods of the testator: *Brassington v. Ault*, 2 Bing. 177. The distinction above pointed out might seem unnecessarily labored in the present treatise, had it not been laid down in previous works on the same subject as an absolute proposition that an executor may maintain actions of trespass or trover, before probate, for such of the effects of the testator as never came to his actual possession, taken or converted after the testator's decease. See *Toller*, 47. 2 *Roberts. on Wills*, 172, 173.

(*g*) 1 B. & Adol. 241.

pony having been the property of the husband, passed on his death to his personal representative, and it had not been shown that the plaintiff was either executrix or administratrix. But it was held that there was evidence, though perhaps slight, that the plaintiff was in possession of the pony at the time it was seized ; and if so, since she might clearly have maintained trespass against a wrongdoer, she might waive the tort, and maintain this action to recover the money produced by the sale (*h*).

And the law is the same with respect to the grantee of the executor. nor can his grantee : Accordingly, in the action of trover for a horse and gig, which the plaintiff claimed as the vendee of an executor, it was held, that as at the time of the trial the Ecclesiastical Court had not granted probate, and the executor had never had actual exclusive possession of the gig and horse, the plaintiff could not make out his title, though he produced the will appointing his vendor executor (*i*). In this case, the plaintiff and defendant both claimed title to the property ; and Lord Tenterden, in his address to the jury, observed, that if the plaintiff had proved a clear and undisputed possession, it might have been sufficient ; but it appeared that the defendant, before and after the sale to the plaintiff, used the gig and horse.

But although an executor cannot *maintain* actions before probate, but he may commence an action before probate : except upon his actual possession, yet he may *\*advance* in them as far as that step where the production of the probate becomes necessary,<sup>15</sup> and it will be sufficient if he obtains the probate in time for that exigency (*k*). Thus where he sues as executor, he may *commence* the action before probate (*l*) : for,

(*h*) See also *Accord*. *White v. Mullett*, 6 Exch. 713, 715 ; and see further *Waller v. Drakeford*, 1 E. & B. 749.

(*i*) *Pinney v. Pinney*, 8 B. & C. 335.

15. *Monroe v. James*, 4 Munf. 194, 195 ; *Rand v. Hubbard*, 4 Met. 252, 256 ; *Shirley v. Healds*, 34 N. H. 407, 411 ; *Mitchell v. Rice*, 6 J. J. Marsh. 623.

(*k*) *Wills v. Rich*, 2 Atk. 285. *Easton v. Carter*, 5 Exch. 8, 14. The court may, however, make an order compelling him to produce the probate upon which he founds his right to maintain the action or stay proceedings until he places himself in a situation to do so.

*Webb v. Adkins*, 14 C. B. 401. *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294.

(*l*) 1 Roll. Abr. 917, A. 2. *Martin v. Fuller*, Comb. 871. *Wankford v. Wankford*, 1 Salk. 302, 303. *Webb v. Adkins*, 14 C. B. 401. But in cases where the defendant does not dispute his liability or the title of the executors to probate, but merely requires production of the probate before paying the executor, the executor ought not to sue, and the court will stay the action if he does. See *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294.

as it has been before observed, the probate, although obtained after action brought, shall, when produced, have relation to the death of the testator, so as to perfect and consummate the will from that period (m).<sup>16</sup> So where a reversion of a term comes to him, he may avow before probate for such rent as hath accrued after the death of the testator (n), and if such an issue is joined that it becomes necessary for him to prove his title by executorship (as for instance, if *non tenuit* should be pleaded), it will be sufficient if he obtains probate in time to produce it in evidence at the trial. So in the cases above considered, where the executor brings an action without naming himself executor, on his constructive possession, he may declare before probate, and if his title to the property be put in issue by the pleadings, he may take probate at any time before the trial, and that will enable him to support the action (o).

\*So an executor, before probate, may commence an action in the Chancery Division (the bill, however, it was formerly said, must allege that he has proved the will) (p), and the subsequent probate makes the action a good one, if obtained at any time before hearing (q).<sup>17</sup>

(m) Plowden, 281. 1 Roll. Abr. 917, A. 2.

16. Alvord v. Marsh, 12 Allen 603; Hatch v. Proctor, 102 Mass. 351; Dearborn v. Mathes, 128 Id. 194, 196; Strong v. Perkins, 3 N. H. 517; Spring v. Parkman, 12 Me. 127; Wilson v. Wilson, 54 Mo. 213; Barnard v. Bateman, 76 Id. 414; Drury v. Natick, 10 Allen 169, 174.

It follows that acts of the executor done before probate will be valid upon probate, if the rights of innocent parties have not intervened. Wilson v. Wilson, *ubi supra*.

(n) Wankford v. Wankford, 1 Salk. 307, *per* Holt, C. J. Whitehead v. Taylor, 10 A. & E. 210.

(o) It is said an executor may maintain a *quare impedit*, if he be entitled to the next presentation of a church, which became void, without showing forth the will: Wentw. Off. Ex. 84,

14th edition. But if by the course of the pleadings it should become a part of his case to prove his title, he certainly can only do so by producing the probate; and it may be doubtful whether the passage above cited is, in any case, law, inasmuch as it should seem that executors must show their title in the declaration in *quare impedit*.

(p) Humphreys v. Ingledon, 1 P. Wms. 753. It seems, however, that an executor may, pending an application for probate, bring an action to protect the estate, by obtaining an injunction or otherwise, although he alleges in the statement of claim that he has not yet obtained probate. See Newton v. Metropolitan Railway, 1 Dr. & Sm. 583, *infra*, note (q).

(q) Humphreys v. Humphreys, 3 P. Wms. 351. And in the case of Patten, Executrix, v. Panton, in the Exchequer,

17. Monroe v. James, 4 Munf. 194 195.

An executor can be a petitioning creditor in bankruptcy, but he must obtain probate before he can get a receiving order (*r*).  
he may be petitioning creditor in bankruptcy before probate :

It would seem also that the executor of a creditor of a company may present a winding-up petition under the Companies Act before he has obtained probate : it being sufficient if he has obtained probate before the hearing of the petition (*s*).  
and may present winding-up petition :

\*On the other hand, if he have elected to administer, he may also, before probate, be sued at law or in equity by the deceased creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible (*t*). So an action may be commenced against an executor, before probate, by a residuary legatee, for an account of the estate and effects of the testator, and to have the assets secured (*u*). So, before probate, an executor may be compelled to discover the personal estate of his testator, though a suit be pending respecting the validity of the will (*x*).

1793, it was said, *arguendo*, that it had been determined by that court about three years ago, that it is sufficient if the probate were obtained at any time before hearing : 3 Bac. Abr. 53, by Gwillim, Executors (E.) 14. But a plea that the executor has not obtained probate was allowed, on the ground that the cause must be considered as having come on to be heard : *Simons v. Milman*, 2 Sim. 241. See also *Jones v. Howells*, 2 Hare, 353, *per* Wigram, V.-C. *Post*, Pt. V. Bk. I. Ch. II. In *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 583, a bill by executors for a specific performance alleged, as the fact was, that the executors had not proved. Notice of motion for an injunction was given, and at that time when the motion, but for the press of business, would have been heard, there was no probate : but when the motion was actually heard, the probate was in court ; and it was held by Sir R. Kindersley, V.-C., that the defendants could not resist the motion upon the ground

of demurrer : See also *Beardmore v. Gregory*, 34 L. J., Ch. 392.

(*r*) See *ex parte Paddy*, 3 Madd. 241. *Rogers v. James*, 7 Taunt. 147, cases decided under the old Bankruptcy Acts.

(*s*) *Re Masonic & General Life Assurance Co.*, 32 C. D. 373.

(*t*) *Wentw. Off. Ex.* 86, 87, 14th edition. *Plowd.* 280. *Toller*, 49. It is clear upon the grounds which have already been stated (see p. \*228), that if he has administered, he will be liable, not only before probate, but though he should refuse to take probate, and administration should be committed to another. See the observations of Best, C. J., in *Douglas v. Forest*, 4 Bingh. 704.

(*u*) *Blewitt v. Blewitt*, 1 Younge, 41.

(*x*) *Dulwich College v. Johnson*, 2 Vern. 49. See also *Phipps v. Steward*, 1 Atk. 285. *Fonbl. Treat. on Eq. Bk.* 4, Pt. 2, c. 1, s. 2, n. *b*. Since the passing of the Judicature Acts, actions for the sole purpose of obtaining discovery have become very rare.

If an executor die before probate, although, as already mentioned, the acts which he may legally do before probate stand firm and good, yet his executor may not prove both wills, and so become executor to both the testators (y). But administration of the goods of the first testator, with the will annexed to it, is to be committed to the executor of the executor, if the first executor be residuary legatee of the first testator ; or to such other person as may be so appointed ; otherwise to the next of kin of the first testator (z).

(y) *Wankford v. Wankford*, 1 Salk. 308, in Lord Holt's judgment. S. C., 1 Freem. 520.

(z) *Isted v. Stanley*, Dyer, 372, a. Wentw. Off. Ex. 82, 14th edition. Godolph. Pt. 1, c. 20, s. 2. See *post*, Pt. I. Bk. V. Ch. III. § I.

If he die before probate, his executor shall not be executor to the first testator.

## \*CHAPTER THE SECOND.

### OF THE MANNER OF OBTAINING PROBATE, AND THE PRACTICE OF THE COURT WITH RESPECT THERETO.

#### SECTION I.

*By whom the will should be proved: and herewith of the production and deposit of testamentary papers.*

The person alone by whom the testament can be proved is the executor named in it (a),<sup>1</sup> whom (as before stated) the court may cite to the intent to prove the testament, and take upon him the execution thereof, or else to refuse the same (b). This may the court do, not only *ex officio*, but at the instance of any party having an interest, which interest is proved by the oath of the party.

Executor alone  
can prove will.

The executor may  
be cited to prove  
by the Ordinary.

A citation answers two purposes: it either compels a representation to be taken by those who are primarily entitled to it, or where they do not take it, the process provides a substitute for a voluntary renunciation on their part. Availing himself, therefore, of the rule, a person having an inferior interest, but unable to procure the renunciation of the persons who have the superior interest, cites all those persons who have such superiority to take the required grant, or show cause why it should not be made to himself.<sup>2</sup>

Thus in the case of a will, the residuary legatee cites the executor "to accept or refuse the probate and execution of the testator's Will, or to show cause why letters of administration with the Will annexed of the personal estate of the testator should not be granted to him (the residuary legatee)." And if there be also a residuary legatee in trust the party citant cites him "to accept or refuse letters of administration\* with the Will annexed of the personal estate of the testator."

(a) Wankford v. Wankford, 1 Salk. 309.

1. No such rule as this prevails in the United States. And however appropriate it might be that the executor should initiate proceedings for probate, probate will be granted upon a will duly proved before the court without regard to which of the persons

entitled was the mover in the proceeding.

But devisees under a nuncupative will cannot prove it without annulling their devises. Lewis v. Aylott, 45 Tex. 190.

(b) Swinb. Pt. 6, s. 12, pl. 1. Godolph. Pt. 1, c. 20, s. 2. Ante, p. \*225.

2. Matter of Batchelor, 64 How. Pr. 350.

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A legatee or a creditor (c) similarly cites both the executor and the residuary legatees or the testator's next-of-kin if the residue has not been disposed of.

Before any citation can issue in respect of a will, that will must have been filed.

The party citing must therefore have previously obtained possession of the will (d).

By the Court of Probate Act, 1857, s. 26, "The Court of Probate may, on motion or petition, or otherwise in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open court (e), \*or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and

20 & 21 Vict. c. 77, s. 26.

Order to produce any instrument purporting to be testamentary.

(c) A creditor may cite the next of kin to accept administration though his right of action is barred by the Stat. of Limitations: In the Goods of Coombs, L. R. 1 P. & D. 193.

(d) Tristram and Coote's Probate Practice, 10th edit. pp. 239, 240.

(e) See In the Goods of Shepherd [1891] P. 323. The examination of a person respecting his knowledge of testamentary papers under this section must be either in open court or on interrogatories, so there is no power to order his examination before the registrar of the district where he resides: In the Goods

of Laws, L. R. 2 P. & D. 458. But if he be proved by affidavit to be unable from illness to attend to be examined in open court, the court has power under this section to order his attendance to be examined *viva voce* before a commissioner: Banfield v. Pickard, 6 P. D. 33. The court will not order the attendance for examination in open court of the attesting witnesses to a will because they may have declined to give information as to the circumstances attending the execution of the same: Evans v. Jones, 36 L. J., P. & M. 70.

had made such default; and the costs of any such motion, petition or other proceeding (*f*), shall be in the discretion of the Court.”<sup>3</sup>

Further, by stat. 21 & 22 Vict. c. 95, s. 23, it is enacted that “It shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpoena requiring any person to produce and bring into the principal or any district registry, or otherwise as in the said Registrar may issue subpoenas. subpoena may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpoena, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing (*g*).”

\*The practice with regard to citations in non-contentious business is in all respects the same as that which prevailed before the passing of the Judicature Acts. Not having been affected by them in any way it continues in force as before (*h*). For rules relating to the practice in this respect, see Probate Rules of 1862 (non-contentious), Rules 68-70.

(*f*) On a motion for attachment of a person served with a subpoena under this section to bring in a testamentary paper and failing to comply with it, the party proceeded against must receive notice of the application in the first instance: *Baigent v. Baigent*, 1 P. D. 421.

3. Where on the return of a citation, issued by the register of wills, to produce a will, the parties cited deny all knowledge of its existence, but the evidence produced by the petitioner shows the falsity of such denial, an orphans' court cannot pass upon the matter, but the parties cited must be proceeded against by indictment. *Estate of Prentzel*, 11 Phila. 34.

(*g*) Where a subpoena has been personally served upon a person to bring in

a testamentary paper, and such person fails to comply therewith, the court will not at once order an attachment to issue against him, but will make a preliminary order that he shall attend in court to be examined in reference to his possession of such paper: *Parkinson v. Thornton*, 37 L. J., P. M. 3. And where an executor who had intermeddled with the estate but did not take probate of the will, had been cited to do so and had not obeyed the citation, the court refused to order an attachment in the first instance, but directed that a peremptory order should be served to take probate within ten days: *Mordaunt v. Clarke*, L. R. 1 P. & D. 592.

(*h*) *Tristram and Coote's Probate Practice*, 10th edit. 246.



It has been more than once laid down by Lord Eldon, that the lien of an attorney or solicitor does not extend to the original will executed by his client; and that he cannot refuse the production of it (i).

Solicitor who prepared the will has no lien on it.

In *Brown v. Coates* (j), Sir John Nicholl strongly inclined to an opinion, that a mere holder of a will, monished to bring it into the Prerogative Court, could not be allowed to dispute the jurisdiction, and put the other party to proof of *nota notabilia* prior to giving up the will.

Holder of a will not allowed to dispute jurisdiction.

Disputed wills ought to be lodged in the registry of the court for custody. On one occasion Sir John Nicholl observed (k), "Practitioners have no right to keep Wills in their possession. I have, in several instances, stated, that the expense necessary to get a Will out of the hands of a party must fall upon those who withhold it."

Disputed wills ought to be lodged in the registry.

It has been the constant practice of the court, to order all testamentary papers to be brought in when required. And a duplicate is a part of a will, and to be considered a testamentary paper within this rule (l).<sup>4</sup>

Order to bring in all testamentary papers.

Whether the will respected personal estate only, or whether it was a mixed will, concerning both lands and goods, it was, \*after probate, deposited, together with all other testamentary papers, in the registry of the Ecclesiastical Court in which it had been proved. And now, by the 66th section of the Court of Probate Act, 1859 (20 & 21 Vict. c. 77), "there shall be one place of deposit under the control of the Court of Probate, at such place in London or Middlesex as her Majesty may by order in Council direct, in which all the original Wills brought into the Court or of which probate or administration with the Will annexed is granted under this Act in the princi-

Deposit of will in registry: when and how it can be got out.

20 & 21 Vict. c. 77, s. 66.

Place of deposit of original wills.

(i) *Georges v. Georges*, 18 Ves. 294. *Lord v. Wormleighton*, Jac. 580. *Balch v. Symes*, 1 Turn. & Russ. 87. He engages to make a will effectual for the purposes of the testator; which it cannot be unless it is produced elsewhere: *Jacob*. 581. See also *Ex parte Law*, 2 A. & E. 45.

(j) 1 Add. 345.

(k) *Cunningham v. Seymour*, 2 Philim. 250.

(l) *Killican v. Parker*, 1 Cas. temp. Lee 662.

4. But it is not necessary that both should be admitted to probate: it is, however, proper that, when one is admitted to probate, the other should be produced, in order that it may appear that they are alike in all particulars, and that the one not probated does not contain any evidence of having been revoked. *Crossman v. Crossman*, 95 N. Y. 145; S. C. 30 Hun 385.

pal registry thereof, and copies of all Wills the originals whereof are to be preserved in the district registries, and such other documents as the Court may direct, shall be deposited and preserved, and may be inspected under the control of the court and subject to the rules and orders under this Act" (m).<sup>5</sup> If it should be needed in order to be

(m) By sect. 67, "The judge shall cause to be made from time to time in the principal registry of the Court of Probate calendars of the grants of probate and administration in the principal registry, and in the several district registries of the Court, for such periods as the judge may think fit, each such calendar to contain a note of every probate or administration with the Will annexed granted within the period therein specified, and also a note of every other administration granted within the same period, such respective notes setting forth the dates of such grants, the registry in which the grants were made, the names of the testators and intestates, the place and time of death, the names and descriptions of the executors and administrators, and the value of the effects; and the calendars to be so made shall be printed as the same are from time to time completed."

By sect. 68, "The registrars shall cause a printed copy of every calendar to be transmitted through the Post or otherwise, to each of the district registries, and to the office of Her Majesty's Prerogative in *Dublin*, the office of the Commissary of the county of *Midlothian* in *Edinburgh*, and such other offices, if any, as the Court of Probate shall from time to time by rule or order direct; and every printed copy of a calendar so transmitted as aforesaid shall be kept in the registry or office to which it is transmitted, and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected."

By sect. 69, "An official copy of the

whole or any part of a Will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the Will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act."

5. In *New Jersey*, all original wills, wherever probated, are filed, after probate, in the office of the register of the Prerogative Court in *Trenton*. Rev. p. 784, § 143; p. 1095, § 9. In *New York*, when it is necessary to prove a will by verification of the handwriting of the testator and the subscribing witnesses, owing to the absence, or inability of all the subscribing witnesses, or their forgetfulness of the occurrence, or because they testify against the execution of the will, the will having been probated by such proof of handwriting, such will must be filed with, and remain in the surrogate's office. Code Civ. Pro. § 2620. In *Mississippi*, it is provided by statute that all original wills after probate shall be recorded and remain in the office of the clerk of the court where they were probated, R. C. 1880, § 1975; and it is provided in *Missouri* that all original wills shall be carefully filed in the office of the clerk of the court in which they are admitted to probate, R. S. 1889, Vol. 2, § 8896; and in *Montana* the original will and the certificate of the proof thereof, together with all the testimony taken, must be filed by the clerk of the Probate Court, C. S. 1887, p. 281, § 26; and in *Nevada* the will and certificate of proof must be filed by the clerk of the

\*put in evidence in some other judicial proceeding, the attendance of the registrar, or other proper officer, with it must be procured. In some cases, an order of the Court of Chancery has been obtained that it shall be delivered out by the registrar on giving security to return it (*n*). And the Ecclesiastical Court itself has, on several occasions, ordered the will to be delivered out of its registry for the legal purpose of its being sent to the proper place for its custody (*o*). The last of these orders (*p*) appears to have been a decree that the will and codicils of Napoleon Bonaparte should be delivered out (after notarial copies had been made) in order to be sent to the legal authorities in France to be recorded there in the proper place.

But with respect to cases where it was formerly necessary to produce the original will, in order to establish a devise of real estate, it is enacted by stat. 20 & 21 Vict. c. 77 (Court of Probate Act), s. 64, that on notice being given of intending to put the probate in evidence, the probate shall be sufficient evidence of the will and its validity, unless the other party shall give notice that he intends to dispute the validity of the will.

Stat. 20 & 21 Vict. c. 77, s. 64:

probate to be evidence of the will in suits as to real estate, unless the validity of the will is disputed.

This subject, and the enactment contained in the 62nd section of the

court granting probate. G. S. 1885, § 2688. In *New York*, it is provided that upon the proof of a will, it must be retained by the surrogate until the expiration of one year after it has been recorded, and if a petition for the revocation of probate is filed by that time, then until a decree is made upon such petition; after the expiration of the year, or upon a decree upon such petition, the will is to be returned, upon demand, to the person who delivered it, Code Civ. Pro. § 2635; in *Ohio*, every will when admitted to probate shall be filed in the office of the probate judge, and recorded together with the testimony, R. S. 1892, Vol. 2, § 5930; while the provision of the statute in *Pennsylvania* is that after record the original will shall be filed and remain in the office of the register of the county where admitted to probate, Brightley's *Purd. Dig.* 1885, Vol. 1, p. 509, § 11; and in *Texas* the requirement is that the will shall be

filed with the clerk of the county court at the time of the application, and shall thereafter remain in such office. Sayle's *Tex. C. S.* 1888, Vol. 1, § 1832.

But the failure to record the will is not sufficient reason to impeach the action of executors, *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403; in such case, the probate of the will, naming executors; the filing and approval of their bond; and the exhibition and passage of their accounts in which was an item for "registering letters," is abundant proof that letters testamentary were granted. *Id.*

Nor will the failure of the clerk to record the letters testamentary of a duly qualified executor vitiate the authority of the executor. *Wright v. Mongle*, 10 Lea 38.

(*n*) See *post*, § IX.

(*o*) *Post*, § VII.

(*p*) In re Napoleon Bonaparte, 2 Robert 606.

same statute, that the probate shall be conclusive of the validity of the will, in all proceedings affecting the real estate, where the probate has been granted after proof in solemn form, &c., will be considered hereafter (*q*), together with the general doctrine of the effect of probate.

## \*SECTION II.

### *When the will is to be proved.*

If the testator be yet living, the judge may not proceed to the proving of his testament ;<sup>6</sup> because it is of no force as long as the testator lives, who also may revoke or alter the same at any time before his death (*r*).

Now by 91st section of the Probate Act, 1857, (20 & 21 Vict. c. 77,) it is enacted, that "One or more safe and convenient depository or depositories shall be provided, under the control and directions of the Court of Probate, for all such Wills of living persons as shall be deposited therein for safe custody : and all persons may deposit their Wills in such depository upon payment of such fees and under such regulations as the judge shall from time to time by any order direct."

The time, after the testator's death (*s*), when the will is to \*be

(*q*) *Post*, Pt. I. Bk. VI. Ch. I.

6. *Devlin v. Commonwealth*, 101 Pa. St. 273 ; *Thomas v. People*, 107 Ill. 517 ; *Roderigas v. East River Savings Institution*, 76 N. Y. 316. Nor has a surrogate power to grant administration upon the estate of one civilly dead. *Matter of Zeph*, 50 Hun 523. The jurisdiction of the surrogate depends upon the judicial determination of the death of the decedent. *Roderigas v. East River Savings Institution*, 43 N. Y. Supr. 217. A statute that provides for the *ante-mortem* probate of a will, and leaves the testator at liberty to revoke or alter it, or by removal from the jurisdiction to escape the effect of any action under it, is inoperative and void, and is also un-

constitutional. *Lloyd v. Lloyd*, 56 Mich. 236.

Where an educated man, who had lost his wife, and thereupon had become dissipated, went away, saying that he would commit suicide ; his silent absence for ten years, coupled with evidence of the above facts, raises a presumption of his death sufficient to authorize administration. *Matter of Nolting*, 43 Hun 456.

(*r*) *Swinb.* Pt. 6, s. 13, pl. 1.

(*s*) If the death of the party cannot be proved by sufficient witnesses, recourse must be had to the presumption of law ; for which see *Swinb.* Pt. 6, s. 13, pl. 2. *Godolph.* Pt. 1, c. 20, s. 3. *Dean v. Davidson*, 3 Hagg. 554. In the *Goods of Hutton*, 1 Curt. 595. Or

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proved is somewhat uncertain, and left to the discretion of the judge, according to the distance of the place, the weight of the will, the quality of the executors, the absence of the witnesses, the importunity of creditors and legatees, and other circumstances incident thereto.<sup>7</sup> And by stat. 55 Geo. III. c. 184, s. 37, it is enacted, that if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within

Time within which the will ought to be proved.

Penalty under 55 Geo. III. c. 184, s. 37, for administering without obtaining probate or letters of administration.

in the case of a person long absent, and in parts far remote, and transmarine, to common fame: Swinb. Pt. 6, s. 13, pl. 2. Godolph. Pt. 1, c. 20, s. 3. In the Common Law Courts, a jury may presume that a man is dead at the expiration of seven years from the time when he was last known to be living: *per* Lord Ellenborough, in *Doe v. Jesson*, 6 East, 84. See also, as to this presumption, *Doe v. Nepean*, 5 B. & Adol. 86. S. C. on error, 2 M. & W. 894. Taylor on Evid. 8th edit. 218 *et seq.* In the Goods of Turner, 3 Sw. & Tr. 476. In re Tindall's Trust, 30 Beav. 151. In re Beasley's Trusts, L. R. 7 Eq. Cas. 498. Re Rhodes, 36 C. D. 586. Re Corbishley, 14 C. D. 846. There is no legal presumption as to the time of his death: *Doe v. Nepean*, *ubi supra*. In the Goods of Smith, 2 Sw. & Tr. 508. *Thomas v. Thomas*, 2 Dr. & Sm. 298. Re Rhodes, 36 C. D. 586. Where a legatee has not been heard of for seven years his death will be presumed, and the onus of proving that he survived the testator lies upon those who claim under him. See In re Benham's Trusts, L. R. 4 Eq. 416. In re Phene's Trusts, L. R. 5 Ch. 139. In re Walker, L. R. 7 Ch. 120. Hickman v. Upsall, L. R. 20 Eq. 136. Therefore in a case where a legatee under the will of a testator who died in February, 1860, left England in 1858, and was last heard

of by a letter from Australia, dated in January, 1859, and where the legacy had been paid into court, and in 1870 the residuary legatee petitioned for payment to himself on the ground that in the absence of proof that the legatee had survived the testator, the legacy must be taken to have lapsed, Malins, V.-C., ordered the money to be paid to the residuary legatee, and the Court of Appeal affirmed the decision: *Re Lewes' Trusts*, L. R. 6 Ch. 356. The doctrine of presumption, however, does not seem to have been ever applied to cases where the person whose death is to be presumed is neither the person whose estate is to be administered nor a legatee, *e. g.*, a husband, who, if alive, would have been entitled to administration as next of kin of his deceased wife: In the Goods of Clark, 15 P. D. 10.

7. The will should be presented for probate within a reasonable time. Foote v. Foote, 61 Mich. 182. The court shall proceed without unreasonable delay. *People v. Knickerbocker*, 114 Ill. 539.

It has been held, in Michigan, that, where one refrained from producing for probate the will of the testator which he held, and under which he claimed an interest, and concealed such will for the space of fourteen years, and then offered the same for probate, he had barred himself from claiming any

two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased ; every person so offending

benefit under its provisions. *Foot v. Foot*, *ubi supra*.

In some states it is provided that the will shall be probated within a certain time after the death of the testator. Thus in *California*, it is provided that the custodian of the will shall, within thirty days after knowledge of the death, deliver the same to the superior court having jurisdiction, Deering's Codes, &c., 1885, Vol. 3, § 1298; and in *Connecticut*, the provision is that the executor shall prove the will, or renounce, within thirty days after the death, G. S. § 547; and in *Idaho*, the provision is also that the custodian shall deliver the will within thirty days after knowledge of the death. R. S. 1887, § 5296. The provision of the *Iowa* Code is that the custodian shall, as soon as he is informed of the death, file the will for probate. R. C. 1888, § 2338. In *Maryland*, the provision is simply that the will shall be presented to the court after death of the testator. P. G. L. Vol. 2, Art. 93, §§ 324, 325. The statutory provision in *Michigan* is that the will shall be presented for probate within thirty days after knowledge of the death, G. S. 1882, §§ 5797, 5798; and in *Montana* the same limit of thirty days is established by statute, C. S. 1887, p. 277, §§ 8, 11; the statute in *Nebraska* is to the same effect, C. S. 1891, c. 23, §§ 136, 137; and also the limit of thirty days is established in *Nevada*. G. S. 1885, §§ 2670, 2671. It is also provided in *New Hampshire* that the will shall be proved within thirty days after the decease of the testator, R. S. 1878, c. 186, § 3; while in *New Jersey* the provision is only that it shall not be proved until the expira-

tion of ten days after the death, Rev. p. 755, § 16; and in *North Carolina* it is provided that if the executor do not apply within sixty days after the testator's death, then any other interested person may apply. Code 1883, Vol. 1, c. 54, § 2152. In *Rhode Island*, probate must be applied for within thirty days after the knowledge of the death, P. S. 1882, c. 18, § 4; so also in *Utah* the statute requires the production of the will for probate within thirty days, C. L. 1888, Vol. 2, § 2993; while the similar provision of thirty days prevails in *Vermont*, G. S. 1870, c. 49, § 13; the time within which probate is required in *Wisconsin* is also thirty days, R. S. 1878, § 3785; as also in *Washington*, Code 1881, §§ 1342, 1343, 1344.

In *New Jersey* it is provided that no will shall be probated until after ten days from the death of the testator. Rev. p. 755, § 16.

In *Mississippi*, a nuncupative will must be probated within six months, upon citation previously served upon all the heirs at law resident within the state, unless the words have been reduced to writing within six days after their utterance; and if this is not done, any subsequent establishment of the will is rendered impossible by the provisions of § 2393 of the Code, 1871. *George v. Greer*, 53 Miss. 495.

In *North Carolina*, where administration has not been granted upon the estate of a decedent within six months after the death, the public administrator will be appointed to take charge of the estate. *Garrison v. Cox*, 95 N. C. 353; *Hill v. Alspaugh*, 72 Id. 402; *State v. Kendall*, Busb. 242; *Jenkins v. Sapp*, 3 Jones 510.

shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the stamp duty payable on the probate of the will, or letters of administration of the estates and effects of the deceased.

The penalty now substituted for that imposed by the above section is one of double the amount of duty chargeable, which is a debt due to the crown, and is recoverable by any of the ways or means in force for the recovery of probate, legacy or succession duty (*t*). Penalty now in force in substitution for above.

\*By rule 43 of the "General Rules and Orders for the Registrars of the Principal Registry (made in 1862)," "No probate or letters of administration with the Will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars." Rule 43, P. R. 1862.

And by rule 45, "in every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory the registrars are to require such proof of the alleged cause of delay as they may see fit." Rule 45.

### SECTION III.

#### *Of the practice of the Court of Probate, and herewith of proof of the wills in common form.*

By the Court of Probate Act, 1857, 20 & 21 Vict. c. 77, s. 13, "There shall be established for each of the districts specified in Schedule (A.) to this Act, and at the places respectively mentioned in such schedule, a public registry attached to and under the control of the Court of Probate, hereinafter referred to as 'The District Registry.'" 20 & 21 Vict. c. 77. s. 13.  
District registries to be established.

(*t*) Customs and Inland Revenue Act, 1881, 44 Vict. c. 12, s. 40. Proceedings may also be taken under stat. 28 & 29 Vict. c. 104, s. 57, as to which see *post*, Pt. I. Bk. VII.

8. In Massachusetts, a will devising lands may be admitted to probate at any time after the death of the testator. *Haddock v. Boston & Maine R. R.*, 146 Mass. 155; *Shumway v. Holbrook*,

1 Pick. 115, 117; *Marcy v. Marcy*, 6 Met. 360, 370.

And where a codicil was probated fourteen years after the will, it was said "If no will had been proved the lapse of time would not prevent both will and codicil from being proved now." *Waters v. Stickney*, 12 Allen 1, 13.

In Connecticut, however, by statute, the time for probating a will is limited

By the 46th section of the same statute, "Probate of a Will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate, and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, and such place of abode being stated in the affidavit, and such probate or letters of administration \*shall have effect over the personal estate of the deceased in all parts of *England* accordingly (u).

And by sect. 47, "Such affidavit shall be conclusive for the purpose of authorizing the grant by the district registrar of probate or administration; and no such grant of probate or administration shall be liable to be recalled, revoked or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death, and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required."

By sect. 48, "The district registrar shall not grant probate or administration in any case in which there is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form."

And by sect. 49, "Notice of every application to any district regis-

to ten years from death; but a minor who is interested may have three years after his majority to require probate. Rev. 1875, Tit. 18, c. 11, § 11.

And in Maine the limit is twenty years. Rev. Sts. c. 64, § 1.

Where it is provided by statute that the neglect of a devisee for three years to have a will, which he knows to exist, probated, the devise shall lapse, such

provision applies to the original probate, and not to the admission to record of a will probated elsewhere. *Carpenter v. Denoon*, 29 O. St. 379.

(u) It is not obligatory to apply for probate or administration to any district registry, but the application may, in every case, be made to the principal registry. See sect. 59 of the Probate Act, 1857.



trar for the grant of probate or administration, shall be transmitted by such district registrar to the registrars of the principal registry by the next post after such application shall have been made; and such notice shall specify the name and description, or addition [if any], of the testator or intestate, the time of his death, and the place of his abode at his decease, as stated in the affidavit made in support of such application, and the name of the person by whom the application has been made, and such other particulars as may be directed by rules or orders under this Act; and no probate or administration shall be granted in pursuance of such application until such district registrar shall have received a certificate under the hand (x) of one of \*the registrars of the principal registry, that no other application appears to have been made in respect of the goods of the same deceased person, which certificate the said registrar of the principal registry shall forward as soon as may be to the district registrar; all such notices in respect of applications in the district registries shall be filed and kept in the principal registry, and the registrars of the principal registry shall, with reference to every such notice, examine all notices of such applications which may have been received from the several other district registries, and the applications which may have been made for grants of probate or administration at the principal registry, so far as it may appear necessary to ascertain whether or no application for probate or administration, in respect of the goods of the same deceased person, may have been made in more than one registry, and shall communicate with the district registrars as occasion may require in relation to such applications."

S. 49. As to transmission of notice of application for grants of probate, &c., to district registrar.

And by sect. 51, "On the first *Thursday* of every month, or oftener, if required by any rules or orders to be made in that behalf, every district registrar shall transmit to the registrars of the principal registry a list in such form and containing such particulars as may be from time to time required by the Court of Probate, or by any rules or orders under this Act, of the grants of probate and administration made by such district registrar up to the last preceding *Saturday*, and not included in a previous return, and also a copy certified by the district registrar to be a correct copy (y), of every Will to which any such probate or administration relates."

Sec. 51. District registrars to transmit lists of probates and administrations and copies of wills.

(x) By stat. 21 & 22 Vict. c. 95, s. 26, the certificate need not be under the hand, but may be issued under a stamp

provided for that purpose, and approved of by the judge of the court.

(y) By stat. 21 & 22 Vict. c. 95,

And by sect. 52, "Every district registrar shall file and preserve all original Wills of which probate or letters of administration, with the Will annexed, may be granted by him, in the public registry of the district subject to such \*regulations as the Judge of the Court of Probate may from time to time make in relation to the due preservation thereof and the convenient inspection of the same."

S. 52. District registrars to preserve original wills.

By sect. 29, "The practice of the Court of Probate shall, except otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice of the Prerogative Court" (z).

Stat. 20 & 21 Vict. c. 77, s. 29.

Practice of the court to be according to the present practice of the Prerogative Court.

S. 30. Rules and orders to be made for regulating the procedure of the court.

By sect. 30, "And to the intent and end that the procedure and practice of the Court may be of the most simple and expeditious character, it shall be lawful for the Lord Chancellor, at any time after the passing of this Act, with the advice and assistance of the Lord Chief Justice of the Court of Queen's Bench, or any one of the judges of the superior courts of law to be by such Chief Justice named in that behalf, and of the Judge of the said Prerogative Court, to make rules and orders to take effect when this Act shall come into operation for regulating the procedure and practice of the Court, and the duties of the registrars, district registrars, and other officers thereof, and for determining what shall be deemed contentious, and what shall be deemed non-contentious business, and, subject to the express provisions of this Act, for fixing and regulating the time and manner of appealing from the decisions of the said Court, and generally for carrying the provisions of this Act into effect; and after the time when this Act shall come into operation, it shall be lawful for the Judge of the Court of Probate from time to time, with the concurrence of the Lord Chancellor and the said Lord Chief Justice, or any one of the judges of the superior courts of law to be by such Chief \*Justice named in this behalf, to repeal, amend, add to or alter any

s. 25, these copies may be certified and transmitted under a stamp provided for that purpose.

(z) Sir C. Cresswell appears to have been of the opinion that this section applies to the procedure only of the

court, and not to the principles on which it is to act. In the Goods of Oliphant, 1 Sw. & Tr. 525. See also Belbin v. Skeats, 1 Sw. & Tr. 148; 27 L. J., P. & M. 56; Braine v. Braine, 1 Sw. & Tr. 271; 29 L. J., P. & M. 151.

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such rules and orders as to him, with such concurrence as aforesaid, may seem fit."

And now by sect. 18 of the Judicature Act, 1875, it is enacted that, "All rules and orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, *except so far as they are expressly varied by the first schedule hereto, or by rules of Court made by order in council before the commencement of this Act* (a), shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act.<sup>9</sup>

38 & 39 Vict. c. 77,  
s. 18.

Rules of Probate,  
Divorce and Ad-  
miralty Courts to  
remain in force.

(a) The words in italics are repealed by the Stat. Law. Rev. Act, 1883.

9. The appointment of a guardian *ad litem*, though not provided for by statute, for infants and persons under disability, in matters of probate, is essential in order to make the proceedings binding on such persons. *O'Dell v. Rogers*, 44 Wis. 136. But, in Minnesota, the failure to appoint such guardian is no ground for setting aside the probate of the will and ordering a re-probate. *Mousseau's Will*, 30 Minn. 202.

Where the publication of the required notice of the hearing for probate has actually been made, as provided for by law, the failure to file proof of such publication before the hearings will not render the judgment void. *Roberts v. Flanagan*, 21 Neb. 503. But where it appears, from the record of the probate, that the hearing for probate was had upon a day later than the day named in the notice, in the absence of evidence to the contrary, it will be presumed that the hearing was regularly adjointed by the court. *Field v. Apple River Co.*, 67 Wis. 569. And where a decree admitting a will to

probate is made without the notice to parties required by statute, and which statute provides that no will shall be proved without such notice, such decree and the acts of the executor thereunder are not void as to persons of full age who actually appeared at the probate, or who have since ratified such probate, by acts clearly indicating their assent thereto. *O'Dell v. Rogers*, 44 Wis. 136.

But the order directing publication of notice need not state the number of times it is to be published, if it require it to be published according to the statute, *McCrea v. Haraszthy*, 51 Cal. 146; nor will the order be void or the proceedings set aside because the judge failed to sign the minutes thereof entered in the minute book. *Id.*

Where the required bond for costs in an action to contest a will has not been filed, the court may either dismiss the action or stay proceedings until a bond is filed, *Coffman v. Reeves*, 62 Ind. 334; although the court should dismiss for failure to file the bond, yet if a satisfactory bond is presented after the filing of the complaint it should be accepted. *Lange v. Dammier*, 119 Ind. 567.

A petition to reopen probate after an

“The President for the time being of the Probate and Divorce Division of the High Court of Justice shall have, with regard to non-contentious or common form business in the Probate Court, the powers now conferred on the judge of the Probate Court by 20 & 21 Vict. c. 77, sect. 30.”

Under the powers conferred by 20 & 21 Vict. c. 77, s. 30, already referred to, a great many very copious, minute, and explicit rules and

unexplained delay of sixteen years, and not alleging that there is any newly discovered evidence, will be dismissed. *Gale v. Nickerson*, 144 Mass. 415. But a petition in an action to contest a will, will not be dismissed for failing to allege the jurisdictional fact that the testator died, or left assets, in the county where the contest is being carried on, *Kinnaman v. Kinnaman*, 71 Ind. 417; so a general allegation that the will was unduly executed, or that the testator was a person of unsound mind, is good under the statute. *Lange v. Dammier*, 119 Ind. 567. Nor will omissions of matters required by statute be assumed to invalidate probate. *McCrea v. Haraszthy*, 51 Cal. 146.

Where the contest is between two wills, and the question is which shall be admitted as the will of the deceased, it is proper to submit the issue of “will or no will” as to each of such papers to the same jury. *Phillips v. Phillips*, 81 Ky. 328. Where there had been a trial by jury, it is necessary that motions for a new trial upon the evidence reported by the trial judge shall come before a court of law. *McKenney v. Alvord*, 73 Me. 221; so, properly, a law court should consider a motion to set aside a verdict in a probate case upon issues framed at *nisi prius*. *Carvill v. Carvill*, Id. 136.

On the trial of an issue in a suit in chancery to contest the validity of a

will, it is error to allow a certified copy of the will and order of the county court admitting it to probate to be introduced in evidence. *Purdy v. Hall*, 134 Ill. 298.

A decree in chancery setting aside the probate of a will, in a suit to which neither the executors and trustees under the will, nor, where they have resigned, the administrator *cum testamento annexo*, are made parties, is not binding upon beneficiaries under a trust in the will, who were not before the court. *McArthur v. Scott*, 113 U. S. 340.

But in a proceeding for probate it is not admissible to determine the question whether the testator made a binding agreement to make some other testamentary disposition. *Farmer v. Sprague*, 57 Wis. 324.

As to practice in probate courts see, also, *Hall v. Merrill*, 67 Me. 112; *Daniel v. Bellamy*, 91 N. C. 78; *Roberts v. Flanagan*, 21 Neb. 503; *Will of Colgate*, 12 Phila. 48; *Will of Carroll*, 50 Wis. 437; *Matter of Hatten*, 22 Abb. N. C. 66; *Wetter v. Habersham*, 60 Ga. 193; *Downey v. Downey*, 16 Hun 72; *Will of Middleton*, 72 Iowa 424; *Watkins v. Donnelly*, 88 Mo. 322; *Matter of Macaulay*, 27 Hun 577; *Cockrill v. Cox*, 65 Tex. 669; *Beeks v. Odorn*, 70 Id. 183; *Templeton v. Falls*, 77 Id. 55; *Perez v. Perez*, 59 Id. 322; *Johnson v. Wilcox*, 53 Id. 413; *Hutton v. Sawyer*, 104 N. C. 1; *Bryan v. Moring*, 94 Id. 687.

orders were, in the years 1862 and 1863, made for the guidance of practitioners in the Court of Probate, both in respect of contentious and non-contentious business, and for the instruction as well of the principal registrars as of the district registrars, together with a very large collection of forms. As to which it is thought more expedient to refer to the books of practice (*b*), than, by inserting them, to encumber this treatise by such a very long statement as would be requisite for that purpose (*c*).

\*These rules, orders, and directions are for the most part founded on the doctrines and practice previously established in the Prerogative Court with regard to the making, &c., of wills, which have already been stated in the progress of this work.

A testament may be proved in two ways; either in common form,<sup>10</sup> or by form of law; which latter mode is also called the solemn form, and, sometimes, proving *per testes* (*d*).

Ways of proving a will: 1, common form; 2, solemn form.

A will is proved in common form, when the executor presents it

(*b*) Tristram & Coote's Probate Practice, 10th edit.

(*c*) The Judicature Acts do not appear to have altered the *procedure or practice* of the Court of Probate with respect to non-contentious business. Nor do they alter or enlarge the *jurisdiction* of the Court of Probate in non-contentious matters. In the Goods of Tomlinson, 6 P. D. 209. But in In the Goods of Gunn, 9 P. D. 242, 244, Sir James Hannen said, "It appears to me that a very great change has been worked now by the fusion of all the courts into one. There is no difference between the law to be administered in this (Probate) Division and elsewhere, but each court is to ascertain what the law is, whether legal or equitable, and I think therefore it is open to me to establish a different basis to that which existed in the Probate Court. I am of opinion that where freehold property has had impressed upon it a changed character by reason of the doctrine of equitable conversion, it is to be treated as personalty, and probate

duty is payable, and it therefore follows that probate must be granted."

10. Where probate is made in common form, such probate is conclusive as to the facts that there is a will and an executor thereof, so long as the adjudication of probate stands unreversed. London v. Wilmington & Weldon R. R. Co., 88 N. C. 584; Kearney v. Kearney, 72 Cal. 591; West v. Waddell, 33 Ark. 575.

Where probate is made in common form, the will must be regarded, in all collateral proceedings, as established as the will of the decedent, until overthrown in a direct proceeding. Tucker v. Whitehead, 58 Miss. 762; Estate of Whitaker, 14 Phila. 275; Loosemore v. Smith, 12 Neb. 343.

The failure for four years after the probate of a will in common form to dispute the validity of its provisions, cannot be construed into acquiescence in those provisions, nor does it bar the right to have probate declared null and void. Craig v. Beatty, 11 S. C. 375.

(*d*) Swinb. Pt. 16, s. 14, pl. 1. Godolph. Pt. 1, c. 20, s. 4.

before the judge, and in the absence, and without citing the parties interested, produces witnesses to prove the same;<sup>11</sup> who Common form. testifying, by their oaths, that the testament exhibited is the true, whole and last will and testament of the deceased, the judge thereupon, and sometimes upon less proof, does annex his probate and seal thereto (e).<sup>12</sup>

In proceedings to probate a will, there are no parties. The judgment is *in rem*, and unless appealed from, is binding on the whole world. Storey's Will, 20 Ill. App. 188. Probate is conclusive until it is set aside upon a contest. Matter of Williams, 1 Lea 529. The probate of a will establishes its *status*, and such *status* adheres to the will, and concludes the whole world, subject only to be avoided by such direct proceedings to that end as may be provided by some affirmative law. Kearney v. Kearney, 72 Cal. 591.

11. The rule, largely prevailing in this country, is that the will may be established by one only of the attesting witnesses. Matter of Page, 118 Ill. 576; Welch v. Welch, 2 B. Mon. 83; Lambert v. Hooper's Executors, 29 Gratt. 61; Thornton v. Thornton, 39 Vt. 122; Doran v. Mullen, 78 Ill. 342; Estate of Whitaker, 14 Phila. 275.

Upon the *ex parte* probate of a will in "common form" the testimony as to the mental condition of the testator need not be confined to the subscribing witnesses, but others may testify as to his condition. The difference between the two classes of witnesses is that the subscribing witnesses may express their opinions, the other witnesses are confined to a narration of facts; and the probate judge should allow probate where he is satisfied from the testimony of the other witnesses that the testator had capacity, although the subscribing witnesses testify against the capacity. Martin v. Perkins, 56 Miss. 204.

The practice of admitting wills to probate in common form is quite, if not universally, prevalent throughout the United States. In many of the states the matter of admission to probate both in common and solemn form is regulated by statute. The admission of wills to probate in common form is provided for by statute in the following states: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Washington.

Under the Revised Statutes of Kentucky a holographic will can be admitted to probate upon proof by only one witness that the will is in the handwriting of the testator. Dupoyster v. Gagli, 84 Ky. 403.

Under the North Carolina statute (Rev. Stat. c. 122, § 6) probate of a will, prior to 1856, is sufficiently evidenced by the certificate of the clerk, that it was proved in open court by one of the two subscribing witnesses. Cowles v. Reavis, 13 S. E. 930.

(e) Swinb. Pt. 6, s. 14, pl. 2. Golph. Pt. 1, c. 20, s. 4.

12. In New York, it is not necessary that each of the statutory requirements be satisfactorily proved by two witnesses. Matter of Graham, 30 N. Y. St. Rep. 292.

The provisions of § 2618, Code Civ.

If the will be perfect on the face of it, and there is an attestation clause, reciting that the solemnities required by the statute 1 Vict. c. 26, s. 9, have been complied with (*e. g.*, "signed and declared by the above-named testator, as and for his last Will and testament, in the presence of us present at the same time, who, in his presence and in the presence of \*each other, have hereunto set our names as witnesses thereto. John Styles, Richard Nokes"), probate in common form may be obtained upon the oath of the executor alone.<sup>13</sup>

Manner of obtaining probate in common form (*f*).

But if there is no attestation clause, or if there is a clause which does not state a performance of all the prescribed ceremonies, an affidavit is required from one of the subscribing witnesses, by which it must appear that the will was executed in compliance with the statute (*g*). But this rule may be dispensed with, if the witnesses, after diligent inquiry, are not forthcoming (*h*).

Where no or imperfect attestation clause.

Where it appears from the affidavits, the attestation clause being imperfect, that the will was not properly attested by the witnesses under the statute, the court cannot decree administration to pass to the effects of the deceased *as dead intestate*; for there might be collusion: All that the court will do in such cases is to reject the prayer for probate,<sup>14</sup> leaving the parties to take out administration if they think proper; as notwithstanding the court declines to grant probate, the will might be propounded and established (*i*).

Pro., as to proof of wills have not altered the requirements of the statute as to the due execution of the will. *Matter of Graham, ubi supra.*

(*f*) For practical directions for obtaining grant of probate in common form, see *Browne's Probate Practice*, rev. edit. 206 *et seq.*

13. In Iowa, no other or further notice than that contemplated by § 2341 of the Code is necessary to give the Circuit Court jurisdiction in proceedings for the probate of a will. *Re Will of Middleton*, 72 Iowa 424; *Farrell v. Leighton*, 49 Id. 174.

(*g*) In the Goods of Johnson, 2 Curt. 341. In the Goods of Batten, 7 Notes of Cas. 290. Rule 4, P. R. 1862 and 1871 (Non-Contentious Business). Where one of the witnesses deposed

that the will was signed in the presence of himself and the other witness, the other witness having no recollection as to the fact, probate was allowed: In the Goods of Hare, 3 Curt. 54. See also *ante*, p. \*91.

(*h*) In the Goods of Luffman, 5 Notes of Cas. 183. In the Goods of Dickson, 6 Notes of Cas. 278. As to the course to be adopted when no affidavit is obtainable, see Rule 7, P. R. 1862 (Non-Contentious).

14. If there be a reasonable doubt whether any one of the requirements of the statute has been complied with, probate must be denied. *Will of Harris*, Tuck. 293, 300; *Tarrant v. Ware*, 25 N. Y. 429.

(*i*) In the Goods of Ayling, 1 Curt. 913. See also In the Goods of Watts,

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If a will, bearing date on or after January 1, 1838, has upon the face of it any unattested obliteration, interlineation or alteration, the practice is to require an affidavit, showing whether they were made before or after the execution of the will (*k*).<sup>15</sup>

Probate of wills exhibiting alterations and obliterations.

\*Where alterations are satisfactorily shown to have been made before the execution, it is usual to engross the probate copy of the will *fair*, inserting the words interlined in their proper places, and omitting words struck through or obliterated. But in cases where the construction of the will may be affected by the appearance of the original paper, the court will order the probate to pass in *facsimile* (*l*). And it appears to have been sometimes supposed that the grant of such a probate leaves it open to a court of construction to inquire whether such alterations of the will were made under such circumstances as to be effectual (*m*). But it is plain, it should seem, that unless the Court of Probate had adjudged that the obliterations or other alterations had been effectually made, the decree would have been for probate of the will in its original state. A *facsimile* probate, therefore, of a will made after the Wills Act came into operation is conclusive in the temporal courts, that the will was in that state before its execution, *i. e.*, that the testator duly executed it with the alterations or cancellations upon it (*n*). And the object of the *facsimile* is that the alterations, &c.,

1 Curt. 594. Rule 5, P. R. 1862 (Non-Contentious). If on perusing the affidavit or affidavits setting forth the facts of the case it appear doubtful whether the will or codicil has been duly executed, the registrar may require the parties to bring the matter before the judge on motion. Rule 6.

(*k*) Rules 8, 9, 10, and 11, P. R. (Non-Contentious Business). One of the subscribed witnesses will suffice, if he can speak positively. But if none of them can do so, they should all, whatever be their number, join in the affidavit: In the Goods of Townshend, 5 Notes of Cas. 146. If none of them can depose negatively or affirmatively, the practice is for the executor to join in the affidavit and depose that he cannot adduce any further or other evidence, and then

probate will be granted of the will as it originally stood. When two witnesses join in one affidavit, both must depose to the due execution: In the Goods of Batten, 7 Notes of Cas. 290. See *ante*, p. \*123, as to probate where words are completely obliterated.

15. As to practice in New York, see Crossman *v.* Crossman, 95 N. Y. 145.

(*l*) See *post*, Pt. I. Bk. VI. Ch. I. In the Goods of Raine, 34 L. J., P. M. & A. 125. In the Goods of Smith, 3 Sw. & Tr. 889.

(*m*) See the argument of Sir R. Bethell in Shea *v.* Boschetti, 18 Beav. 321. 3 De G. M. & G. 778, 779.

(*n*) Gann *v.* Gregory, 3 De G. M. & G. 777. *Post*, Pt. I. Bk. VI. Ch. I.



may possibly help to show the meaning of the testator: As, for example, in a case where a testator says, "I give A. B. an annuity of 500*l.*, and I also give him 1,000*l.*": and the testator then strikes out down to and including the words "500*l.*" (*o*).

\*In a case where a testator, having duly executed a will, made a later one, betraying on the face of it insanity, the executors of the earlier will took out a decree calling on all persons interested in the later paper to propound it, with an intimation that, on not appearing, the court would decree probate of the earlier will: The persons cited, executed proxies declining to propound the later paper, and consenting to probate of the earlier one: And Sir H. Jenner Fust accordingly decreed probate of it in common form, without the later paper having been propounded at all, and said that the course which had been taken was that which ought to be adopted in all similar instances (*p*).

Probate after citation of persons interested to propound a later paper.

#### SECTION IV.

##### *Proof of wills in solemn form, or per testes.*

This is a part of the "contentious business" of the court (*pp*), which now commences by the issue of a writ of summons in an action which is substituted for the citation formerly used.<sup>16</sup>

Proof in solemn form; contentious business.

When a will is to be proved in solemn form, it is now, in accordance with the old practice, requisite that such persons as have interest (that is to say, the widow and next of kin of \*the deceased, to whom the administration of his goods ought to be committed, if he died intestate)

Action now substituted for former citation.

Proof in solemn form under the old practice:

(*o*) *Gann v. Gregory*, 3 De G. M. & G. 780. Suppose, again, the words "to be equally divided amongst them" interlined (without any *caret* to show where they were intended to come in), and in such a position that they are applicable to two sets of legatees: In such a case, it should seem, there must of necessity, be a *facsimile* probate.

(*p*) *Palmer v. Dent*, 2 Robert. 284.

(*pp*) R. S. C. 1883, Ord. II. Rule 1. The practice in contentious business seems now to be governed by the Judicature Acts and Rules, together with the

Rules and Orders of 1862 (contentious business) made under the authority of the Probate Court Act and the old practice inherited by the Probate Court from the Prerogative Court, save in so far as the same have been altered by the Judicature Acts and Rules: *Kennaway v. Kennaway*, 1 P. D. 148; which case shows that notwithstanding the substitution of a writ of summons for the initial citation the former practice as to citing to see proceedings still obtains.

16. In matters of probate the first question is whether the paper pro-

should be cited to be present at the probation and approbation of the testament.<sup>17</sup>

According to the practice under the Court of Probate Act, 1857, <sup>under the new practice.</sup> declarations and pleas were substituted for the old modes of pleading. Now, by the new Judicature Acts, statements of claim and defenses are substituted for declarations and pleas.<sup>18</sup>

By rule 4 of the Rules and Orders, 1862 (Contentious), "Executors or other parties who, previous to the passing of the 'Court of Probate Act, 1857,' might prove Wills in solemn form of law, shall be at liberty to prove Wills under similar circumstances, and with the same privileges, liabilities, and effect, as heretofore."

Rule 5.—"Next of kin and others, who, previously to the passing of the said Act, had a right to put executors or parties entitled to

pounded is a will. *Hathaway's Appeal*, 46 Mich. 326.

Where a will has been admitted to probate in common form, and it is decided to reject certain pencil memoranda upon the will as probated, and to exclude them from the probate, it is proper to petition for the probate of the will in solemn form. *Roberts v. McMillan*, 9 Lea 571.

A proceeding for probate is in the nature of a proceeding *in rem*, which is binding on all parties who are entitled to participate, and are brought in by due process of law. *Hoyt v. Hoyt*, 112 N. Y. 493, 505.

Probate of a will, by a court having jurisdiction, is a proceeding *in rem*, and, in absence of statutes, it is conclusive as to the capacity of the testator and the due execution and validity of the will. *Brock's Administrator v. Frank*, 51 Ala. 85; *Estate of Haskell*, *Myrick's Prob.* 204.

It is not the policy of courts to *strain after probate* of a will, and it is equally true that courts should not *strain to refuse probate*. If the testator is possessed of testamentary capacity and the will is free from influence, probate should be granted, otherwise the statute

of wills becomes a mockery and the learning expended upon it becomes useless verbiage. If the testator lack capacity, or the will be the act of another and not of the testator, probate should be refused as matter of course. *Wood v. Bishop*, 1 Dem. 512; *Legg v. Meyer*, 5 Redf. 628.

17. But in order to be bound by the decree the parties must have been privy to the whole proceeding; where a contestant withdraws pending the contest, he is not a party to the *whole* proceeding, and he is not bound thereby so as to preclude him from impeaching the will in equity within five years. *Dillard v. Dillard*, 78 Va. 208.

18. As to jury trials on "contentious business," in Iowa, see *Collins v. Brazill*, 63 Iowa 432; *Smith v. James*, 74 Id. 462.

The Code of Civil Procedure in New York, § 2614, requires in proceedings for probate of a will, the presentation of a written petition "describing the will." But under these provisions it is not essential, in order to give the surrogate jurisdiction, when the will was executed in duplicate, that this fact should be stated in the petition. *Crossman v. Crossman*, 95 N. Y. 145.

administration with Will annexed upon proof of a Will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore."

Rule 6.—"Parties who previously to the passing of the said Act had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore."

The difference between the common form and the solemn form, with respect to citing the parties interested, works this diversity of effect: *viz.* that the executor of the will proved in common form may, at any time within thirty years, be compelled, by a person having an interest, to prove it *per testes* in solemn form (*q*). Thus, a probate of a codicil \*granted in common form 1808, was upon the citation of the executor by a next of kin to prove it *per testes* in due form of law, revoked in 1818 (*r*), and one granted in 1807, by a similar proceeding revoked in 1820 (*s*). So that if the witnesses be dead in the meantime, it may endanger the whole testament. Whereas, the testament being proved in solemn form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterward be dead, the testament still retains its full force (*t*).

The executor may, after proof in common form, be cited to prove the will *per testes*.

but not when already proved in solemn form.

(*q*) Godolph. Pt. 1, c. 20, s. 4. Indeed, Swinburne, Pt. 6, s. 14, pl. 4, seems to consider ten years as the limit within which the executor may be compelled to prove: but this probably is a typographical mistake for thirty: see 4 Burn. E. L. 318, Phillimore's edit. However, in *Hoffman v. Norris* (Prerog. 1805), reported in a note to Newell v. Weeks, 2 Phillim. 231, Sir Wm. Wynne says, "I do not know that there is any specific time, that limits a party." See also *Merryweather v. Turner*, 3 Curt. 802, 817. In the Goods of Topping; 2 Robert. 620, by Sir J. Dodson, *Accord*. But where a party who is thus entitled to call in the probate and put the executor to proof of the will, chooses to let a long time elapse before he takes this

step, he is not entitled to any indulgence at the hands of the court: He is entitled to have the law strictly administered and to nothing beyond it: *Blake v. Knight*, 3 Curt. 553. And under such circumstances the court (having regard to the infirmity of the witnesses' memory after the lapse of time) is, it should seem, somewhat astute to discover circumstances whereupon to found an inference that the formalities required for a due execution of the will have been gone through. See the cases collected, *ante*, p. \*91.

(*r*) *Satterthwaite v. Satterthwaite*, 3 Phillim. 1.

(*s*) *Finucane v. Gayfere*, 3 Phil. 405.

(*t*) *Swinb. v. Pt. 6, s. 14, pl. 4.*

Hence, not only are wills proved in solemn form, at the instance of persons who desire to invalidate them; but the executor himself may, and in prudence often does, for greater security, propound and prove the will, in the first instance, *per testes*, of himself, citing the next of kin, and "all others pretending interest in general," to "see proceedings"; which being done, the will shall not be set aside afterward (provided there be no irregularity in the process) when the witnesses are dead (u).<sup>19</sup>

\*But the executors cannot be allowed to issue a citation against the legatees under a codicil, which they do not believe to be a true codicil of the deceased, calling on them to propound and prove it if they think fit. The proper course is for the executors to prove the will in solemn form, and cite the next of kin and the asserted legatees under the codicil to see the will proved (x).

The next of kin, as such merely, are entitled to call for proof in solemn form of the deceased's will, of common right. And the mere acquiescence of a next of kin to the probate being taken in the common form is no bar to the exercise of this right, even though he has received a legacy as due to him under the will;<sup>20</sup> for he is still at

The executor may be compelled to prove in solemn form by a next of kin, who has acquiesced and received a legacy:

(u) 1 Ought. tit. 6, s. 5, tit. 222, s. 1, 2. Lister v. Smith, 3 Sw. & Tr. 53. Where an executor has proved the will in common form, a party desirous of putting him to proof in solemn form commences an action for revocation, having first cited the executor to bring in the probate. If the executor desires to sustain the will, he must either plead and propound it in the action for revocation, or he must commence an action himself to obtain proof in solemn form.

19. In many of the states there are statutory provisions for the probate of wills in solemn form. That is to say, provisions for the citation of all parties to attend before the court, at a time set for the taking of the proof of the specified will. Such provisions are found in Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Iowa, Kansas,

Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia and Wisconsin.

In Tennessee, the probate of a nuncupative will is required to be in solemn form. Brown v. Harris, 9 Baxt. 386.

Probate of a will of real estate in common form is conclusive, unless set aside. Matter of Williams, 1 Lea 529.

It is essential in Georgia that where a lost will is to be established, the copy thereof must be probated in solemn form. Mosely v. Carr, 70 Ga. 333.

(x) In the Goods of Benbow, 2 Sw. & Tr. 488.

20. A devisee, although a stranger to the blood of the testator, has a right to have the will probated in solemn form. Roberts v. McMillan, 9 Lea 571.

liberty to call in the probate, and put the executor on proof of that identical will *per testes* (y). A strong instance of this occurs in the case of *Core v. Spenser* (which was decided in the Prerogative Court of Canterbury, in 1796) (z), where Spenser, the executor, was cited to bring in the probate of a will, taken in 1788, eight years before, at the suit of Core, whose mother had received an annuity under that will for five of the eight years; and she, Core herself, her mother dying at the end of the fifth year, for the remaining three: Spenser, in that case, appeared under protest, and contended that Core was barred from putting him on proof of the will: But the court thought otherwise, and overruled the protest. However, long acquiescence, unaccounted for by any special circumstances, and acts done by a next of kin under the provisions of the will, may (if no fact appears which excites a reasonable suspicion of the genuineness or validity of the will) amount to such a waiver of his rights, as to preclude him from putting the will in suit (a). But where a will of \*the deceased having been found in which the plaintiff was named executor, he gave notice thereof to the defendant, who was about to obtain a grant in the goods of the deceased as interested under a previous will, and entered a caveat, and before the caveat had been warned and therefore before contentious proceedings had originated therefrom, he withdrew it, and signified to the defendant that he did not seek to establish his will, and administration with the earlier will annexed issued to the defendant, and subsequently the plaintiff took out a citation calling upon the defendant to bring in the administration and show cause why it should not be revoked, the court held that the plaintiff was not precluded from continuing a suit to determine which was the last will of the deceased (b).

And before a legatee, who has received all or part of his legacy, can be permitted thus to dispute the will, he must bring into court the amount of the legacy paid to him, to abide <sup>but he must bring his legacy into</sup> court: the event of the suit (c).

(y) *Bell v. Armstrong*, 1 Add. 370. *Merryweather v. Turner*, 3 Curt. 802.

(z) 1 Add. 374, in Sir J. Nicholl's judgment in the case of *Bell v. Armstrong*.

(a) *Hoffman v. Norris*, 2 Phillim. 230, in a note to *Newell v. Weeks*. *Braham v. Burchell*, 3 Add. 257, 258. See

also *Merryweather v. Turner*, 3 Curt. 802.

(b) *Goddard v. Smith*, L. R. 3 P. & D. 7.

(c) *Bell v. Armstrong*, 1 Add. 374. *Braham v. Burchell*, 3 Add. 256, 257. *Secus*, where the legatee is a minor: *Goddard v. Norton*, 5 Notes of Cas. 76.

A legatee who has renounced administration *cum testamento annexo*, as legatee and next of kin, whereupon it has been granted to another, is not barred by such renunciation from contesting the will; and he may therefore cite such administrator to bring the letters of administration into court to prove the will by witnesses, or to show cause why the deceased should not be pronounced to have died intestate, and why administration should not be granted to himself (d).

But when the executor propounds and proves the will, *per testes*, of himself, duly citing the next of kin "to see proceedings," all next of kin so cited are, generally speaking, thereby forever barred; and if he so propounds and proves the will against *certain* only of the deceased's next of kin, without having cited them all to see proceedings, the others, even \*though uncited, if to a certain extent privy to and aware of the suit, shall not put the executor on proof *per testes* of the will, so once already proved, a second time (e).<sup>21</sup>

It is clearly established that before a person can be permitted to contest a will, the party propounding has a right to call on him to show that he has some interest (f).

(d) *Gascoyne v. Chandler*, 2 Cas. temp. Lee, 241.

(e) *Newell v. Weeks*, 2 Phillim. 224. *Bell v. Armstrong*, 1 Add. 372. Accordingly it was held by Sir C. Cresswell, that a next of kin, though not cited to see proceedings, and not having intervened, if in fact cognizant of a suit between the executor and another next of kin, ending in the establishment of the will, is not at liberty in any way to oppose probate of such will being taken: and where on a verdict, the court had pronounced for a will, and a next of kin so situated had entered a caveat, the court directed probate to issue, in spite of the caveat, and condemned the next of kin in costs: *Ratcliffe v. Barnes*, 2 Sw. & Tr. 486. But this rule does not apply to a case where the parties to the suit compromise it and the decree is founded on the compromise. *Wytchery v. Andrews*, L. R. 2 P. & D. 327.

21. Where a writing purporting to be the last will and testament of a testator has been offered for probate in "common form" under the Mississippi Code, and probate has been refused for want of proof, such refusal will not preclude the devisees or legatees under the will from subsequently presenting the writing for probate in solemn form. *Martin v. Perkins*, 56 Miss. 204.

But the appearance of counsel for heirs, and the cross-examination by them of the witnesses to the will, upon the hearing of a petition for the probate of the will in common form, does not waive the right to probate in solemn form, where it appears that the waiver of such right was not intended. *Gray v. Gray*, 60 N. H. 28.

(f) *Hingston v. Tucker*, 2 Sw. & Tr. 596. But when two persons oppose a will, one cannot call upon the other to propound his interest. *Ibid.*

Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper.<sup>22</sup> Thus where a testator disposed of all his personal estate by his will and gave his real estate,

What interest a party must have to entitle him to oppose a will.

22. It is not necessary that all the heirs of a testator should join in bringing an action to contest his will. Any one or more may bring such action. *Kinnaman v. Kinnaman*, 71 Ind. 417. Where an action so brought is dismissed as to part of the plaintiffs, the case will stand as if it had been originally brought by those who did not dismiss, *Id.*; so too, where the action is brought by two contestants, and one of them dies, the action will not abate, but will proceed as to the survivor. *Diffenderffer v. Griffith*, 57 Md. 81.

Relatives of an infant are not parties entitled to file a caveat in their own names against the probate of a will, such caveat should be filed in the name of the infant. *Middleditch v. Williams*, 2 Dick. 575.

A judgment creditor of an heir has a right to contest the probate of a will of his debtor's ancestor, which, if probated, would defeat the lien of his judgment. *Matter of Langwin*, 45 Minn. 429. But a creditor of a decedent cannot contest his will, as he is not a person "interested therein" within the meaning of § 1989 of the Alabama Code. *Montgomery v. Foster*, 91 Ala. 613. On such a contest allegations in the language of the statute are insufficient, being mere conclusions of law; the petition should state facts. *Id.*; *Estate of Burrell*, 77 Cal. 479. But one presenting a claim against the estate is not on that account estopped from contesting the will. *Roberts v. Abbott*, 127 Ind. 83.

Where the statute provides that an omitted child shall take as if his parent had died intestate, a son, living at the

time of the execution of his father's will, cannot contest the allowance of the will on the ground that he is not mentioned or referred to therein. *McIntire v. McIntire*, 64 N. H. 609.

Where one makes a parol agreement with a pecuniary consideration, not to attack the will of the testator, such agreement cannot be repudiated after performance on the part of the other party. Thus where a devise was made of a quarter of the proceeds of real estate to T.'s daughter A. for life, the principal to be paid to her daughter B., C., the son of A., urging A. to break the will, A. and B. agreed with C. that he should have A.'s share of the personalty, and it should amount to at least one thousand dollars, upon which C. agreed not to attack the will, and, he having received more than one thousand dollars from A. and B., it was held that he could not repudiate his contract, and that he could not sustain an action to contest the validity of the will, *Jones v. Duff*, 47 Hun 170; and a promise by an executor to pay an heir a certain sum if he would forbear further opposition to the probate is founded upon sufficient consideration, and is not within the statute of frauds, *Bellows v. Sowles*, 57 Vt. 164; but where a legatee had given a receipt for the amount of her legacy, and an agreement for herself and heirs not to oppose the will, and she died before probate of the will, it was held that her son was not estopped from contesting the probate of the will, *Billing's Appeal*, 49 Conn. 456; but a promise by one wishing to contest a will made to others interested, to induce them to join the promissor, that he would divide in a certain way

but none of his personal, to his brother's children, and by a codicil he gave them pecuniary legacies, revoking the devise to them of the real estate which was of greater value than the legacies; it was held that they might oppose the codicil alone, notwithstanding their only right to a share of the personalty was under it (*g*). Though a next of kin may, as such, oppose all the testamentary papers, he has not a right to

is enforceable in equity. *Cubberly v. Cubberly*, 6 Stew. (N. J.) 82.

The receiver of a judgment debtor appointed in supplementary proceedings cannot contest the probate of the will of the debtor's deceased wife, which divests the husband of all interest in her property. *Matter of Brown*, 47 Hun 360.

The mere fact that suit has been brought against a party by the administrator of the estate of a decedent, gives such party no such interest in the estate as to entitle him to have the letters of administration revoked on the ground that they were illegally granted. *Kent v. Pennsylvania R. R. Co.*, 6 Mackey 335.

Purchasers from a devisee are proper parties to contest a will. *Roberts v. Abbott*, 127 Ind. 83.

In an action by several persons to contest a will, an answer that one of the plaintiffs is a legatee, and that he retains his legacy, is insufficient. *Floyd v. Floyd*, 90 Ind. 130.

Where an action is brought by a number of parties to set aside a will, the complaint is insufficient if it fails to allege the interest of some of the plaintiffs in the subject matter of the action. *Scott v. Farman*, 89 Ind. 580.

A party who has not appeared on the probate proceedings, where notice of application was given by publication, need not appeal from the order of probate, but may maintain an original action to set it aside. *Gregg v. Myatt*, 78 Iowa 703.

Upon a caveat to a will admitted to

probate, and upon which letters had issued, legatees cannot demand, as matter of right, that they should be permitted to take part in defending the will. *Little Sisters v. Cushing*, 62 Md. 416.

See also *Rainwater v. Harris*, 51 Ark. 401; *Matter of Hyde*, 41 Hun 72.

Where the petition of a caveator, which is sworn to, states that the caveator has an interest in the property of the deceased, such allegation is sufficient to sustain the fact, where the caveatees, in their answer, do not deny it, but merely state that they have no personal knowledge thereof, and do not attempt to disprove it on the trial, *Brewer v. Barrett*, 58 Md. 587; so too, although denied in the answer, if the caveatees do not demand presentment of proof on the trial. *Little Sisters v. Cushing*, 62 Md. 416.

In New York, a surrogate's court has no power to make an order allowing the intervention of new parties to a contest over the probate of a will, where a decree has been rendered in the matter, and an appeal is pending. *Matter of Dunn*, 1 Dem. 294.

Upon a petition for a revocation of probate, the Orphans' Court, before awarding issues, should satisfy itself of the interest of the petitioner. *Reilly v. Dougherty*, 60 Md. 276.

(*g*) *Kipping v. Ash*, 1 Robert. 270. See also *Dixon v. Allinson*, 3 Sw. & Tr. 572. But see the observations of Sir C. Cresswell on the first named case in *Crispin v. Doglioni*, 2 Sw. & Tr. 17.



oppose any particular one he may think fit ; for some interest in it, however remote, is necessary (*h*).

A creditor has only a right to have a *constat* of the estate \*of the deceased, to see whether there are assets sufficient to pay the debts ; but he cannot controvert the validity of a will ; for it is indifferent whether he shall receive his debt from an executor or an administrator ; and if a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense, and delay to executors (*i*).

A creditor cannot dispute the validity of a will, unless he has had a grant of administration.

But when administration has been granted to a creditor, he may oppose a will ; he is the same for this purpose as the next of kin (*k*).

but when administration is granted to him he may oppose a will :

And he may contest a will without costs ; because he is the appointee of the court and defends in that character, and does not appear simply as a creditor (*l*).

and this without costs.

If nobody, who has a right, appears to oppose the will, the court is not obliged, *ex officio*, to order a citation to issue to call the next of kin (*m*).

Court not obliged *ex officio* to order citation to next of kin.

A legatee cannot set up a will, after it has been litigated between the executor and next of kin, or between the executor and the executor of another will, and pronounced against, unless he can show the parties agreed to set aside the will by fraud or collusion (*n*). But if he is afraid the executor will not do justice, he may intervene for his interest pending the suit (*o*), but apparently not after the hearing (*p*).

A legatee cannot set up a will which has been pronounced against after being litigated by next of kin, or by the executor of another will.

According to the old practice of the Prerogative Court, when an executor had been called upon by a next of kin to prove the will *per testes*, and had sufficiently proved it, if the party who caused him to do this merely cross-examined the witnesses produced in support of the will, he was not

According to old practice next of kin was not liable to costs, when he compelled the ex-

(*h*) Baskcomb v. Harrison, 2 Robert. 118. S. C. 7 Notes of Cas. 275.

(*i*) Burroughs v. Griffiths, 1 Cas. temp. Lee, 544. Menzies v. Pulbrook, 2 Curt. 845.

(*k*) Dabbs v. Chisman, 1 Phillim. 159, 160, *per curiam*.

(*l*) Menzies v. Pulbrook, 2 Curt. 851.

(*m*) Burroughs v. Griffiths, 1 Cas. temp. Lee, 544.

(*n*) Bittleston v. Clark, 2 Cas. temp. Lee, 250. Hayle v. Hasted, 1 Curt. 236 : or unless, as it is said, there has been neglect or mismanagement in the conduct of the suit : 1 Curt. 240.

(*o*) Bittleston v. Clark, 2 Cas. temp. Lee, 250.

(*p*) Peters v. Tilley, 11 P. D. 145. See the judgment of Butt, J., in this case, p. 149.

subject \*to costs, generally speaking (*q*). A next of kin might, however, exercise his undoubted right in this matter so vexatiously, as to make himself responsible, if not wholly, in part for the costs of his opponent (*r*). And there was a difference between next of kin, who are favorites of the court, and the legatees under a former will; for, though such a legatee might call for proof, *per testes*, of a will, by which his interests under a former will were prejudiced, and might interrogate the witnesses produced in support of that will, he did this at the risk of being condemned in costs, if the court had reason to suspect him of undue litigation (*s*).

Where an executor, who had obtained probate of a former will, or a creditor who had a grant of administration, opposed a later will, he had the same right to do so without being subject to costs, as where a will was opposed by next of kin (*t*). But costs might be decreed against a party who had taken probate of a will which he knew was not the last will of the deceased (*u*).

By the rules of the Supreme Court of Judicature, 1883, order XXI., rule 18, which now govern the procedure and practice of the probate division upon this point, it is enacted \*that "the party opposing a Will may with his defense give notice to the party setting up the Will, that he merely insists upon the Will being proved in solemn form, and only intends to cross-examine the witnesses produced in support of the Will, and he shall thereupon be at liberty to do so, and shall be subject

The practice now governed by R. S. C. 1883, Order XXI., rule 18, as to costs.

(*q*) 1 Oughton, tit. 6, s. 7. Reeves v. Freeling, 2 Phillim. 56. Urquhart v. Fricker, 3 Add. 56.

(*r*) Urquhart v. Fricker, 3 Add. 57: As where a next of kin acquiesced in the probate, and received his legacy, and then, after a considerable interval, cited the executor to prove the will: Bell v. Armstrong, 1 Add. 375. And where a next of kin and residuary legatee under a prior will, suing *in forma pauperis*, put the executor of a later will to proof *per testes*, after seven years' acquiescence in the probate, and the proofs then adduced were perfectly clear and satisfactory; the court condemned the party in costs, suspending

the taxation while he continued a pauper: Wagner v. Mears, 2 Hagg. 524.

(*s*) Urquhart v. Fricker, 3 Add. 58: See also on this subject, Mansfield v. Shaw, 3 Phillim. 22; Boston v. Fox, 29 L. J., P. M. & A. 68, from which cases it appears that the executor of a former will has the same right as a next of kin. This right, however, does not extend to a residuary legatee under a former will. Hockley v. Wyatt, 7 P. D. 239.

(*t*) 1 Phillim. 160, note (*e*) to Dabbs v. Chisman. See also Lovett v. Harkness, 1 Cas. temp. Lee, 332.

(*u*) Martin v. Robinson, 2 Cas. temp. Lee, 535.

to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate."

This rule re-enacts rule 41 (contentious business), the practice under which was that a next of kin who availed himself of this rule was in the same position (*x*) as a next of kin in the Prerogative Court, *i. e.*, not liable to costs (*y*): But, if he called witnesses in support of pleas of undue execution, and incapacity, or the like, his liability to costs was in the discretion of the court, and he was not, generally speaking, condemned in costs, if there was a reasonable ground for litigation (*z*). But a failure to establish pleas of undue influence and fraud was, as a general rule, followed by condemnation in costs (*a*).

But it should be observed that where an action in the Probate Division is tried by a jury, the costs follow the event unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall for good cause otherwise order. R. S. C. 1883, order LXV. rule 1 (*b*).

\*Very material alterations in the law, with respect to probate in solemn form of wills relating to real estate, were effected by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

One of the great objects of that act was to prevent the possibility of a double trial on the same will: And accordingly it is enacted by sect. 61, that where the validity of a will affecting real estate is disputed, on proving it in solemn form or any other contentious cause, the heir-at-law, devisees, &c., shall be cited. And by sect. 62, after proof in solemn form, or where the validity of the will is otherwise decided on, the decree

20 & 21 Vict. c. 77, s. 61.

Heir, &c., to be cited when a will affecting real estate is proved in solemn form.

S. 62. Where the validity of the will is decided on, the decree of the court is to be binding on the persons interested in the real estate:

(*x*) If the party opposing a will does not deliver the notice of his intention not to call witnesses until after he has delivered his plea, he loses the protection against condemnation in costs given by the above rule 41, and the question of costs is left to the discretion of the court. *Bone v. Whittle*, L. R. 1 P. & D. 249. See also *Leeman v. George*, L. R. 1 P. & D. 542.

(*y*) *Cleare v. Cleare*, L. R. 1 P. & D. 655. There may be cases, however, where he will be condemned in costs. *Beale v. Beale*, L. R. 3 P. & D. 179.

(*z*) *Bramley v. Bramley*, 3 Sw. & Tr. 430. *Ferrey v. King*, 3 Sw. & Tr. 51. *Tippett v. Tippett*, L. R. 1 P. & D. 54. *Smith v. Smith*, L. R. 1 P. & D. 239.

(*a*) *Summerell v. Clements*, 3 Sw. & Tr. 35. *Bone v. Whittle*, L. R. 1 P. & D. 249. See also *Ireland v. Bendall*, L. R. 1 P. & D. 194. *Harrington v. Bowyer*, L. R. 2 P. & D. 264.

(*b*) See *Morris v. Freeman*, 3 P. D. 65; *Foley v. Brogan*, 11 L. R. Ir. Ch. D. 421.

of the court shall be binding on all persons interested in the real estate.

But by sect. 63, it is provided that the probate, decree or order of the court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

These sections and others connected with and following them will be found stated verbatim, and the whole subject of the probate of disputed wills affecting real estate will be considered, in a subsequent part of this treatise (c), together with the inquiry as to the effect of probate generally.<sup>23</sup>

The position of an heir-at-law cited under the 61st section is similar to that of the next of kin when cited to see proceedings in the Prerogative Court, and therefore, though if he contents himself with putting the executor to proof of the will, and cross-examining the witnesses, is not liable to costs; if he places pleas of undue influence and fraud on the record, and fails in proof of them, he is liable to costs (d).

The inquiry as to the cases in which costs will be decreed out of the estate of the deceased, and the general question as to when the unsuccessful party will be condemned in costs, will be discussed hereafter (e).

\*It remains to be mentioned in this place that by rule 78 (contentious business), it is ordered that "any person proceeding to prove a Will in solemn form, or to revoke the probate of a Will, may, if the Will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorizing him to cite the heir or heirs-at-law or other person or persons having or pretending interest in such real estate to see proceedings; and the judge or registrar on being satisfied by affidavit that the Will in question does affect or purport to affect the real estate,

(c) Pt. I. Bk. VI. Ch. I. p. \*478.

23. The statute of Iowa (Code, § 2340) requires that issues arising on probate of a will be submitted to a jury when either party demands it, and the verdict in such case will have the same effect as in ordinary actions at law, and should not be set aside for any less weighty reasons. *Collins v. Brazill*, 63 Iowa 432.

And since the enactment of the statute of 1876 (L. 1876, c. 11) giving the right to a jury trial, when the proving of the will is contested, the judgment is conclusive on the parties. *Smith v. James*, 74 Iowa 462.

(d) *Fyson v. Westrope*, 1 Sw. & Tr. 279.

(e) Pt. I. Bk. IV. Ch. II. § VII.

will make an order authorizing the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid; provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires" (f').

## SECTION V.

*Evidence in testamentary causes.*

It is now proposed to consider some rules of evidence with respect to the admission of disputed wills to probate.

By the Court of Probate Act, 1857 (21 & 22 Vict. c. 77, s. 33), "The rules of evidence observed in the Superior Court of Common Law at Westminster shall be applicable to and observed in the trial of all questions of fact in the Court of Probate."

Court of Probate Act, 1857, s. 33. Rules of evidence in common law courts to be observed.

By stat. 1 Vict. c. 26, s. 17, it is enacted, "That no person shall, on account of his being an executor of a Will, be in\*competent to be admitted a witness to prove the execution of such Will, or a witness to prove the validity or invalidity thereof."

Competency of executor. 1 Vict. c. 26, s. 17.

This section renders an executor, who is also entitled to a legacy in that character, a competent witness to support the will, if he has released his legacy (g).<sup>24</sup>

Executor who is also legatee is a competent witness if he has released his legacy.

And now, by stat. 6 & 7 Vict. c. 85 (which was held to

(f') Where an executor propounds the latter of two wills, the court will direct a citation to issue against the devisees under the earlier will and against the heir-at-law, although already before the court as defendant in the suit: *Lister v. Smith*, 3 Sw. & Tr. 53. The fact of one co-heir being an infant and child of a plaintiff is no ground for the court refusing to allow such co-heir to be cited: *Nicholas v. Binns*, 1 Sw. & Tr. 19. In this case Sir C. Cresswell observed, that the 61st and 63rd sections do not seem quite consistent: The former is more imperative in its terms than the latter.

(g) *Munday v. Slaughter*, 2 Curt. 72.

24. *Orndorff v. Hummer*, 12 B. Mon. 619; *McDonough v. Loughlin*, 20 Barb. 238; *Burritt v. Silliman*, 13 N. Y. 93; *Murphy v. Murphy*, 24 Mo. 526; *Dorsey v. Warfield*, 7 Md. 65; *Snyder v. Bull*, 17 Pa. St. 54; *Sawyer v. Dozier*, 5 Ired. 97; *Comstock v. Hadlyme*, 8 Conn. 254; *Overton v. Overton*, 4 Dev. & Bat. 197; *Wyman v. Symmes*, 10 Allen 153; *Sears v. Dillingham*, 12 Mass. 358; *Jones v. Larabee*, 47 Me. 474; *Richardson v. Richardson*, 35 Vt. 238; *Vansant v. Boileau*, 1 Binn. 444; *Gunter v. Gunter*, 3 Jones L. 441; *Morton v. Ingram*, 11 Ired. 368; *Tucker v. Tucker*, 5 Id. 161; *Coalter v. Bryan*, 1 Gratt. 18; *Noble v.*

apply to proceedings in the Ecclesiastical Court) (*h*), competency is conferred on interested witnesses generally; and by stat. 14 & 15 Vict. c. 99, s. 2, on parties to suits; and by stat. 16 & 17 Vict. c. 83, s. 1, on husbands and wives of parties.<sup>25</sup>

Competency of witnesses and parties under 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.

By stat. 17 & 18 Vict. c. 47, "In any suit or proceeding depending in any Ecclesiastical Court in England or Wales, the Court (if it shall think fit) may summon and examine *viva voce*.

before it and examine, or cause to be examined, witnesses by word of mouth, and either before or after examination by deposition or affidavit; and notes of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner, as the judge of the Court shall direct."

Burnett, 10 Rich. 505; Henderson v. Kenner, 1 Rich. 474.

But one named an executor in a will, is not a party to the probate of the will so as to exclude him, under § 399, Code Civ. Pro., from testifying to personal transactions and communications between himself and the deceased in regard to the execution of the will. Reeve v. Crosby, 3 Redf. 74. Nor will the fact that the will directs that the executor receive a sum of money, in addition to lawful commissions, for his services "in taking care of and settling the estate," place the executor on a par with the legatees, under § 399, because he is to render services for the money to be paid. *Id*.

But an executor is an incompetent witness in Alabama, nor can he become a competent witness by renunciation of his executorship. Gilbert v. Gilbert, 22 Ala. 529. So too, in Delaware. Davis v. Rogers, 1 Houst. 44. But the wife of an executor is not, on that account, an incompetent witness to a will. Hawley v. Brown, 1 Root 494. But if the executor have no interest, he may be a witness; so also, a mere trustee may be. Comstock v. Hadlyme, 8 Conn. 254, 262; Den v. Allen, 1 Penn.

35; Dorsey v. Warfield, 7 Md. 65; Malloy v. McNair, 4 Jones L. 297; Peralta v. Castro, 6 Cal. 354; Snyder v. Bull, 17 Pa. St. 54.

And if an executor die before trial, he will be held to be a competent witness, and his handwriting may be proved. Harleston v. Corbett, 12 Rich. 604.

But in New Hampshire it is held that the appointment of a person to be executor of a will does not give him such an interest as to render either him or his wife incompetent as a witness. Stewart v. Harriman, 56 N. H. 25. And in Pennsylvania, it is said that an executor, being plaintiff in a feigned issue to determine the validity of a will, is not a competent witness, because he is liable for costs. Vansant v. Boileau, *ubi supra*. But under the act of 1869 an executor, being also a devisee, is a competent witness. Bowen v. Goranflo, 73 Pa. St. 357; Frew v. Clarke, 80 Id. 170.

(*h*) This act did not repeal any of the provisions of the Wills Act.

25. Communications between an attorney and his client, in the presence of a third party, are not privileged under § 835, N. Y. Code of Civil Procedure.

By stat. 20 & 21 Vict. c. 77, s. 31, "Subject to the regulations to be established by such rules and orders as aforesaid, the witnesses, and where necessary, the parties, in all contentious matters, where their attendance can be had, shall be examined orally by or before the judge in open Court; provided always, that, subject to any such regulations as aforesaid, the parties shall be at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite party, orally in open Court as aforesaid; and after such cross-examination, may be re-examined, orally in open Court as aforesaid, by or on behalf of the party by whom such affidavit was filed."

Mode of taking evidence in contentious matters under Court of Probate Act, 1857, s. 31.

\*And by sect. 32, it is provided, "That where a witness in any such matter is out of the jurisdiction of the Court, or where, by reason of his illness or otherwise (*i*), the Court shall

Sect. 32.

Matter of McCarthy, 55 Hun 7; Matter of Austin, 42 Id. 516; Matter of Smith, 61 Id. 101, 105.

Nor are communications by a testator to the attorney who prepared the will, with reference to the will and the trusts therein, privileged. *Blackburn v. Cranfords*, 3 Wall. 199; *Matter of Austin*, *ubi supra*. But *contra*, *Loder v. Whelpley*, 111 N. Y. 239. As to communications of attorney to subscribing witness, see *Vincent v. McMaster*, 27 Hun 98. Nor where the attorney was acting for two clients are his communications privileged in a subsequent litigation arising between the representatives of the two clients. *Sherman v. Scott*, 27 Hun 331.

An executor who presents a will for probate is not such a party to the proceeding within the meaning of § 829, Code Civ. Pro., as to preclude him from testifying to personal transactions between himself and the testator, *Matter of Will of Wilson*, 103 N. Y. 374; but a legatee or devisee who is not a subscribing witness is not competent, under that section, to testify to such transactions, *Matter of Eysaman*, 113 N. Y. 62; and

it seems that one who was a stranger in blood to the testator, but who claimed as a legatee under former wills by the same testator, is a person deriving an interest in the deceased within the meaning of § 829, *Matter of Will of Smith*, 95 N. Y. 516; but where the wife of the testator is executrix and legatee under the will, and went with him to the house of the scrivener at the time of the drafting of the will, she is incompetent under § 829, *Lane v. Lane*, Id. 494; so also the wife of a contestant is incompetent, *Steele v. Ward*, 30 Hun 555; and a daughter whose interest is adverse to the will is incompetent under that section, *Matter of Lasak*, 31 N. Y. St. Rep. 203; S. C. 32 Id. 955; S. C. 57 Hun 417; nor does the right of the executor to commissions render him incompetent on account of interest, *Matter of Will of Wilson*, *ubi supra*; but letters of the testator to the contestant which have been dictated to an amanuensis are not privileged under § 829. *Matter of Budlong*, 54 Hun 131.

(*i*) See *Brown v. Brown*, L. R. 1 P. & D. 720.

not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the Court to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose; and all the powers given to the Courts of Law at Westminster by the Acts of the thirteenth year of King George the Third, chapter sixty-three, and the first year of King William the Fourth, chapter twenty-two, for enabling the Courts of Law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such Courts, and to enforce such examinations, and all the provisions of the said Acts, and of any other Acts for enforcing or otherwise, applicable to such examination, and the witnesses examined, shall extend and be applicable to the said Court of Probate, and to the examination of witnesses under the commissions and orders of the said Court, and to the witnesses examined, as if such Court were one of the Courts of Law at Westminster, and the matter before it were an action pending in such Court."

Formerly the general rule was, that if a party be put to proof of a will, he must examine the attesting witnesses.<sup>26</sup>

Attesting  
witnesses :

wit-

But since the passing of the Court of Probate Act,

26. But the modern doctrine is, that under some circumstances the signature of the testator may be proved by other evidence than that of the subscribing witnesses. *Givin v. Green*, 10 Phila. 99. This course is to be pursued when, after due diligence, the subscribing witnesses cannot be found. *Id. Watson v. Pipes*, 32 Miss. 451; *Hill v. Barge*, 12 Ala. 687; 1 Greenl. Ev. § 272; 4 Kent 515, 516; 2 Greenl. Ev. § 678; 1 Redf. on Wills 244. It has been repeatedly decided that it is the province and duty of the subscribing witnesses to a will not only to attest the corporal act of the execution of the will, but also the sanity of the testator at the time of the *factum*. *Withinton v. Withinton*, 7 Mo. 589; *Heyward v. Hazard*, 1 Bay.

(S. C.) 335; *Field's Appeal*, 36 Conn. 277, 279; *Whitenack v. Stryker*, 1 Gr. Ch. 9.

The rule as to the admissibility of the opinions of witnesses on the subject of the capacity of the testator, in England, is that such witnesses are always allowed to express their opinion as being founded upon their observation of the appearance and conduct of the party. And, to a very great extent, the same rule prevails in the United States; but there are authorities in Maine, Massachusetts and Texas which seem to hold otherwise. The earliest case in Massachusetts seems to be *Pool v. Richardson*, 3 Mass. 330; in which it is said that the court permitted the subscribing witnesses to give their opinions of the



1857, section 33 (*k*), it has not been necessary to call both the attesting witnesses to prove the execution; for in the courts of law the execution of a will may be proved by calling one only of the attesting witnesses (*l*).

\*In the ecclesiastical courts on affidavit that an attesting witness had been diligently sought, and could not be found, an executor might pray publication; but the other party had a right to a monition against the

Practice in ecclesiastical courts where attesting witness could not be found.

sanity of the testator, and other witnesses were allowed to testify to the appearance of the testator, but not to testify merely their opinion or judgment; and in a subsequent case, in which it was offered to prove the opinion of the attending physicians, an objection was made; the court ruled that the attending physician might give his opinion, but must state the particular circumstance or symptom from which he drew his conclusions, *Hathorn v. King*, 8 Mass. 371; and in *Dickenson v. Barber*, 9 Id. 225, the deposition of the physicians were excluded; and in *Commonwealth v. Rich*, 14 Gray 335, 337, it was held, as a matter of law, that a physician of thirty years' practice could not be questioned upon a hypothetical case, treated in the usual manner, although he testified that he had made the subject of mental diseases a study, but not a special study, and had had the usual experience of practicing physicians in matters of mental disease. In *Buckminster v. Perry*, 4 Mass. 593, where two or three witnesses testified to their opinion that the testator was much broken, the court charged the jury that the evidence given by the appellants to

invalidate the will deserved but little consideration; and in *Needham v. Ide*, 5 Pick. 510, it was said that the mere opinions of other witnesses than the attesting witnesses were not entitled to any weight, except as supported by facts proved on the trial. And in the cases of *Commonwealth v. Wilson*, 1 Gray 337, 339; *Hubble v. Bissell*, 2 Allen 196, 200; and *Commonwealth v. Fairbanks*, Id. 511, it is maintained that the incompetency of the opinions of non-experts is not an open question in Massachusetts. While the court did not disturb the rule, Judge Thomas, in *Baxter v. Abbott*, 7 Gray 71, 79, expressed his opinion, that if it were a new question, he should not hold as had been the established law in Massachusetts.

So in Maine, the rulings of the courts in Massachusetts seem to have been most strictly followed. *Ware v. Ware*, 8 Greenl. 42, 54, 55, 56; *Wyman v. Gould*, 47 Me. 159. And in Texas, in *Gehrke v. The State*, 13 Tex. 568, the court, without the citation of a single authority, or the consideration of the principles upon which its action was founded, held that it would have been improper to have received as evidence

(*k*) See *ante*, p. \*284.

(*l*) *Belbin v. Skeats*, 1 Sw. & Tr. 148. *Forster v. Forster*, 33 L. J., P. M. & A. 113. *Bowman v. Hodgson*, L. R. 1 P. & D. 362. But where the party propounding a will, in a contested suit, called one of the attesting witnesses who gave

evidence against the due execution, Sir C. Cresswell held that he was bound to call the other attesting witness: *Owens v. Williams*, 32 L. J., P. M. & A. 159. See also *Coles v. Coles*, L. R. 1 P. & D. 70.

witness to attend for cross-examination, if they could discover him (*m*).

the indefinite expression of a witness that the prisoner looked like or acted as an insane person.

With the exception of these three states, as mentioned above, the prevailing doctrine throughout the United States, as to the opinion of witnesses on the question of the sanity of a testator, is uniformly in accordance with the English rule; that is, testimony of opinion may be given upon a question of insanity in connection with the facts observed by the witness, but this evidence is confined to those who have observed the facts, and not allowed where the opinion of the witness is derived from the statement of facts made to him by another. Thus, it is said that the law is well settled that a witness may give his opinion in connection with the facts upon which it is founded, *Morse v. Crawford*, 17 Vt. 499, 502; but that where the opinion is required upon a given state of facts not connected with the personal observation of the witness, that opinion must be received from professional men alone, *Cram v. Cram*, 33 Id. 15, 18; so in Connecticut, it is said that the best evidence in cases of a question of insanity consists in the representation of facts, and the impression that they make, *Grant v. Thompson*, 4 Conn. 203; so

in New York, it is said that the judgment which we form as to the mental condition of an acquaintance depends as much upon his looks and gestures as upon the words and actions themselves, *De Witt v. Barley*, 9 N. Y. 371, 389; so too, a witness is permitted to express his opinion as to whether a plaintiff was sincerely attached to a defendant in a breach of promise case, *McKee v. Nelson*, 4 Cow. 355; and the witness may also be asked whether in his opinion a person was at the time intoxicated, *The People v. Eastwood*, 14 N. Y. 562; and it is also admissible for a witness to give the look of the eye and the action of the man; but unless he is permitted to express an opinion, he cannot convey to the mind distinctly the condition of the man that such acts and looks portrayed. *Matter of Vanauken*, 2 Stock. 186, 192.

So it is proper in regard to questions respecting the temper in which words have been spoken or acts done. Were they said kindly or rudely—in good humor or in anger—in jest or in earnest? The witness is permitted to express his belief in such matters; and the weight of his evidence must depend upon the consideration of all the circumstances under which his belief was formed, *Clary v. Clary*, 2 Ired. 78; and

(*m*) *Mynn v. Robinson*, 1 Hagg. 68. Where the attesting witness is dead, or insane, or absent in a foreign country, or not amenable to the process of the superior courts, or where he cannot be found after diligent inquiry, evidence of the witness' handwriting has always been admissible: *Roscoe's Nisi Prius Evidence*, 14th edit. p. 131. In a suit for revocation of probate on the grounds of undue influence and incapacity where it appeared that every

effort had been made to find one of the attesting witnesses but without success, the court allowed the affidavit made by him eight years before at the time of proving the will in the district registry to be admitted as evidence of execution and capacity: *Gornall v. Mason*, 12 P. D. 142. See also *Millar v. Sheppard*, 2 Cas. temp. Lee, 520, as to proving the handwriting of a witness when residing in an enemy's country.

There has already been occasions to show (*n*) that a will may be admitted to probate, as duly executed under the Wills Act, notwith-

the statement of the fact that a man's whole conduct is natural, is but the opinion that the witness formed by comparing the particular conduct spoken of with the acts of the past life of the individual. The contention that such evidence should be excluded could hardly be maintained; yet such evidence is neither more nor less than the opinion of the witness that such person is sane. *Clark v. State*, 12 Ohio 483, 490. And it must appear that the facts upon which such testimony is based have come under the personal observation of the witness. *Doe v. Reagan*, 5 Blackf. 217; *Beaubien v. Cicotte*, 12 Mich. 459.

And on a question of sanity, non-experts may be permitted to express their opinions, but such opinion must be founded upon facts given in evidence at the time of giving the opinion, *Parsons v. Parsons*, 66 Iowa 754; so too, it is said in *Upstone v. People*, 109 Ill. 169, 175, "We are of opinion that witnesses, not experts, may give their opinions, founded upon observation, on a question of sanity"; and witnesses who have had opportunity for knowing and observing the conversation, conduct and manner of a person whose sanity is in question, may depose not only to particular facts, but to their opinions or beliefs as to his sanity, formed from certain observation. *Keithley v. Stafford*, 126 Ill. 507, 520. And on such an issue the opinions of those acquainted with the business and social habits of the party are admissible. *Estate of Brooks*, 54 Cal. 471. And if a marked change in the conduct has taken place a witness, not an expert, who knows the fact and has testified to it, will be permitted to express an opinion as to insanity, based

upon his observation of the change of conduct. *State v. Winter*, 72 Iowa 627, 635.

A witness having knowledge of the facts may testify that the testator was firm in his views and convictions. *Moore v. Spier*, 80 Ala. 129. But such a witness must show that his acquaintance had been so long and so intimate as to enable him to form a correct opinion as to the mental capacity of the testator. *Id.*

But before a witness can be permitted to give his opinion as to the mental capacity of the testator who is alleged to be of unsound mind, he must testify to facts showing that he is qualified to give such opinion. *Sutherland v. Hankins*, 56 Ind. 343.

But a non-professional witness is not to be restricted to a recital of facts from which the jury may draw an inference of sanity or insanity, but may give his impression as to the sanity of the party as the result of his own observations. *Clary v. Clary*, 2 Ired. L. 78; *Baldwin v. State*, 12 Mo. 223; *Crowe v. Peters*, 63 Id. 434; *Moore v. Moore*, 67 Id. 192; *Dunham's Appeal*, 27 Conn. 192; *Cram v. Cram*, 33 Vt. 15; *Dennis v. Weekes*, 51 Ga. 24; *Pidcock v. Potter*, 68 Pa. St. 342; *Hardy v. Merrill*, 56 N. H. 227. And such witness can speak only from his personal observation. *Rice v. Rice*, 50 Mich. 448. But he cannot give his opinion generally as to such capacity, but must state facts within his knowledge, and his opinion must be based on such facts. *Pinney's Will*, 27 Minn. 280.

It may be added that the opinion of a witness as to the sanity of a person depends for its weight on the capacity of the witness to judge and his opportunity

(*n*) *Ante*, p. \*91, *et seq.*

standing the attesting witnesses may have no recollection at all as to the circumstances attending the execution,<sup>27</sup> or notwithstanding one only should affirm and the other negative, or even both should negative a compliance with the statute, or the capacity of the testator (o).<sup>28</sup>

The Ecclesiastical Court always allowed witnesses skilled in

to do so. *Burton v. Scott*, 3 Rand. 399, 403.

See also the following cases as to the competency of such evidence: *Lester v. Pittsford*, 7 Vt. 158; *Clifford v. Richardson*, 18 Id. 620, 627; *Crane v. Northfield*, Id. 124; *Cavendish v. Troy*, 41 Id. 99, 108; *Kinne v. Kinne*, 9 Conn. 102; *Dunham's Appeal*, 27 Id. 192; *Stewart v. Lispenard*, 26 Wend. 291, 308, 309; *Culver v. Haslam*, 7 Barb. 314; *Delafield v. Parish*, 25 N. Y. 37, 38; *Clapp v. Fullerton*, 34 Id. 190; *Clark v. Sawyer*, 3 Sandf. Ch. 357; *Den v. Gibbons*, 2 Zab. 117, 135, 136; *Whitenack v. Stryker*, 1 Green Ch. 8; *Sloan v. Maxwell*, 2 Id. 563, 583, 584, 586, 588, 592, 594, 599, 602; *Turner v. Cheesman*, 2 McCart. 243; *Garrison v. Garrison*, Id. 266; *Rambler v. Tyron*, 7 Serg. & R. 90, 92; *Irish v. Smith*, 8 Id. 573, 576; *Wogan v. Small*, 11 Id. 141, 144; *Grabill v. Barr*, 5 Pa. St. 441, 443; *Wilkinson v. Pearson*, 23 Id. 117, 120; *Bricker v. Lightner*, 40 Id. 199; *Duffield v. Morris*, 2 Harr. (Del.) 375, 377, 385; *Brooke v. Townsend*, 7 Gill 1028; *Stewart v. Redditt*, 3 Md. 67, 78; *Stewart v. Spedden*, 5 Id. 433, 446; *Dorsey v. Warfield*, 7 Id. 65, 73; *Weems v. Weems*, 19 Id. 334, 345; *Temple v. Taylor*, 1 Hen. & Munf. 476, 478; *Mercer v. Kelso*, 4 Grat. 106, 118; *Hayward v. Hazard*, 1 Bay 335, 340, 341, 342, 343, 344; *Griffin v. Griffin*, R. M. Charl't. 217, 218, 220, 221, 223; *Potts v. House*, 6 Ga. 324; *Berry*

*v. State*, 10 Id. 510, 529; *Walker v. Walker*, 14 Id. 242, 151; *Roberts v. Trawick*, 13 Ala. 68, 84; *Norris v. State*, 16 Id. 776; *Florey v. Florey*, 24 Id. 241, 247; *Powell v. State*, 25 Id. 21; *Stubbs v. Houston*, 33 Id. 555, 564; *In re Carmichael*, 36 Id. 514, 522; *Gibson v. Gibson*, 9 Yerg. 329; *Baldwin v. State*, 12 Mo. 223; *Farrel v. Brennan*, 32 Id. 328; *Kelly v. McGuire*, 15 Ark. 555, 601; *Abraham v. Wilkins*, 17 Ark. 292, 322; *State v. Gardner*, *Wright* 392, 398; *Roe v. Taylor*, 45 Ill. 485; *American Bible Society v. Price*, 115 Id. 623; *Pelamourges v. Clark*, 9 Iowa 1, 11-19, 29; *State v. Felter*, 25 Id. 67; *White v. Bailey*, 10 Mich. 155, 161; *Hoge v. Fisher*, *Pet. C. C.* 163, 165; *Harrison v. Rowan*, 3 Wash. C. C. 580, 582, 586; *Williams v. Lee*, 47 Md. 321; *Appleby v. Brock*, 76 Mo. 314, 317.

It has been held that a priest is an expert witness on the question of sanity. *Estate of Toomes*, 54 Cal. 509.

27. It is not competent to ask a layman of limited education, although a subscribing witness: "Do you think he had mind sufficient, at the time he is alleged to have executed this will, to give those specific directions with reference to the disposition of the property?" *Matter of McCarthy*, 55 Hun 7. But it is competent to ask such witness, whether in *his* opinion he had mind enough to form a reasonable judgment of the kind and value of

(o) See *ante*, p. \*31, *et seq.*

28. It has been held that the question of competency to make a will involves inquiry whether the testator was of suffi-

cient mental capacity to change any previous intention. *Will of Hoover*, 19 D. C. 495.

the examination of handwriting and detection of forgeries to depose to their opinion, *upon comparison* of the writing in question with other documents admitted to be in the handwriting of the party, or proved to be so by persons who saw them written; whereas, in the common law courts, this mode of evidence was rejected until the passing of the stat. 17 & 18 Vict. c. 125 (*p*).

Doctrine of ecclesiastical courts as to mode of proving handwriting:

in common law courts prior to Common Law Procedure Act, 1854.

\*Generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; <sup>29</sup> and evidence of the will having been read over to the

Rule that on proof of signing, instructions and

property he proposed to give. *Bost v. Bost*, 87 N. C. 477. And it is competent to ask a witness how the mental condition of the testator during his last illness differed from what it had been prior thereto. *Will of Norman*, 72 Iowa 84.

But it is erroneous to instruct the jury that the testimony of experts is usually of very little value in determining the question of sanity. *Eggers v. Eggers*, 57 Ind. 461.

But the mere want of recollection on the part of the witnesses that such communication was made will not defeat the will, where the attestation clause contains a declaration that the will was published. *Brinckerhoff v. Remsen*, 26 Wend. 325; *Ela v. Edwards*, 16 Gray 91, 99. When the witnesses do not remember the execution and attestation of the will, the fact that they signed in the presence of the testator may be established by circumstantial evidence. *Pate's Adm'r v. Joe*, 3 J. J. Marsh. 116. See also *Transue v. Brown*, 31 Pa. St. 92; *Lawyer v. Smith*, 8 Mich. 411; *Sutton v. Sutton*, 5 Harr. (Del.) 459. *Dock v. Dock*, 19 Hun 630; *Estate of Wright*, by How. Pr. 117. And the declaration of a witness that it was never his custom to attest an instrument without hearing it acknowledged, is evidence to go to the jury as to execution. *Pate's Adm'r v. Joe*,

*ubi supra*; *Hughes v. Hughes*, 31 Ala. 519; *Lawyer v. Smith*, *ubi supra*.

The fact that the will offered for probate bears date after the death of the testator is not *per se* proof of forgery of the will. *Doran v. Mullen*, 78 Ill. 342.

If no proof of acknowledgment is produced, the allegation in the attestation clause may be taken as true, and proof that the will was acknowledged. *Will of Alspaugh*, 8 C. E. Gr. 507. Unless there be affirmative evidence to disprove the statement in the attestation clause. *Allaire v. Allaire*, 8 Vr. 312, affirmed, 10 Vr. 113; *Barnes v. Barnes*, 66 Me. 286. So too, if the attestation clause shows that the will was signed and declared in the presence of the witnesses, it will be presumed that both witnesses were present at the same time. *Kirkpatrick's Will*, 7 C. E. Gr. 463.

(*p*) By sect. 27, "Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of the witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

29. And for the purposes of probate it is not necessary that the witnesses should testify that the testator declared

testator, or of instructions having been given, is not necessary (q) :  
 for when an instrument has been executed by a com-  
 petent person, it must be presumed that the party so  
 executing knew the contents and the effect of the instru-  
 ment, and that he intended to give that effect to it (r).<sup>30</sup>

knowledge of the  
 contents shall be  
 presumed :

it to be his will. *Allen v. Griffin*, 69 Wis. 529.

(q) *Billinghurst v. Vickers*, 1 Phillim. 187, 191. *Cleare v. Cleare*, L. R. 1 P. & D. 655.

(r) *Fawcett v. Jones*, 3 Phillim. 476. *Wheeler v. Alderson*, 3 Hagg. 587. *Browning v. Budd*, 6 Moo. P. C. 435. The burden of proof that a testator knew and approved of the contents of a will propounded is upon the person who propounds it: *Cleare v. Cleare*, L. R. 1 P. & D. 655. And if it be proved or admitted that a testator is of sound mind, memory and understanding, that a will has been read over to him, or that he has read it to himself and that he has put his signature to it, the question whether he knew and approved of the contents of such will must be answered in the affirmative: *Atter v. Atkinson*, L. R. 1 P. & D. 665. But there is no unyielding rule of law (especially when the ingredient of fraud enters into the case) that when it has been proved that a testator, competent in mind, has had a will read over to him and has thereupon executed it, all further inquiry is shut out: *Fulton v. Andrew*, L. R. 7 H. L. 448. See also on the question of testator's knowledge and approval of the contents of a will, the case of *Goodacre v. Smith*, L. R. 1

P. & D. 359. Approbation will have the effect of prior instructions: *Forfar v. Heastie*, 2 Cas. temp. Lee, 310. *Durnell v. Corfield*, 1 Robert. 56. Moreover, a testator may, if he likes, authorize another person to make a will for him and may say, "I do not know what you have put down, but I am quite ready to execute it," and such a will would be admitted to probate: *per Sir C. Cresswell*, *Cunliffe v. Cross*, 3 Sw. & Tr. 38. Accordingly that learned judge held a plea that the alleged codicil was not prepared in conformity with the intentions of the deceased, and the deceased, at the time of the execution of the alleged codicil, was ignorant of the contents thereof, to be bad on demurrer: *Cunliffe v. Cross*, 3 Sw. & Tr. 37. If a testatrix has given instructions for her will and it is prepared in accordance with them, the will will be valid, though at the time of execution the testatrix merely recollects that she has given those instructions, but believes that the will is in accordance with them: *Parker v. Felgate*, 8 P. D. 171. See also *Middlehurst v. Johnson*, 30 L. J., P. M. & A. 14. But see *contra* *Hastelow v. Stobie*, L. R. 1 P. & D. 64. 35 L. J., P. M. & A. 18. S. C. 11 Jur., N. S. 1039, where Sir J. P. Wilde held a plea "that the deceased

30. But the jury must be satisfied that testator did know the contents of the will. *Montague v. Allen*, 78 Va. 592. However, if a person of sound mind executes a will, the presumption is that he knew the contents. 45 Md. 422. But express proof of capacity and freedom from coercion where there is no

contest is not requisite. This will be presumed. *Herbert v. Berrier*, 81 Ind. 1.

But on such an issue the burden of proof is on the proponent; but when he has shown a *prima facie* case of capacity and freedom the *onus* shift. *Freeman v. Hamilton*, 74 Ga. 317.

\*Thus, although the rule of the Roman Law that "*Qui se scripsit hæredem*" could take no benefit under a will, does not prevail in the law in England, yet, where the person who prepares the instrument, or conducts its execution is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the court, and calls on it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased (s).<sup>31</sup>

did not know and approve of the contents of the will" to be good. See also *Cleare v. Cleare*, L. R. 1 P. & D. 655. *Sutton v. Sadler*, 3 C. B. (N. S.) 88, 99. But it may be doubted whether the view taken by Sir C. Cresswell is not more correct. It is surely a somewhat harsh construction of the law that a man shall not be allowed to confide in his friend or solicitor, and depute him to draw up his will, and adopt it when so drawn up, without ascertaining what the contents of it are; particularly in wills containing complicated limitations it would seem to be unjust to require that the testator should understand each limitation, which the solicitor, in whom he has confided, has thought proper to insert.

(s) See *ante*, p. \*99. *Dufaur v. Croft*, 3 Moore, P. C. C. 136. *Durnell v. Corfield*, 1 Robert. 51. *Barry v. Butlin*, 2 Moo. P. C. 480. *Fulton v. Andrew*, L. R. 7 H. L. 448.

31. This maxim imposes an additional burden on those who seek to establish a will where the application of this maxim is called for. *Delasfield v. Parish*, 25 N. Y. 9.

See also *Vankleek v. Phipps*, 4 Redf. 99; *Crispell v. Dubois*, 4 Barb. 398; *Blume v. Hartman*, 115 Pa. St. 32; *Waddington v. Buzby*, 18 Stew. (N. J.) 173; *Cuthbertson's Appeal*, 97 Pa. St. 163.

But it does not mean that the taking

of a legacy by the draughtsman is positively prohibited. *Whelpley v. Loder*, 1 Dem. 368, 380.

As to the application of this maxim where the beneficiary was not himself the scrivener, see *Burke v. Nolan*, 1 Dem. 436; *Waddington v. Buzby*, 18 Stew. (N. J.) 173.

But on a bill in chancery contesting a will the *onus* is upon the proponent in the first instance to sustain the will. *Moyer v. Swygart*, 125 Ill. 262.

The question of the mental capacity of the testator is a question for the jury. *Duggan v. McBreen*, 78 Iowa 591; *Sherley v. Sherley*, 81 Ky. 240.

But in Pennsylvania it is said that it is the duty of the court to determine the sufficiency of the evidence of testamentary incapacity, and that it is error to submit the question to the jury. *Cauffman v. Long*, 82 Pa. St. 72.

And a distinction may be made between a stranger and one who is a relative and entitled to some interest in the estate. *Caldwell v. Anderson*, 104 Pa. St. 199.

And where the scrivener is himself made the executor, and his wife and son are favored legatees, this fact will not invalidate the will, but demands suspicious scrutiny. *Waddington v. Buzby*, 18 Stew. (N. J.) 173.

And although vigilance should be aroused where the will is drawn by an attorney, agent, physician, priest or

Where the testator is blind, it must be proved that the contents of the will were known to the deceased: for his execution, where the testator is blind or cannot read: or other acknowledgment of the will, is not sufficient, and the same, where from want of education, or from bodily affliction, he is unable to read (*t*).

So it is an established rule in the Spiritual Court, that where the capacity of the testator is doubtful at the time of execution, there must be proof of instruction, or of reading over, or other satisfactory evidence, of some kind, that he knew and approved of the contents of the will (*u*).<sup>32</sup>

other person standing in a confidential relation, who is a beneficiary, this does not *prima facie* invalidate the will. *Montague v. Allen*, 78 Va. 592.

But where the person is weak-minded and the estate large and principally given to the scrivener, this maxim imposes upon such beneficiary the obligation of showing, not only the possession of testamentary power, but that the testator *knew* how much he was giving to the attorney or scrivener. *Hambleton v. Mendenhall*, 17 Phila. 73; *Cuthbertson's Appeal*, 97 Pa. St. 163.

And if the jury believe that the will was not read or explained before its execution, or read by the testator after he had executed it, the *onus* is upon the beneficiary to show that the will was drawn as directed. *Blume v. Hartman*, 115 Pa. St. 32.

(*t*) *Ante*, pp. \*13, \*14. See Rule 71, P. R. 1862 (non-contentious).

(*u*) *Ante*, p. \*100. *Billinghurst v. Vickers*, 1 Phillim. 193. *Barry v. Butlin*, *ante*, p. \*99. *Mitchell v. Thomas*, 6 Moo. P. C. 137; *Browning v. Budd*, 6 Moo. P. C. 430.

32. As to mental capacity and undue influence, the investigation should be directed to the time of the *factum*. *Kramer v. Weinert*, 81 Ala. 414. A charge to the effect that if the testator at the time of the *factum* had a diseased brain, and from this cause or from disease his mind was so unsound

as not to remember the names of his relatives and to judge soundly of the acts he was about to do, or to know and understand the business he had in view, and to think soundly on the business, then he did not have capacity, was held to be confusing and misleading. *Id*.

But where the question is one of testamentary incapacity, if it does not amount to idiocy, it should be shown by testimony of persons who are acquainted with facts of recent years. *Hoban v. Piquette*, 52 Mich. 346.

But it does not follow from the fact that a witness is a physician, that he is any better judge of the mental capacity of the testator than other men of good common sense. *Carpenter v. Calvert*, 83 Ill. 62.

The testimony of experts, in relation to the sanity of a person, should be tested by the same general rules as the testimony of other witnesses. *Cuneo v. Bessoni*, 63 Ind. 524.

But where probate is contested on the ground of unsoundness of mind, a physician who has attended upon deceased in a professional capacity is not a competent witness for the contestants, to testify from knowledge acquired while so attending him as to his mental capacity. *Matter of Coleman*, 111 N. Y. 220. But when such testimony is admitted by the parties to the proceeding, without objection, the result will not be disturbed. Such objection must be



But this \*rule only applies, or at least only applies with any stringency, where the instrument is inofficious, *i. e.* not consonant to the testator's natural affections and moral duties, or where it is obtained by a party materially benefited ( $\alpha$ ). In a case where a will had been propounded in a *condidit*, and the three attesting witnesses only had been examined: The testatrix was upward of eighty years of age and very infirm; she was deaf and almost blind; and the instrument had been drawn up from directions given by the executor, who was partially the residuary legatee, and no instructions were proved to have been given by the deceased: 33 Sir H. Jenner Fust

specially taken or the defeated party cannot avail himself of it on appeal. *Matter of Gannon's Will*, 2 N. Y. Misc. 329; *Loder v. Whelpley*, 111 N. Y. 239; *Hoyt v. Hoyt*, 112 Id. 493. But they are not incompetent under § 834, Code Civ. Pro., to testify as to knowledge obtained from personal acquaintance either before or after the professional connection. *Matter of Loewenstine's Will*, 2 N. Y. Misc. 323; *Fisher v. Fisher*, 129 N. Y. 654. And under § 836, as amended (L. 1892, c. 514), they may testify as to knowledge gained while assisting the superintendent of an asylum in the discharge of his duties. *Matter of Loewenstine's Will*, *ubi supra*. But a physician is a witness of high grade, especially one who attended the patient in the disease which is supposed to have destroyed testamentary capacity. *Cheatham v. Hatcher*, 30 Gratt. 65; *Montague v. Allen*, 78 Va. 592; *Coryell v. Stone*, 62 Ind. 307. And physicians may be regarded as experts as to the condition of the body, and as to what diseases tend to impair the mind. *Carpenter v. Calvert*, *ubi supra*.

On an issue of undue influence, the court properly exercises its discretion in excluding a question addressed to an attesting witness as to whether the testatrix has strength of mind enough to comprehend a clause in the will creating a charitable trust, as it involved an

opinion upon a subject upon which the jurors and witnesses might differ. *Melanefy v. Morrison*, 152 Mass. 473.

( $\alpha$ ) *Brogden v. Brown*, 2 Add. 449.

33. So it is held that where the decedent is shown, at the time of the alleged execution of the will, to have been aged, ill, physically feeble, and with impaired senses, though of unquestioned mental capacity, mere proof of the due observance of the formalities of subscription and publication will not justify a decree admitting the instrument propounded to probate. *Hyatt v. Lunnin*, 1 Dem. 14. Under such circumstances additional proof is required that the testator's mind accompanied the will, and that he was perfectly aware of the dispositions made by it. *Weir v. Fitzgerald*, 2 Bradf. 42. So where a question arises as to the testator's knowledge of the contents of his will, it is imperative that there be some proof of his familiarity with it. *Burritt v. Silliman*, 16 Barb. 198; *Chaffee v. Missionary Con.*, 10 Paige 85; *Van Pelt v. Van Pelt*, 30 Barb. 134; *Lake v. Ranney*, 33 Id. 49; *Barry v. Boyle*, 1 Thomp. & C. 422.

Where it is claimed that a testator was under delusion as to the chastity of his wife, the testimony of the party accused is admissible to prove it to be an insane delusion. *Burkhart v. Gladish*, 123 Ind. 337.

Facts tending to show testamentary

pronounced against the validity of the will, not on the supposition of any fraud having been practiced, but on the ground of failure of proof (*y*).

Where the alleged will of a seaman is in favor of his agent, there seaman's will in favor of his agent. must be clear proof not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect (*z*).

Under certain circumstances, the validity of a will may be established by proving the handwriting of the attesting witnesses, though no evidence can be given, either of instructions, or of the handwriting of the deceased (*a*). Proof of will by mere evidence of handwriting of attesting witnesses.

In a court of construction, when the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator (*b*): But in the Court of Probate the inquiry is not so limited ;<sup>34</sup> for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case \*taken together (*c*). They must, however, be circumstances existing at the time the will is made (*d*).<sup>35</sup>

incapacity are admissible although they ante-date the *factum* ; the difference of time only affects the weight of the testimony. *Conely v. McDonald*, 40 Mich. 150. But as to intoxication, the testimony must be confined to the time of the *factum*. *Pierce v. Pierce*, 38 Mich. 412. But on questions of testamentary capacity and sanity the evidence may cover a long space of time in either direction. The strength of the testimony weakens as the time lengthens. *Dale's Appeal*, 57 Conn. 127.

(*y*) *Sankey v. Lilley*, 1 Curt. 402. See also *Harwood v. Baker*, 3 Moo. P. C. C. 282. *Dufaur v. Croft*, 3 Moo. P. C. C. 136.

(*z*) *Zacharias v. Collis*, 3 Phillim. 202.

(*a*) *Anderson v. Welch*, 1 Cas. temp. Lee, 577.

(*b*) See *Re Bywater*, 18 C. D. 17.

34. However, the court will look for

the final expression of the intentions of the testator to the will itself. *Matter of Forbes*, 60 Hun 171.

(*c*) *Greenough v. Martin*, 2 Add. 243. *Methuen v. Methuen*, 2 Phillim. 426. In the Goods of English, 3 Sw. & Tr. 586. *Robertson v. Smith*, L. R. 2 P. & D. 43. *Jenner v. Finch*, 5 P. D. 106. See also the cases collected, *ante*, p. \*95, note (*e*).

(*d*) *Stockwell v. Ritherdon*, 1 Robert. 661, 658. 6 Notes of Cas. 415, *per* Sir H. J. Fust: but in *Gould v. Lakes*, 6 P. D. 1, it was held that statements of a testatrix whether made before or after the execution of the will are admissible to show what papers constitute the will.

35. "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so

Therefore, if there is an ambiguity upon the *factum* of the instrument, parol evidence may be admitted, under some circumstances, in the Court of Probate, to explain the intention of the testator. By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as whether a

receivable if there is an ambiguity on the *factum*;

interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." Wigram, V.-C.

"Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases) will be void for uncertainty." Wigram, V.-C.

"Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (*i. e.*, the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." Wigram, V.-C.

See 1 Greenl. Ev., § 275, *et seq.*; 1 Redf. on Wills 496; see also American Bible Society v. Pratt, 9 Allen 109, and

the note to this case in Redf. Am. Cas. on Wills 600; Crosby v. Mason, 32 Conn. 482; Spalding v. Huntington, 1 Day 8; Hearn v. Ross, 4 Harr. (Del.) 46; Wiley v. Smith, 3 Ga. 551; Billingslea v. Moore, 14 Ga. 370; Doyal v. Smith, 28 Ga. 262; S. C., 31 Ga. 198; Thweatt v. Redd, 50 Ga. 181; Walston v. White, 5 Md. 297; Puller v. Puller, 3 Rand. 83; Webley v. Lanstaff, 3 Desaus. 509; Grimes v. Harmon, 35 Ind. 198; Huston v. Huston, 37 Iowa 668; Caldwell v. Caldwell, 7 Bush 516; Timberlake v. Parish, 5 Dana 346; Humble v. Humble, 3 A. K. Marsh. 126; Jackson v. Payne, 2 Metc. (Ky.) 570; Miller v. Springer, 70 Pa. St. 269; Brown v. Brown, 6 Watts 54; Comfert v. Mather, 2 Watts & S. 450; Weatherhead v. Sewell, 9 Humph. 272; Heslop v. Gatton, 71 Ill. 528; Richards v. Miller, 62 Ill. 417; Hyatt v. Pugsley, 23 Barb. 285; Arculavius v. Geissenhainer, 3 Bradf. 64; Mann v. Mann, 1 Johns. Ch. 234; S. C., 14 Johns. 1; Belt v. Belt, 1 Harr. & McH. 409; Taggart v. Boldin, 10 Md. 104; Starling v. Price, 16 Ohio St. 29; Painter v. Painter, 18 Ohio 247; Worman v. Teagarden, 2 Ohio St. 380; Tallman v. Tallman, 3 N. Y. Misc. 465, 480; Tucker v. Seaman's Aid Society, 7 Met. 188; Watson v. Boylston, 5 Mass. 417; Gregory v. Cowgill, 19 Mo. 415; Brownfield v. Wilson, 78 Ill. 467; Gilliam v. Brown, 43 Miss. 641; Brown v. Brown, 43 N. H. 17; Nevius v. Martin, 1 Vr. 465; Heater v. Van Auken, 1 McCart. 160; Brokaw v. Peterson, 2 McCart. 194; Cleveland v. Havens, 2 Beas. 101; Brearley v. Brearley, 1 Stockt. 21.

particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it: As, whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge: whether a codicil was meant to republish a former

As to the inadmissibility of parol proof of the testator's *intentions*, see *Robinson v. Bishop*, 23 Ark. 378; *Avery v. Chappel*, 6 Conn. 270; *Canfield v. Bostwick*, 21 Conn. 550; *Wiley v. Smith*, 3 Ga. 551; *Williams v. McIntyre*, 8 Ga. 34; *Allen v. Van Mater*, 1 Met. (Ky.) 264; *Long v. Duvall*, 6 B. Mon. 219; *Stephen v. Walker*, 8 B. Mon. 600; *Mitchell v. Walker*, 17 B. Mon. 61; *Weston v. Foster*, 7 Met. 297; *Armistead v. Armistead*, 32 Ga. 597; *Crocker v. Crocker*, 11 Pick. 252; *Johnson v. Johnson*, 18 N. H. 594; *Yard v. Carman*, Penn. 936; *Jackson v. Sill*, 11 Johns. 201; *Kelly v. Kelly*, 25 Pa. St. 460; *McKay v. Hugus*, 6 Watts 345; *Comfirt v. Mather*, 2 Watts & S. 450; *Gannaway v. Tarpley*, 1 Coldw. 572; *Den v. Van Cleve*, 4 Wash. C. C. 262; *Bradley v. Bradley*, 24 Mo. 311; *Coffin v. Elliott*, 9 Rich. Eq. 244; *Durant v. Ashmore*, 2 Rich. 184; *Ralston v. Telfair*, 2 Dev. Eq. 255; *Judy v. Williams*, 2 Ind. 449; *Field v. Eaton*, 1 Dev. Eq. 283; *Doe v. Kinney*, 3 Ind. 50; *Fitzpatrick v. Fitzpatrick*, 36 Iowa 674.

It is not admissible to prove by parol that the testator, by a provision that a bequest should vest *absolutely* in his daughters *and their heirs*, intended to create a separate estate in them, *Johnson v. Johnson*, 32 Ala. 637; nor that he intended to include *grandchildren* in a gift to children, *Willis v. Jenkins*, 30 Ga. 169; *Mordecai v. Boylan*, 6 Jones Eq. 365; nor that *slaves* were not intended to be included in a general bequest of testator's *movable effects*, *Humble v. Humble*, 3 A. K. Marsh. 126; nor that "*property*"

was intended to include only *personal* and not *real* property, *Wheeler v. Dunlap*, 13 B. Mon. 292; nor that it was intended to include *illegitimate children* in the word *children*, *Heater v. Van Auken*, 1 McCart. 160; *Gardner v. Heyer*, 2 Paige 11; nor *stepchildren*, *Fowke v. Kemp*, 5 Harr. & J. 135; nor to include in a gift to three daughters the son of a deceased (fourth) daughter, *Brokaw v. Peterson*, 2 McCart. 194; *Reitter v. Fox*, 6 Whart. 99; nor to charge legacies on the land devised, *Massaker v. Massaker*, 2 Beas. 264; *Leigh v. Savidge*, 1 McCart. 124 (in this case a distinction was made between testator's *declarations* and the *circumstances of his property*, the latter being held admissible and the former not); *Andress v. Weller*, 2 Gr. Ch. 604; nor that a remainder to A.'s children, B. and C., was intended for all his children, including others, *Osborne v. Varney*, 7 Met. 301; nor by testator's declarations that a gift to A. and his wife, and the survivor of them, was intended to give A. a fee simple, *Farrar v. Ayres*, 5 Pick. 407; nor that a direction to executors to provide a "handsome support" for A. and B., was intended only for the case of their other means failing, *Crocker v. Crocker*, 11 Pick. 252; nor that by a trust until the charter of a certain bank expire, was meant until the *original* charter expire, *Barrett v. Wright*, 13 Pick. 45; nor what testator intended by the word "heirs," *Love v. Buchanan*, 40 Miss. 758; nor by the word "expenses," as, for instance, that he caused the word "*funeral*," before "*expenses*," to be omitted, in

or a subsequent will (e): whether a codicil, purporting on its face to confirm other codicils of dates subsequent to that of its own execution,

order that the word might cover also expenses of settlement of the estate, *Matter of Haines*, 4 Halst. Ch. 506; nor that the intention was to give *two-thirds* where the will gave *one*, *Jones v. Jones*, 2 Beas. 236.

The distinction above noted in *Leigh v. Savidge* is made also in *Van Winkle v. Van Houten*, 2 Gr. Ch. 172; *Paxson v. Potts*, 2 Gr. Ch. 313; *Dey v. Dey*, 4 C. E. Gr. 137; *Puller v. Puller*, 3 Rand. 83. To the same effect, as to charging legacies on land, see *Tole v. Hardy*, 6 Cow. 333. But it is held, in *Myers v. Eddy*, 47 Barb. 263, that extraneous circumstances are only admissible to prove such intention in case of latent ambiguity. So parol evidence to show an intention on the part of the testator to execute a power by his will was held admissible in the way of circumstances of property, &c., but not of declarations of the testator, *White v. Hicks*, 33 N. Y. 383. And parol evidence (as to character of the land devised) is inadmissible to show that it was testator's intention to give a fee simple, *Charten v. Otis*, 41 Barb. 525; or to contradict the legal presumption of revocation in certain cases, *Adams v. Winne*, 7 Paige 97; or that it was the testator's intention that the heirs of D. should together take one-fourth (instead of each one-fifth) in a gift to A., B., C.,

and the heirs of D., *i. e.*, E. and F., *Bunner v. Storm*, 1 Sandf. Ch. 357; or to show that the testator considered certain land to belong to him, and intended it to pass by a general devise, *Miller v. Springer*, 70 Pa. St. 269; or that the testator had declared his intention to die intestate, as evidence of a revocation, *Lewis v. Lewis*, 2 Watts & S. 455; or what the testator intended as to the powers under a trust erected by his will, *Woodman v. Good*, 6 Watts & S. 169; or that testator intended A.'s son to take a gift "to A., her heirs and assigns," in case of A.'s death before the testator, *Sword v. Adams*, 3 Yea. 34; or that only *sons* were intended by "*children*," *Weatherhead v. Sewell*, 9 Humph. 272; *Weatherhead v. Baskerville*, 11 How. 329; or children and grandchildren, *Harrison v. Morton*, 2 Swan 461; or that, by a gift expressly in lieu of dower, testator did not intend to bar dower in after-acquired property, although a letter of testator's to that effect was found with the will, *Chapin v. Hill*, 1 R. I. 446; or that testator intended to give only a life estate, *McCray v. Lipp*, 35 Ind. 116; or that by bequest of a slave named "*Aaron*," testator meant a slave named "*Lamon*," *Barnes v. Snivens*, 5 Ired. Eq. 392. In this case it was said by Ruffin, C. J.: "There is no ambiguity as there would

(e) *Lord St. Helens v. Lady Exeter*, 3 Phillim. 461, note (g). There the testator left a will, dated 13th Dec., 1800, and a codicil all in his own handwriting, beginning, "This is a codicil to my last will and testament of the 10th Jan. 1798, and I do hereby ratify and confirm my said will." On the part of the executors it was alleged that at the time of the execution of the codicil the de-

ceased was at Burghley, and copied this from a form which he had procured from his solicitor, and inadvertently copied the date from a former will, which it was to be presumed had been destroyed, as it could not be found: Parol evidence was admitted to prove this allegation, and show this mistake: and the codicil was pronounced a codicil to the will of December, 1800.

was correctly dated (*f*): these are matters of ambiguity upon the *factum* of the instrument.

But it was considered as a rule in the Prerogative Court, \*that, in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, *the ambiguity must be upon the face of the paper*; and further, the facts alleged and to be proved must *completely* remove that ambiguity (*g*). When no ambiguity whatever appears upon the face of the instrument, the court will not admit parol evidence: Thus, in the case of Fawcett v. Jones (*h*), the allegation stated in substance that the residuary clause of the will was not coextensive with

be if there were two Aarons, when it would be admissible to show which of the two was meant. But here the attempt is to show that testator did not mean any Aaron at all, but meant Lamon, a different person altogether." But parol evidence has been held admissible to show that advancements made by a testator subsequent to his will were not intended by him to satisfy the provision in the will, *May v. May*, 28 Ala. 141; *Rogers v. French*, 19 Ga. 316; *Clendenen v. Clymer*, 17 Ind. 155; *Hine v. Hine*, 39 Barb. 507; or to show that certain notes taken by the testator were given for advancements made by him, *Nolan v. Bolton*, 25 Ga. 352; *Tillotson v. Race*, 22 N. Y. 122; or where a bequest of money was made to executors, to be used and disposed of by them according to verbal instructions given them, to show what those instructions were, *Cagney v. O'Brien*, 83 Ill. 72; or to show that certain of his children were intention-

ally omitted in his will, *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8; *Wilson v. Foster*, 6 Met. 400; *Lorieux v. Kellar*, 5 Iowa 196; (but this rule is different in Rhode Island—*Chace v. Chace*, 6 R. I. 407; Missouri—*Bradley v. Bradley*, 24 Mo. 311; California—*Estate of Garraud*, 35 Cal. 336;) or that one child's name was omitted by mistake, *Geer v. Winds*, 4 Desaus. 85.

So an intention on the part of the testator to evade a statute against manumission may be proved by parol, *Smithwick v. Evans*, 24 Ga. 461; *Cobb v. Battle*, 34 Ga. 458. So too, an intention that a legacy to a debtor should be a discharge of the debt or otherwise, *Gilliam v. Chancellor*, 43 Miss. 437; *Gilliam v. Brown*, 43 Miss. 641; *Williams v. Crary*, 8 Cow. 246; 4 Wend. 443; *Stagg v. Beekman*, 2 Edw. 89; (whether testator's declarations are admissible for that purpose, *quare*, *Eaton v. Benton*, 2 Hill (N. Y.) 576; *Zeigler*

(*f*) In the *Goods of Thomson*, L. R. 1 P. & D. 8. In the case of *Reffell v. Reffell*, L. R. 1 P. & D. 139, the court held that parol evidence is admissible to prove that a will was executed on a date other than that which appears upon the face of it.

(*g*) *Fawcett v. Jones*, 3 Phillim. 434. *Draper v. Hitch*, 1 Hagg. 678. *Harrison v. Stone*, 2 Hagg. 550. *Shadbolt v. Waugh*, 3 Hagg. 570: and see *Sandford v. Vaughan*, 1 Phillim. 128.

(*h*) 3 Phillim. 434.

the instructions given by the party deceased, and the allegation also contained an averment (which it was proposed to support by parole evidence only), suggesting that such variation was not made by any directions received from the deceased, nor with his privity or knowledge, but through mere error and oversight of the drawer, and of the testatrix herself; and the court was prayed to pronounce for the part of the instructions so alleged to have been omitted as part of the will: But Sir John Nicholl, in a very elaborate judgment, in which all the previous cases upon the subject are collected and commented upon, refused to admit the allegation, on the ground that the will had been regularly executed, and there was no ambiguity apparent upon the face of it.

It was said that as to undue omissions or insertions in wills, the result prior to the Wills Act of the authorities connected with this subject is, that where these two conditions are satisfied, *viz.* 1. Some absurdity or ambiguity on the face of the will ascribable to something either omitted or inserted; and 2. Clear and satisfactory proof that the insertion or omission was contrary to the intention of the testator; the court is at liberty, and even bound, to pronounce for the will, not in its actual state, but with such error first reformed or corrected, either by the insertion of the passage omitted, or by the omission of that inserted.

With respect to wills made on and after January 1, 1838, \*it is plain that, by reason of the provisions of the stat. 1 Vict. c. 26, the whole of every testamentary disposition must be in writing, and signed and attested pursuant to the act: Whence it follows, that the court has no power to correct omissions or mistakes by reference to the instructions in any case to which that statute extends (§).<sup>36</sup> The

Omissions cannot be supplied from the instructions in any case in wills made after Jan. 1, 1838.

1 Vict. c. 26.

*v. Eckert*, 6 Pa. St. 13; *Holmes v. Holmes*, 36 Vt. 525; *Hopkins v. Holt*, 9 Wis. 206). And in *Brown v. Dy-singer*, 1 Rawle 408, parole evidence was admitted to show that only personal property was intended by a gift of “*any earthly property* which God hath been pleased to give me”; or to show whether gold or Confederate States

paper was intended by a legacy in “dollars.” *Elder v. Ogletree*, 36 Ga. 64.

Parole evidence is not admissible to show directions at the time of the making of the will, that it should be inoperative upon the happening of certain events. *Sewell v. Slingluff*, 57 Md. 537.

(§) In the Goods of Wilson, 2 Curt. 853. *Stanley v. Stanley*, 2 Johns. & H.

36. Parole evidence, or evidence *dehors* the will, is not admissible to vary and control the terms of a will, although it is admissible to remove a latent am-

biguity. *Grime's Executors v. Harmon*, 35 Ind. 198, 208; *Mann v. Mann's Executors*, 1 Johns. Ch. 231; *Jackson v. Payne's Executor*, 2 Met. (Ky.) 567;

court, however, has power, if words have been inserted in a will by fraud (*k*), or by mistake, without the knowledge of the testator (*l*), to correct the error by omission of words so

Power of court to correct error in case of fraud or

491. *Harter v. Harter*, L. R. 3 P. & D. 11. See also *Birks v. Birks*, 4 Sw. & Tr. 23, 31; 34 L. J., P. M. & A. 92, *per* Sir J. P. Wilde. *Guardhouse v. Blackburn*, 1 Law Rep. P. & D. 109, where that learned judge stated the general rules which, since the Wills Act, ought to govern questions of this nature.

(*k*) *Allen v. McPherson*, 3 Phil. 455. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 116.

(*l*) In the *Goods of Duane*, 2 Sw. & Tr. 590. In the *Goods of Oswald*, L. R. 3 P. & D. 162. A testator, in the instructions for his will, directed that all his B. shares should be given to his nephews, but the word "forty" was inserted several times in the will before the word "shares," and the will was executed with that word repeated several times before the word "shares." The jury found that the word "forty" was introduced by mistake, *that the clauses including the word were never read over to the testator*, and that he only approved of the will on the supposition that all his B. shares were given to his nephews, and thereupon the court ordered that the word "forty" wherever it occurred should be struck out. *Morrell v. Morrell*, 7 P. D. 68. So where a testator, in giving instructions for the preparation of his will, directed that a

bequest of £10,000 should be given to each of his unmarried daughters "Georgiana" and "Florence," and the conveyancer who prepared the will by inadvertence inserted the name "Georgiana" in both clauses of the will relating to gifts to unmarried daughters, and omitted the name of "Florence" altogether, it was held that probate of the will omitting the name of "Georgiana" in the second clause of the gift might be granted to the executors. The draft was not read over to the testator at any time, but he did read what professed to be an epitome of it, such epitome being in accordance with the instructions. In the *Goods of Boehm* [1891], P. 247. Apart from fraud, the fact that a will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with its execution, be held conclusive evidence that he approved of, as well as knew, the contents thereof. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 116. *Fulton v. Andrew*, L. R. 7 H. L. 448. But where the rejection of part alters the sense of the remainder, *quære*, whether there is a valid will within the meaning of 1 Vict. c. 26, s. 9. *Rhodes v. Rhodes*, 7 A. C. 192.

*Worthington v. Huyler*, 4 Mass. 196; *Gilmer v. Stone*, 120 U. S. 590; *Tallman v. Tallman*, 3 N. Y. Misc. 465, 479; *Newell's Appeal*, 24 Pa. St. 197; *Hart v. Marks*, 4 Bradf. 161; *Meadows v. Barry*, 1 Ga. 80; *Lefevre v. Lefevre*, 59 N. Y. 440; *Knight v. Bunn*, 8 Ired. L. 82; *Patch v. White*, 117 U. S. 210; *Hinckley v. Thatcher*, 139 Mass. 477; *De Camp v. Dobbins*, 2 Stew. (N. J.) 36;

*McBride v. Elmer's Exrs.*, 2 Halst. Ch. 107.

A devise not found in a will cannot be established or supplied by parol proof, though it may appear ever so clearly that it was the intention of the testator to have had such a clause inserted, *Tudor v. Terrel*, 2 Dana 48, 49; neither can parol evidence show that where the testator used unmeaning and senseless words, he



inserted, and to negative the knowledge of the testator, to \*refer to the instructions, but the court has no power to supply words accidentally omitted from a will (*m*). mistake without knowledge of testator.

A verdict in an action of ejectment, brought for the purpose of trying the validity of a will as to realty, was not admissible in an allegation in a testamentary cause, respecting the same will, in the Ecclesiastical Court (*n*). Verdict in ejectment: inadmissible in a testamentary cause.

meant certain things thereby, nor can it explain the meaning of "to her" where two women had been previously named in the will, *Doe d. Hughes v. Wilkinson*, 35 Ala. 467, 468; neither is parol evidence admissible to control the construction of a will. *Johnson's Admr. v. Johnson*, 22 Ala. 637, 644.

Nor can extrinsic evidence be admitted to alter, detract from or add to the terms of a will, nor to correct a supposed mistake in a will, *Bunell v. Bunell*, 73 Ind. 163, 166; not even where a clause in the will was defective by reason of failure or omission to state therein any property upon which the devise could operate, and there were no words or expressions elsewhere in the will by which the omission could be cured, can extrinsic evidence be admitted for the purpose of showing what property was intended to be embraced in said clause. *Hawman v. Thomas*, 44 Md. 30, 43. But where it appeared by the will itself that there was an omission in the description of the property devised, parol evidence was admitted to correct it. *Kenny v. Kenny*, 3 Litt. 302. It is true that the court may put itself in the place of the testator by looking into the state of his property, and the circumstances by which he was surrounded at the time of

making his will, but this can only be done to explain ambiguities arising out of extrinsic circumstances, and not to show a different intention from that which the will discloses. *Allen's Exrs. v. Allen*, 18 How. 393.

Nor can parol evidence, even of the person who drew the will and who was of unimpeachable character, when offered to support the allegation of a mistake in a will, and that the testator intended to dispose of his property in a manner not apparent on the face of the will, be received, *Rothmaker v. Myers*, 4 Desaus. 215; nor that he had omitted a certain legacy, which the testator had directed. *Andress v. Weller*, 2 Gr. Ch. 604.

Mistakes in wills, where the mistake is apparent from the will itself, can be corrected by a court of chancery. *Chappel v. Avery*, 6 Conn. 31. The only object and purpose to which extrinsic proof can be properly admitted is not to show what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. *Hammond v. Hammond*, 55 Md. 575, 581. Unless there was latent ambiguity in the will, resort cannot be had to extrinsic testimony. *Brome v. Pembroke*, 60 Md. 193, 196; *Leaming v. Sisters of St.*

(*m*) *Harter v. Harter*, L. R. 3 P. & D. 11. But in the case of *In the Goods of Bushell*, 13 P. D. 7, *Butt, J.*, granted probate of a will with the word "Bristol" substituted for "British" inserted in the will by mistake in copying the

will: the will not having been read over to the testator. And in *In the Goods of Huddleston*, 63 L. T. N. S. 255, the word "including" was substituted for "excluding."

(*n*) *Grindall v. Grindall*, 3 Hagg. 259.

Not only when the competency of the testator is in dispute, but in all cases where there is any imputation of fraud in the making of the will, the declarations of the testator are admissible in evidence respecting his dislike or affection for his relations, or those who appear in the will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property (c).<sup>37</sup>

In what cases the declarations of the testator are admissible in evidence.

Francis, 8 Stew. (N. J.) 292; Goodell v. Union Association, 2 Id. 32.

Words cannot be supplied in a will, except where it is certain, beyond reasonable doubt, what particular words were omitted, and this certainty must be reached by the construction of the terms of the will. *Hawman v. Thomas*, 44 Md. 30, 43; *Warner v. Wiltenberger*, 21 Md. 264; *Walston's Lessee v. White*, 5 Id. 297; *Fouke v. Kemp's Lessee*, 5 Harr. & J. 4. However, where the testator has omitted words in his will which are necessary to express the meaning intended, and the intended meaning is clearly inferable from the will taken as a whole, the court will, by construction, supply the omitted words, *Kellogg v. Mix*, 37 Conn. 243, 247; and the words "before he arrived at full age" were supplied in order

to effect the meaning of the testator. *Holms v. Williams*, 1 Root 332.

But parol evidence may be admitted to show who the testator intended as a devisee, where the wrong name is used. *Dunham v. Averill*, 45 Conn. 61, 69; *The American Bible Society v. Whitmore*, 17 Id. 181; *Ayres v. Weed*, 16 Id. 291; *Brewster v. McCall's Devises*, 15 Id. 275; *Trustees v. Peaselee*, 15 N. H. 317; *Tucker v. Seaman's Aid Society*, 7 Met. 205; *Shipman v. Robbins*, 98 N. Y. 311; *Power v. Cassidy*, 79 N. Y. 602, 610; *Minot v. Boston Asylum*, 7 Met. 416; *Tallman v. Tallman*, 3 N. Y. Misc. 465, 480.

Extrinsic evidence of the intention of the testator is inadmissible for the purpose of supplying a devise or any other material provision omitted by mistake, or to superadd any qualification to the

(c) *Doe v. Palmer*, 16 Q. B. 747, 759.

37. The general doctrine as to declarations of a testator in regard to the execution of a will and the circumstances attendant thereon is that declarations made prior to the making of the will are admissible on the question of undue influence. *Whitman v. Morey*, 63 N. H. 448; *Mooney v. Olsen*, 22 Kans. 69; *Thompson v. Ish*, 99 Mo. 160, 170; *Muir v. Miller*, 72 Iowa 585, 590; *Bates v. Bates*, 27 Id. 110; *Stephenson v. Stephenson*, 62 Id. 163. However, declarations made years before the execution of the will were held inadmissible on the question of undue influence. *Rutherford v. Morris*, 77 Ill. 397. It

has been held competent, however, in a contest where undue influence is alleged, to show conversations with the testator prior to the making of his will, in which he expressed his views on making wills. *Staser v. Hogan*, 120 Ind. 207. But whether made prior or subsequently to the execution, they are not admissible on a question of fraud, *Kitchell v. Beach*, 8 Stew. (N. J.) 446; and it seems that declarations by the testator as to his daily transactions are admissible. *Pinney's Will*, 27 Minn. 280. And it is competent to give in evidence declarations as to the state of affairs in the family, to show the influence of the wife in favor of herself and her children,

So it was held by the Court of Q. B. in *Doe v. Palmer* (*p*), that, in order to rebut the presumption which, as there has already

terms used, or to evince a mistake in writing the instrument. *Stephen v. Walker*, 8 B. Mon. 600, 602; *Iddings v. Iddings*, 7 Serg. & R. 111; *Dunham v. Averill*, 45 Conn. 61, 69. And in an attempt to prove different instructions to the scrivener, and that what he was told he omitted, not being a latent am-

biguity, but a mistake, parol evidence is inadmissible. *Jackson v. Sill*, 11 Johns. 201. And as a general proposition it has been uniformly held that parol evidence cannot be received to correct a mistake in a will. *Fairfield v. Lawson*, 50 Conn. 501, 509.

But it is competent to prove under

and against other children. *Reynolds v. Adams*, 90 Ill. 134. It is error in proceedings for the probate of a will where the mental capacity is in controversy to refuse to allow the contestants to show what the testator said when he was angry and violent prior to the date of the will. In *re Brown*, 38 Minn. 112. And when the charge is undue influence, it is competent to show that for years prior there had been estrangement and ill will between the testator and one of the devisees, and as evidence of such estrangement and ill will to introduce statements and declarations of the testator. *Mooney v. Olsen*, *ubi supra*.

But unless the testator's statements are made contemporaneously with making the will, they are not competent, in Indiana, to prove either fraud or undue influence. *Todd v. Fenton*, 66 Ind. 25. And declarations, as to importunity of a devisee, made at a time so remote from the execution, that they are not a part of the *res gestæ*, can be considered only on the question of testamentary capacity. *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433. And the same may be said as to declarations in general too remote to form a part of the *res gestæ*. *Griffith v. Diffenderfer*, 50 Md. 467; *Hoppe v. Byers*, 60 Id. 381. But upon a question of forgery of the will, such declarations as make for or against the authenticity of the disputed

paper are not admissible. *Gordon's Case*, 5 Dick. 397, 424; *Boylan v. Meeker*, 4 Dutch. 274; *Lynch v. Clements*, 9 C. E. Gr. 431; *Kitchell v. Beach*, 8 Stew. (N. J.) 446; *Middleditch v. Williams*, 18 Id. 726.

And such declarations, as to what the testator intended to do with his property, are admissible on the question of the validity of the will. *Conway v. Vizzard*, 122 Ind. 266, 268; *Lamb v. Lamb*, 105 Id. 456; *Hayes v. West*, 37 Id. 21.

But in an action disputing the validity of a will, on the ground that it has been revoked, no declarations of the testator can be received which would impeach the validity, except such as are made at or so near the alleged revocation as to become a part of the *res gestæ*. *Caeman v. Van Harke*, 33 Kans. 333, 338; *Mooney v. Olsen*, 22 Id. 69; *Hayes v. West*, *ubi supra*.

But declarations of a testator, as to his beneficiaries, made at the time of making the will, are admissible. *Tucker v. Seaman's Aid Society*, 7 Met. 209; *Trustees v. Peaselee*, 15 N. H. 330; *Tallman v. Tallman*, 3 N. Y. Misc. 465, 480.

And declarations made before the execution of a will, by parties who afterward become legatees under the will, are not competent to affect the validity of the will. *Will of Ames*, 51 Iowa 596; *Dye v. Young*, 55 Id. 433, 435. (*p*) *Id.*, 747.

been occasion to mention (*q*), exists that unattested alterations appearing on the face of a will were made *after* the execution, it is allowable

to give evidence of declarations of the testator, made before the execution, of his intention to provide by his will for a person who would be unprovided for without the alterations in question (*r*): But that court further held his declarations inadmissible, which were made after the execution, to the effect that the \*alterations had been made previously: And Lord Campbell,

in giving the judgment, said, the court could not be guided alone by the consideration that both parties claimed under the testator; for his declarations, made after a time when a controverted will is supposed to have been executed, would not be admissible to prove that it had been duly signed and executed as the law requires (*s*). In many cases the declarations of a testator made after a will has been executed are admissible and are most important, *e. g.*, in questions as to testamentary capacity and

the statute of Massachusetts that the omission of children by the testator in his will was intentional and not by an oversight. *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8; *Converse v. Wales*, 4 Allen 512; *Wilson v. Foskett*, 6 Met. 404. But in Rhode Island the rule is otherwise. *Chace v. Chace*, 6 R. I. 407. But in South Carolina the court admitted parol evidence that the name of one child was omitted by mistake, and rectified the mistake. *Geer v. Winds*, 4 Desaus. 85.

See also *Jones v. Jones*, 2 Beas. 236; *Comstock v. Hadlyme*, 8 Conn. 254; *McAllister v. Butterfield*, 31 Ind. 25; *Abercrombie v. Abercrombie*, 27 Ala. 489; *Caldwell v. Caldwell*, 7 Bush 516; *Webb v. Webb*, 7 Mon. 626; *Lefevre v. Lefevre*, 59 N. Y. 434, reversing 2 Thomps. & C. 330; *Cæsar v. Chew*, 7 Cill & J. 127.

(*q*) *Ante*, pp. \*112, \*213.  
(*r*) See also *Dench v. Dench*, 2 P. D. 60. So where the name of the executor appointed by a will was written on an erasure, the court admitted a declaration of the testator as to the person he had appointed executor, made before

the execution of a codicil which referred to the will. In the Goods of *Sykes*, L. R. 3 P. & D. 26.

(*s*) *Doe v. Palmer*, 16 Q. B. 747, at p. 757. See *Accord*. In the Goods of *Ripley*, 1 Sw. & Tr. 68. In the Goods of *Hardy*, 30 L. J., P. M. & A. 142. *Staines v. Stewart*, 2 Sw. & Tr. 320. The verbal and written declarations or statements made by a testator in and about the making of his will, when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will. *Johnson v. Lyford*, L. R. 1 P. & D. 546. Evidence, however, of the declarations of a testator as to the contents of his will not forthcoming, whether made before or after its execution, are admissible to prove its contents: *Sugden v. Lord St. Leonards*, 1 P. D. 154, overruling *Quick v. Quick*, 3 Sw. & Tr. 442. *Mellish*, L. J., *dissentiente*. See also *Johnson v. Lyford*, *ubi sup.*, and *Woodward v. Gouldstone*, 11 App. Cas. 469, in which case doubt was expressed whether post-testamentary declarations of a testator as to the contents of a lost will are admissible.

fraud (ss).<sup>38</sup> Declarations of the testator have been deemed admissible to prove the fact of the destruction of a will, even in cases where no fraud or misconduct is imputed (t).

(ss) *Per* Sir C. Cresswell, in *In the Goods of Hardy*, 30 L. J., P. M. & A. 143.

38. But declarations of a testator made after the execution of the will are not admissible to show his mental condition at the time of the execution of the will, *Crocker v. Chase*, 57 Vt. 413; but where one in feeble health makes declarations shortly after the *factum*, they are competent to show his mental condition and vigor. *Matter of Clark*, 40 Hun 233.

But in Missouri it is held that such declarations are competent on questions of capacity, but not if the issue be undue influence, *Jones v. Roberts*, 37 Mo. App. 163; *Rule v. Maupin*, 84 Mo. 587; and in Indiana, on a question of capacity, whether made before or after, or contemporaneously. *Todd v. Fenton*, 66 Ind. 25. But in Kansas it is held that they are competent whether the issue be incapacity or undue influence, and whether made before or after the execution. *Mooney v. Olsen*, 22 Kans. 69, 77.

But where there is no evidence to show that the declarations were made soon enough after the execution of the will to afford any indication as to the condition of the testator's mind at the time of the *factum*, they are properly rejected. *Mason v. Williams*, 53 Hun

398, 404; *Hoppe v. Byers*, 60 Md. 381; *Griffith v. Diffenderfer*, 50 Id. 467. In a matter where the charge was influence it was held that declarations made two years after the execution of the will were too remote in time to be received as evidence of the testator's mental capacity at the time of the *factum*, *Le Bau v. Vanderbilt*, 3 Redf. 384; but otherwise if made within two months. *Matter of Clark*, 40 Hun 233. And in Iowa, it was held to be proper, on an issue of undue influence, to show that, after the *factum*, the testator said that if he had it to do over again he would make a different disposition. *Parsons v. Parsons*, 66 Iowa 754. See also *Will of Hollingsworth*, 58 Id. 526. But under § 3639 Code, conversations between the proponent and the testator touching the will are not admissible. *Sisters of Visitation v. Glass*, 45 Id. 154.

And it is proper to admit the declarations of the testator to show his mental capacity and his susceptibility to the influences which surrounded him at the time of the *factum*, *Lucas v. Cannon*, 13 Bush 650; *Milton v. Hunter*, Id. 163; and declarations tending to show the relations between the principal beneficiary and the testator, and the power of the former over the latter, and indicating that undue influence and

(t) See *Hale v. Tokelove*, 2 Robert. 328, by Dr. Lushington. Where evidence was produced of declarations of a testator showing an intention to adhere to a will in order to rebut the presumption of revocation, arising from its being not forthcoming after his death, Sir J. Hannen held that evidence of declarations of an intention not to

adhere to the will, produced by the opponents to the will, was admissible to contradict the evidence of adherence, and that therefore a declaration by the testator that he had burnt his will was admissible, not as evidence of the fact of destruction but as evidence of intention. *Keen v. Keen*, L. R. 3 P. & D. 105.

Upon a question between heir and devisee as to the competency of the testator at the time of making his will, it was held to be no misdirection to tell the jury that they \*might take into consideration statements made by the testator as to the dispositions contained in his will, and which, in fact, corresponded therewith, as throwing back light on the period at which the will was executed (a year before), and as affording means of inferring what was the state of his competency at that period (*u*).

## SECTION VI.

*Of the probate of wills of foreigners, &c., and of British subjects domiciled out of the jurisdiction of the court.*

If the deceased left no personalty in this country, his will need not be proved here :  
 If the deceased left no personalty in this country, his will need not be proved here :  
 country, generally speaking, his will need not be proved in any Court of Probate here : and, therefore, where the plaintiff, as administrator of I. S., who died at Naples, brought his bill to have a discovery of the intestate's personal effects, the defendant pleaded that the deceased had by his will made him, the defendant, his executor, and he had proved the will according to the law of the country ; and he denied that the deceased had left any estate but what was at Naples : and this plea was held good (*x*).<sup>39</sup>

improper control had been exercised should be admitted. *Herster v. Herster*, 116 Pa. St. 612 ; S. C., 122 Id. 239. And evidence of conversations between the wife and the witness, after the death of the testator, and upon the day of his death, may be given to show the influence of the wife, continuing up to the time of death. *Mullen v. Helderman*, 87 N. C. 471.

But declarations of a legatee made after the *factum*, tending to show undue influence, are not competent, *Will of Ames*, 51 Iowa 596 ; but if made at or about the time it is error to exclude them. *Horn v. Pullman*, 72 N. Y. 269. But a memorandum of a declaration by a testator made intermediate between the making of the will and his death is not admissible to show an intent different from that expressed in the will. *Thomas v. Lines*, 83 N. C. 191.

In case of one suffering from disease, upon the question of whether the disease had reached such a stage at a given time before it had developed itself, that the patient was incapable of making a will, the opinions of his neighbors—men of good common sense—are of more value than that of medical experts. *Rutherford v. Morris*, 77 Ill. 397.

In New Jersey, on an issue of undue influence, declarations respecting previous occurrences are not evidence of such occurrences. *Rusling v. Rusling*, 9 Stew. (N. J.) 603.

(*u*) *Sutton v. Sadler*, 3 C. B., N. S. 99. See also *Whiteley v. King*, 17 C. B. N. S. 756.

(*x*) *Jauncey v. Sealey*, 1 Vern. 397. *Post*, Pt. I. Bk. V. Ch. II. § I.

39. The personal property and assets of a decedent, though situate in different jurisdictions, constitute but one

But if a foreign executor should find it necessary to institute a suit here, to recover a debt due to his testator, he must prove the will here also,<sup>40</sup> or a personal representative must be constituted by the Court of Probate here to adminis-

unless his executor institute a suit;

estate, and must be distributed according to the law of the domicile at the time of the death. But when they are in several jurisdictions, and administration is granted in each, each administrator is accountable in the courts of the state in which he was appointed, and each administration must be settled where it was granted. *Equitable Life Assurance Society v. Vogel*, 76 Ala. 441.

If the testator leave personal property within the jurisdiction, the will may be proved there, even though, at his death, the testator were domiciled elsewhere, and the will has not, at the time, been proved at the place of his domicile. *Hyman v. Gaskins*, 5 Ired. 267; *Wood v. Matthews*, 73 Mo. 477; *Varnar v. Bevil*, 17 Ala. 286; *Jaques v. Horton*, 76 Id. 238; *Stevens v. Gaylor*, 11 Mass. 255; *Gordon's Case*, 5 Dick. 397.

The courts of New Jersey have no jurisdiction to require an executor appointed in Pennsylvania of an estate of a resident of New Jersey to account, although the beneficiary's efforts to obtain an account in Pennsylvania have proved futile. *Vandyke v. Vandyke*, 9 Stew. (N. J.) 521. See also *Cocks v. Varney*, 15 Id. 514. And this is also held in Pennsylvania, it being said that such executor must account in the foreign jurisdiction, *Musselman's Appeal*, 101 Pa. St. 165; and in such case, no proceedings will lie in Pennsylvania either by an administrator *de bonis non cum testamento annexo*, or by a legatee and *cestui que trust* under the will to charge such executor, or his representative, with assets of the estate, until an account has been filed in the foreign state, showing a balance in his hands. Id.

40. The phrase "foreign executor" is never used to signify the non-residence of the individual holding the office, but it refers to the foreign origin of the representative character. That is the sole product of the foreign law, and depends upon it for existence, and cannot pass beyond the jurisdiction of its origin. *Hopper v. Hopper*, 125 N. Y. 400.

It may be said that letters testamentary have no extra-territorial effect. *Wright v. Gilbert*, 51 Md. 146; *Dickinson v. Seaver*, 44 Mich. 624; *Luce v. Manchester & Lawrence R. R. Co.*, 63 N. H. 588; *Turner v. Linam*, 55 Ga. 253; *Succession of Butler*, 30 La. Ann. 887; *Stewart v. O'Donnell*, 2 Dem. 17; *Hatchett v. Berney*, 65 Ala. 39; *Ferguson v. Morris*, 67 Id. 389; *Mosely v. Burrow*, 52 Tex. 396; *Sims v. Hodges*, 65 Miss. 211; *Jackson v. Scanland*, Id. 481; *Moore v. Jordan*, 36 Kans. 271; *Sloan v. Frothingham*, 72 Ala. 589; *Harris v. Moore*, Id. 507; *Buck v. Johnson*, 67 Ga. 82; *Corrigan v. Jones*, 14 Col. 311. It is now held, almost universally, that, although the executor or administrator cannot maintain a suit in a foreign state, to recover personal property, or collect a debt due the estate, yet he is permitted to take possession of any such property peaceably, without suit, and he may collect a debt that is voluntarily paid to him, and in case there be no conflicting administration in the state where such property was situate, or debt due, the courts of that state will recognize the title of the foreign executor or administrator as rightful, and protect it as fully as if he had taken out administration there. *Putnam v. Pitney*, 45

ter *ad litem* (y). So an executor having obtained probate in Ireland could not bring an action here as executor, even to recover Irish assets, without having obtained probate in England also (z). For the courts here will not recognize \*any will of personalty except such as the Court of Probate of this country has by the probate adjudged to be the last

Minn. 242; *Selleck v. Rusco*, 46 Conn. 370; *Metamara v. Metamara*, 62 Ga. 200.

In Missouri, the defect of parties, where a suit is brought, in that state, by a foreign administrator, must be taken advantage of in the trial court, by demurrer or answer. If not so objected to, it will be deemed to be waived, and such objection cannot be raised for the first time on appeal. *May v. Burk*, 80 Mo. 675. See *Dye v. Gritton*, 29 Ill. App. 54. Where an action is brought by a foreign executor, in Michigan, before the will is probated there, such action will be made good by the subsequent probate before the hearing. *Gray v. Franks*, 86 Mich. 382.

Under § 3267, R. S. of Wisconsin, the same rights and remedies are accorded to a foreign executor or administrator as to one appointed in Wisconsin, upon his filing his appointment, or a duly authenticated copy thereof, in any county in Wisconsin, *Murray v. Norwood*, 77 Wis. 405; it is immaterial whether the decedent had property or not in the county in which the appointment, or copy, is filed. *Id.*

A foreign executor or administrator

has no standing as a party plaintiff in the courts of New York, without taking out letters in that state. *Farrington v. American Loan & Trust Company*, 18 Civ. Pro. 135. Nor can an administrator appointed in one state maintain, as such, any suit in another state. *Johnson v. Powers*, 139 U. S. 156. And this rule prevails largely throughout the United States. *Wright v. Gilbert*, 51 Md. 146; *Gibson v. Ponder*, 40 Ark. 195; *Fugate v. Moore*, 86 Va. 1045; *Sloan v. Sloan*, 21 Fla. 589; *Matter of Webb*, 11 Hun 124; *Buck v. Johnson*, 67 Ga. 82. Nor can a non-resident maintain a suit, in the courts of Pennsylvania, against a foreign administrator, who has no assets in Pennsylvania. *Magraw v. Irwin*, 87 Pa. St. 139. So too, in New York, where an action is brought against a foreign administrator, for work and services done at his special instance and request, in the absence of allegations that there are assets in New York, the court has no jurisdiction. *Murphy v. Hall*, 38 Hun 528; *Fischer v. Fischer*, 50 N. Y. Super. 74. But in Illinois, he may maintain an action to recover damages for injuries to the person of his intestate. *Wabash, St. Louis & Pacific Ry. Co. v. Shacklett*, 10 Ill. App. 404. Nor

(y) *Attorney-General v. Cockerell*, 1 Price, 179, by Richards, B. Mitf. Pl. 177, 4th edition. *Tyler v. Bell*, 2 M. & Cr. 89. *Attorney-General v. Bouwens*, 4 M. & W. 193.

(z) *Carter v. Crofts*, Godb. 33. *Whyte v. Rose*, 3 Q. B. 508, *per Tindal*, C. J. But now sealing an Irish probate or a

Scotch confirmation gives them a like force and effect as if a probate had been granted. See 20 & 21 Vict. c. 79, § 95; 21 & 22 Vict. c. 95, § 29, and Rule 73, P. R. 1862 (non-contentious), as to Irish probates; and 21 & 22 Vict. c. 56, §§ 9, 12 & 14, as to Scotch confirmations.



will (a). Therefore, if a testator die in India, and his personal estate be wholly there, and his executor be resident there and the will be proved there, yet if a part of the assets remain in the hands of the executor unappropriated, and come to be administered in England, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, administration to the testator ought to be taken out in this country, and the administrator made a party to the suit (b). So to a bill which seeks an account of the

can the assignee of a foreign executor maintain an action on a note and mortgage, in South Carolina. *Dial v. Gary*, 24 S. C. 572. Nor can a foreign administrator sue for possession of his intestate's land, in Arkansas. *Fairchild v. Hagel*, 54 Ark. 61. Nor can he be substituted in the place of the deceased in an action pending against him at the time of his death. *Matter of Webb*, *ubi supra*. However a foreign executrix may maintain an action in her individual name, on a judgment recovered by her, as executrix, in another state on a debt due to her testator. *Lewis v. Adams*, 70 Cal. 403.

But an action in a Federal court will not abate on account of the death, but the executor must take out letters in the state where the action is pending, for which purpose a reasonable time will be allowed. *Kropff v. Potts*, 7 N. J. L. J. 11.

But he can maintain an action in Kansas under § 422 of the Code. *Kansas Pacific Railway Co. v. Cutter*, 16 Kans. 568. And under § 203, c. 37, G. S. p. 472, he may sue or be sued, "in like manner and under like restrictions as a non-resident may sue or be sued." *Cady v. Bard*, 21 Kans. 667. And a foreign administrator *cum testamenta*

*annexo* may sue out an order of attachment in Kansas. *Dunlap v. McFarland*, 25 Kans. 488. Executors appointed by a court of another state have no authority to prosecute, in their representative capacity, a special proceeding, in the State of New York. Their power cannot be exercised beyond the geographical limits of the state wherein the same originated, and this disability is not confined to the maintenance of actions. *Stewart v. O'Donnell*, 2 Dem. 17. But in Mississippi, a foreign executor may maintain an action if he complies with Code 1880, § 2091; otherwise he cannot. *Hope v. Hurt*, 59 Miss. 174.

The courts of New York have no equitable jurisdiction over a foreign executor, to compel an accounting, and enjoin the withdrawal of assets situate in New York, when the executor is neither within nor served with process within the state, *Kanter v. Peyser*, 51 N. Y. Super. 441; but an administrator appointed in a foreign country coming into New York with assets may be required to account in his character as trustee to one entitled to a distributive share without taking out letters. *Marshall v. Bresler*, 1 How. Pr. N. S. 217. But such administrator may be proceeded against, in a proper action,

(a) *Price v. Dewhurst*, 4 M. & Cr. 80, 81. *Bond v. Graham*, 1 Hare, 484. *Lasseur v. Tyrconnel*, 10 Beav. 28.

(b) *Logan v. Fairlie*, 2 Sim. & Stu. 284. 1 Myln. & Cr. 59. See also *Low v. Fairlie*, 2 Madd. 101.

assets of an intestate, who died in India, possessed by a personal representative there, a personal representative of the intestate, constituted in England, is a necessary party, though it does not appear that the intestate, at the time of his death, had any assets in England (c). And it may be stated, as a fully established rule, that in order to sue in any court of this country, whether of law or equity, in respect of the personal rights or property of a deceased person, the plaintiff must, except in the case

brought in equity, to compel an accounting for such assets. *Field v. Gibson*, 20 Hun 274.

Although it is well settled that foreign administrators or executors cannot be sued as such, it is equally well settled that if such executor or administrator come within such jurisdiction, and bring with him assets or property belonging to the trust estate, he may be held to account as a trustee for those entitled to the effects in his hands. *Dillard v. Harris*, 2 Tenn. Ch. 196; *Johnson v. Jackson*, 56 Ga. 326; *Lake v. Hardee*, 57 Id. 459; but in a case where an administrator brings choses in action into the jurisdiction and settles them without suit, he cannot afterward be sued in that jurisdiction for the proceeds of such choses in action. *Metamara v. Metamara*, 62 Ga. 200.

Where a foreign executor or administrator is sued in the courts of a state foreign to his appointment, the nature and the extent of his liability will depend upon the laws of the state where he derived his authority to administer the assets of the decedent. *Hoskins v. Sheddon*, 70 Ga. 528.

A foreign administrator cannot be sued in his representative capacity in the courts of New Jersey. *Durie v. Blauvelt*, 20 Vr. 114; *Banta v. Moore*, 2 McCart. 97; *Porter v. Trall*, 3 Stew. (N. J.) 106. Nor can an executor be called to account in New Jersey, where the will of the non-resident testator has

never been proved in that state. *Cocks v. Varney*, 15 Stew. (N. J.) 514.

Where a non-resident testator held a mortgage on lands in New Jersey, the mere filing of an exemplified copy of his will in the proper county of New Jersey does not qualify his executors to maintain a suit to foreclose the mortgage, *Porter v. Trall*, *ubi supra*; he should take out letters testamentary in New Jersey. *Id.* Since the above decision, this matter has been regulated in New Jersey, by statute, it being provided (P. L. 1879, p. 28) that executors or administrators, by authority of foreign letters, may prosecute actions in the courts of New Jersey, provided that upon commencing suit, they file in the office of the clerk of the court in which such suit shall be brought an exemplified copy of the record of their appointment. But in South Carolina, the filing of such exemplified copy, and the marking of it "filed and admitted to probate," by a probate judge, does not authorize executors to bring an action there without letters issued. *Patterson v. Pagan*, 18 S. C. 584. But in Michigan, the failure of the probate judge to record the authenticated copy of a foreign will, which has been proved and admitted to probate, is a mere omission of clerical duty, and will not invalidate the proceedings. *Clow v. Plummer*, 85 Mich. 550.

(c) *Tyler v. Bell*, 2 Myln. & Cr. 89. *Bond v. Graham*, 1 Hare, 482. See *post*, Pt. V. Bk. II. Ch. II.

of Irish probates and Scotch confirmations resealed, appear to have obtained probate or letters of administration in the Court of Probate in this country (d).<sup>41</sup>

\*Likewise, if a will be made in a foreign country, and proved there, disposing of personal property in this country, the executor must prove the will here also (e). And generally speaking, the Court of Probate in this country will adopt the decision of the

but a will made abroad of property in this country must be proved here:

(d) *Whyte v. Rose*, 3 Q. B. 507. See also *M'Mahon v. Rawlins*, 16 Sim. 429. *Enohin v. Wylie*, 10 H. of L. 19, *per* Lord Cranworth. It appears from an able note to the American edition of the present treatise (which Mr. Francis I. Troubat has done the author the honor of publishing at Philadelphia), that it has been established as a rule, by repeated decisions in many of the states, that the executor or administrator of a person who dies domiciled in Great Britain, or any other foreign country, cannot maintain an action in the United States, by virtue of letters testamentary or administration granted to him in the country where the deceased died: But that on the ground of them, an ancillary probate authority or administration will be granted: And further, that the rule just mentioned does not apply, except where the party sues in right of the deceased: If he sues in his own right, although that right be derived under a foreign will, no administration need be taken out in the United States. See also *Story's Conf. of L. Ch.* viii. ss. 513, 516, 517, and the note of Mr. Asa Fish to the 5th American edition of this work. And see *Accord. Vanquelin v. Bouard*, 15 C. B., N. S. 341.

41. Although the general rule is that executors cannot sue or be sued in a state foreign to their appointment, yet, in New York, this rule applies only to claims and liabilities depending wholly upon their representative character, that

is, suits brought upon debts due to or by the testator, in his lifetime, or based upon some transaction with him; it does not prevent such executors from suing or being sued upon a contract made with them as executors, *Johnson v. Wallis*, 112 N. Y. 230; or as trustees. *Fox v. Fay*, 89 Cal. 339. And in South Carolina, foreign executors can sue on a bond and mortgage executed to them, without taking out letters, *Fyer v. Charleston Rice Milling Co.*, 32 S. C. 598; and in Illinois, they may foreclose deeds of trust. *Hickok v. Frank*, 102 Ill. 660. But the laws of Florida do not clothe a foreign executor with authority to defend a suit in her courts; nor can such jurisdiction be conferred by consent of parties that he shall become a party defendant. *Sloan v. Sloan*, 21 Fla. 589. But in Michigan, a foreign executor can sue in his own name on a note belonging to the estate and payable to bearer. *Knapp v. Lee*, 42 Mich. 41. And as to the rule in California, see *Lewis v. Adams*, 70 Cal. 403.

Where a foreign executor brings an action in Maryland, in his representative capacity, and is subsequently granted letters in that state, he cannot, by amendment, continue the suit in his new and distinct capacity as administrator, by virtue of such letters. *Wright v. Gilbert*, 51 Md. 146.

(e) *Lee v. Moore*, Palm. 163. *Tourton v. Flower*, 3 P. Wms. 369. *Vanthienen v. Vanthienen*, Fitzgib. 204.

Court of Probate in the foreign country in which the testator died domiciled (*f*).<sup>42</sup>

And now by stat. 21 & 21 Vict. c. 56, s. 12, "When any confirmation (which is the Scotch term for Probate) of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland which includes besides the personal estate situated in Scotland, also personal estate situated in England shall be produced in the principal Court of Probate, in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be

Stat. 21 & 22 Vict.  
c. 56, s. 12.

Scotch confirmation produced in Probate Court of England, and sealed there, to have the effect of probate or administration.

(*f*) See *post*, p. \*302. See Raymond v. De Watteville, 2 Cas. temp. Lee, 358, as to the proper authentication of a copy of a will proved and deposited in a court of a foreign state. Before granting probate of a foreign will, the court should be satisfied of one of two things, viz., either that the will is valid by the law of the country where the testator was domiciled, or that a court of the foreign country has acted upon it and given it efficiency. In the Goods of Deshais, 34 L. J. P. & M. 58. R. domiciled in Mexico made a will according to the law of Mexico. The proper court there decreed probate of a Spanish translation and not of the original. It was held that the grant in this country must be made upon the production of an English translation of the Spanish copy and not of a certified copy of the original: In the Goods of Rule, 4 P. D. 76. See also In the Goods of Clarke, 36 L. J. P. & M. 72. In a case where the will of a British subject domiciled abroad at the time of his death had been proved in the French courts and deposited with a notary who by the law of France was forbidden to allow it to be removed from his custody, it was held that probate might be granted of a copy of the original will properly proved, limited to such time

as might elapse before the original itself should be brought in. In the Goods of Lemme [1892], P. 89.

42. When wills which have been probated abroad are about to be probated in Michigan, it is necessary that the copy of the will presented should be accompanied by the foreign probate, and due authentication thereof, and these together constitute the one instrument, or subject matter, to be acted upon under the statute, and are all essential to authorize the Probate Court to exercise jurisdiction. Pope v. Cutler, 34 Mich. 150; Wilt v. Cutler, 38 Id. 189. And in Kentucky this is all that is required as to a will of personality. Williams v. Jones, 14 Bush 418.

The will of a testator, domiciled in Louisiana, which is executed and probated there, disposing of personal property in Texas, is competent evidence in Texas, without being probated there. Hurst v. Mellinger, 73 Tex. 188.

Where a resident of Pennsylvania dies in a foreign country, and his will is admitted to probate there, a copy thereof proved by the testimony of the subscribing witnesses, taken upon a commission, is entitled to be admitted to probate in the court of his domicil. Estate of McDonald, 130 Pa. St. 480.

And where a properly authenticated

sealed with the seal of the said Court and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be (g), and had been granted by the said Court of Probate." (h)

And as to Irish probates, it is provided by 20 & 21 Vict. c. 79, s. 95, "From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in *Ireland* shall be produced to, and a copy thereof deposited with the registrars of the Court of Probate in *England*, such probate or letters of administration shall be sealed with the \*seal of the last-mentioned Court, and being duly stamped shall be of the like force and effect, and have the same operation

20 & 21 Vict. c. 79, s. 95.

Probates granted in Ireland to be of like force as probates granted in England on being resealed.

copy of the record and probate of a will in another state has been recorded in Vermont, under R. L. §§ 2058-2061, and it appears that the court granting the probate had jurisdiction, the validity of the will cannot be attacked, in Vermont, for incapacity or undue influence, although the testator was a resident of Vermont and left property there. *Ives v. Salisbury*, 56 Vt. 565.

And as to the practice as to the admission to probate of foreign wills which have been probated abroad, see *Brundige v. Rutherford*, 59 Tex. 22; *Barr v. Closterman*, 2 O. Cir. 387; *Matter of Delaplane*, 19 Abb. N. C. 36; *Stark v. Parker*, 56 N. H. 481; *Estate of Shearer*, 1 Civ. Pro. 455.

(g) Where confirmation of the executor of a person who has died domiciled in Scotland has been sealed with the seal of the Court of Probate, in manner provided by this section, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds in England, although they are specifically bequeathed, and although, by the law of Scotland, an executor cannot deal with leasehold property in that country: *Hood v. Barrington*, L. R. 6 Eq. 218. W. E. died possessed of property of small value in

this country and entitled under the will of his uncle to large assets in Scotland which were being duly administered there. The executors of W. E. proved his will in Scotland only. A legatee under W. E.'s will applied for a grant of administration of the estate of W. E. in this country, which application was opposed by the executors. It was held (1) that the court is not bound to make such a grant but that its power is discretionary; and (2), that, it not having been shown that the executors were not doing their duty, there was no necessity for any grant in this country: In the Goods of *Ewing*, 6 P. D. 19; see also the cases therein cited.

(h) Further provisions as to resealing confirmations and additional confirmations or elks are contained in 39 & 40 Vict. c. 70, ss. 41-45. These sections meet the difficulties raised in such cases as In the Goods of *Ryde*, L. R. 2 P. & D. 86. The object of the section cited in the text is to render unnecessary a second application for probate, but the Scotch confirmation is not conclusive evidence of the domicile, if that question has been raised in the English court: *Hawarden v. Dunlop*, 2 Sw. & Tr. 340. Where the proper

in *England* as if it had been originally granted by the Court of Probate in *England*" (i).

All personal property follows the person, and the rights of a person constituted in England representative of a party deceased, *domiciled in England*, are not limited to the personal property in England, but extend to such property wherever locally situate (k).<sup>43</sup>

The rights of the representative constituted here of a person domiciled here extend to personal property abroad :

but the grant of probate here does not extend to it :

It must not be understood, however, that where a testator dies domiciled in England, leaving assets abroad, the grant of probate here can extend to them.<sup>44</sup> For the

duty has been paid in Scotland, no further duty is payable on resealing : Booth's Trusts, 1 Giff. 46. By 22 Vict. c. 30, s. 1, payments made in reliance on any instrument sealed under this act are protected, notwithstanding any defect affecting the validity of the confirmation.

(i) See *Divenny v. Corcoran*, 32 L. J. P. & M. 26.

(k) *Spratt v. Harris*, 4 Hagg. 405.

43. A foreign executor has power to assign by indorsement a negotiable promissory note, property of the estate, and the indorsee may maintain an action in his own name upon such a note, *Abercrombie v. Stillman*, 77 Tex. 589 ; so he may by power of attorney transfer stock, belonging to the estate, by him sold, and it is not necessary to have letters of administration issued in order to obtain transfer, on the books, of stock so sold, *Brown v. The San Francisco Gas Light Company*, 58 Cal. 426 ; and the assignment of a mortgage by a foreign administrator vests the title thereto in the assignee, and the assignee may maintain an action thereon in New York. *Smith v. Tiffany*, 16 Hun 552. In the absence of ancillary administration or statutory prohibition, the domiciliary administrator appointed in another state has authority to sell and assign stock of the decedent in a corporation in New Hampshire. *Luce v.*

*Manchester & Lawrence R. R. Co.*, 63 N.H. 588.

It seems that the voluntary consent of a corporation to the transfer of its stock by accepting the outstanding certificate with a power to transfer, signed by a foreign executor or administrator, and the issuing of a new certificate to the purchaser is binding upon the corporation, and objection to the authority of such administrator or executor cannot afterwards be raised. *Luce v. Manchester & Lawrence R. R. Co.*, *ubi supra*.

The rightful executor, though without official authority in a state foreign to that of his appointment, can lawfully receive into his possession, in such foreign state, assets voluntarily paid or delivered to him. *Selleck v. Rusco*, 46 Conn. 370 ; *Metamara v. Metamara*, 62 Ga. 200 ; *Fox v. Fay*, 89 Cal. 337 ; *Putnam v. Pitney*, 45 Minn. 212.

44. When property is found in a jurisdiction other than that of the domicile, it will support a grant of administration there. *Equitable Life Assurance Society v. Vogel*, 76 Ala. 441. A debt on simple contract is sufficient "property" to sustain a grant of administration, *Equitable Life Assurance Society v. Vogel*, *ubi supra* ; so is an interest in an action at law. *Murphy v. Creighton*, 45 Iowa 179.

probate was never granted except for goods which at the time of the death were within the jurisdiction of the Ordinary who made grant (*l*): Though if it should become necessary \*that the courts of the foreign country where the assets were situate should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such courts, by the comity of nations, would probably follow the decision of the Court of Probate in this country, as being the country of domicile (*m*).

(*l*) *Attorney-General v. Dimond*, 1 Cr. & J. 356. A will disposing only of property in a foreign country is not entitled to probate in this country: In the Goods of Coode, L. R. 1 P. & D. 449. In the Goods of Tucker, 34 L. J. P. & M. 29. In the case of In the Goods of Winter, 30 L. J. P. & M. 56, probate was granted by Sir Cresswell Cresswell of a will purporting to deal only with property out of the jurisdiction. The authority of this decision may, however, be doubted. See *post*, p. \*544. At all events Sir James Hannen in In the Goods of Howden, 43 L. J. P. & M. 27, approved the decision in In the Goods of Coode, and pointed out that in the cases of In the Goods of Harris, L. R. 2 P. & D. 83 (Lord Penzance), and In the Goods of De la Saussaye, L. R. 3 P. & D. 42 (Sir James Hannen), where probate was granted of a foreign

will purporting to deal only with property out of the jurisdiction, together with an English will dealing with property in England, the English will by reference incorporated the foreign will. In the case of In the Goods of Bolton, 12 P. D. 202, probate was granted of a Belgian will purporting to deal only with property in Belgium together with an English will dealing only with property in England, although there do not seem to have been any words of reference or incorporation. The grant to the executor appointed by the English will was made, however, by the consent of the Belgian executor who had renounced. As to when it is unnecessary to treat the foreign will as incorporated, see In the Goods of Astor, 1 P. D. 150. In the Goods of Smart, 9 P. D. 64. Again, a testator died in England possessed of property in Eng-

(*m*) See Story's Confl. of L. Ch. xiii. ss. 512, 513, 518. The courts of the country where the deceased was domiciled will administer the property wherever situate; but if, in the course of the administration, it becomes necessary to take legal proceedings to reduce the estate into possession, the representative constituted by the court of the domicile will have to clothe himself with a title from the court where the property is locally situate: by the comity of nations, however, the foreign court will, as a matter of course, grant

probate ancillary to that granted by the courts of the domicile. In all matters, except that of procedure, the foreign courts have no jurisdiction, unless the representatives themselves accept the jurisdiction of such foreign court, to determine questions of construction or administration, and then the foreign court will apply the *lex domicilii*. *Enoch v. Wylie*, 10 H. L. Cases, p. 1. In the Goods of Cosnahan, L. R. 1 P. & D. 183. In the Goods of Hill, L. R. 2 P. & D. 89. In the Goods of Weaver, 36 L. J. P. & M. 41.

Again, if a will be made here and proved in the Court of Probate here, the probate will not extend to property in the colonies (*n*); though, if the testator was domiciled in this \*country, the judge of probate in the plantations is bound by the probate here, and ought to grant it to the same person (*o*).

But though the executor of a man who has died domiciled in England be not able to sue in a foreign court by virtue of an English probate (any more than he can sue in an English court by virtue of a foreign probate), yet for the purpose of suing in an English court, a probate obtained in the proper court here extends to all the personal property of the deceased wherever situate at the time of his death, whether in Great Britain or the colonies, or in any country abroad (*p*).<sup>45</sup> So an

land and South Africa. He executed two wills, one disposing of his English estate and the other of his South African estate: each purporting to be independent of the other and intended to have no operation on the property disposed of by the other. It was held that probate might be granted of the English will without requiring the South African will to be brought in, on an affidavit being filed exhibiting an attested copy of it and a statement being inserted in the probate that such affidavit had been filed. In the Goods of Callaway, 15 P. D. 147. See also In the Goods of De la Rue, 15 P. D. 185, where the same principle was applied to a case in which a testator had executed separate wills relating respectively to his English and Swiss property. See also in the Goods of Seaman [1891], P. 253. In the Goods of Fraser, *ib.*, 285. So where the deceased left a will expressly limited to her property abroad, which was proved by her executors in the foreign court, but she died intestate as to her property in this country, it was held that administration of her property in this country might be granted to her sole next of kin. In the Goods of Mann [1891], P. 293.

(*n*) Burn v. Cole, Ambl. 416. Atkins v. Smith, 2 Atk. 63. So a defendant who had been arrested in Ireland, by writ of *ne exeat regno* issued out of chancery there for a debt due to an intestate, was discharged, on the ground that the plaintiff had not obtained administration in that country: Swift v. Swift, 1 Ball & Beat. 326. See stat. 23 Vict. c. 5, s. 1, by which probate here is to extend to India government notes, &c.

(*o*) By Lord Mansfield, Ambl. 416.

(*p*) Whyte v. Rose, 3 Q. B. 493, 507.

45. Where a foreign executor comes into Virginia, bringing assets, or collects debts or assets there, he may be sued there. Fugate v. Moore, 86 Va. 1045. And where a foreign administrator brings funds or property of the estate into Tennessee, he may be compelled to account there, Whittaker v. Whittaker, 10 Lea 93; and if he be improperly investing such funds, or appropriating them to a purpose foreign to the trust, such accounting may be had in advance of the time limited for a settlement of the administration in the forum of appointment. Whittaker v. Whittaker, *ubi supra*.



executor having clothed himself with an English probate, might, without having obtained probate in Ireland also, sue in the courts here to recover a debt which was *bona notabilia* in Ireland (q).

It is now a clearly established rule, that the law of the country, in which the deceased was domiciled at the time of the death, not only decides the course of distribution or succession as to personalty (r), but also subject in the case of British subjects to the exceptions hereafter mentioned, regulates the decision as to what constitutes the last will, without regard to the place either of birth or death, or the situation of the property at that time.

Accordingly, if the deceased was a foreigner, domiciled abroad, and his will be brought into the Court of Probate \*here for the purpose of being admitted to probate, the court, in deciding whether the instrument be a valid will or not, will be guided not by our own law, but by the law of the country where the deceased was domiciled (s).<sup>46</sup> Thus in a case, where the testatrix was a married woman, a native of Spain, domiciled there,<sup>47</sup> and it appeared upon affidavits, that by the law of Spain she had power to bequeath, as a *feme sole*, the property which she brought her husband on her marriage, probate was granted of the will, made according to the law of that country (t).

The law of the place of domicile regulates the decision as to the validity of the will :

with respect to the validity of the will of a foreigner domiciled abroad, the court will be guided by the law of the place of domicile :

(q) *Whyte v. Rose*, 3 Q. B. 493. It would, however, be a good defense to such an action that the debt had been paid to a personal representative of the deceased duly constituted in Ireland : *ibid.* 510.

(r) *Craigie v. Lewin*, 3 Curt. 435. *De Zichy Ferraris v. Lord Hertford*, 3 Curt. 468, 486. *Bremer v. Freeman*, 10 Moo. P. C. 306. *Enohin v. Wylie*, 10 H. of L. 1. *Crispin v. Doglioni*, 3 Sw. & Tr. 96, 99. *Whicker v. Hume*, 7 H. of L. 124. *Miller v. James*, L. R. 3 P. & D. 4. See, however, as to wills made by British subjects dying after August 6, 1861, stat. 24 & 25 Vict. c. 114, s. 3, *post*, p. \*309, and see stat. 24 & 25 Vict. c. 121.

(s) *Curling v. Thornton*, 2 Add. 21. The French lawyers, it should seem, acknowledge the same principle : see

*Collectanea Juridica*, vol. 1, pp. 333, 331. 2 Add. 22.

46. Where a petition, in Kansas, shows the appointment of an administratrix, in a foreign jurisdiction, and her subsequent marriage, but does not show what effect, under the foreign law, such marriage has upon her authority as administratrix, it will be presumed in accordance with the law of Kansas, to have no effect. *Kansas Pacific Railway Co. v. Cutter*, 16 Kans. 568. But an original action may be maintained, in a district court, in Iowa, to set aside the probate of a foreign will, on the ground that such will is invalid as an instrument of title, in Iowa. *Lynch v. Miller*, 54 Iowa 516.

47. See *Will of Paulding*, Tuck. 47; also see *ante*, p. 90, n. 70.

(t) In the *Goods of Maraver*, 1 Hagg. 498.

And it was established by the determination of the delegates in *Stanley v. Bernes* (u), that the same rule, viz., that the question of the validity of a will of a testator domiciled abroad ought to be determined in our courts of probate according to the law of the country where the testator died domiciled, extends to the case of a British subject domiciled in a foreign state, notwithstanding the will disposes of property in England (x). In that case the delegates, reversing a sentence of the Prerogative Court, refused probate to two codicils, disposing solely of money in the British Funds and made by a British born subject, domiciled in the Portuguese dominions, on the ground that the instruments were not executed according to the law of Portugal.

And it should seem that if a British subject, domiciled in a foreign country, by his will appoints an executor, but makes a disposition of his property, which, though valid by the law of England, is invalid by the laws of that foreign country, the Court of Chancery is at liberty, notwithstanding probate may have been granted to the executor in this country, to hold that the will has no operation beyond the appointing of the executor (y); and, consequently, that he is a trustee \*for the next of kin, and must distribute the property exactly as if the deceased had died intestate.

When it is said that the law of the country of domicile must regulate the succession, it is not always meant to speak of the general law, but, in some instances, of the particular law which the country of domicile applies to the case of foreigners dying domiciled there, and which would not be applied to a natural born subject of that country. Thus in *Collier v. Rivaz* (z), the testator, an English born subject, died domiciled in Belgium, leaving a will not executed according to the forms required by the Belgian law: But by that law, the succession in such a case is not to be governed by the law of the country applicable to its natural born subjects,

(u) 3 Hagg. 374.

(x) But see now stat. 24 & 25 Vict. c. 114, *post*, p. \*308.

(y) *Thornton v. Curling*, 8 Sim. 310. See also *Campbell v. Beaufoy*, Johns. 320. On the same principle it would seem that a will of a British subject which must be held by an English court to be duly executed by reason of 24 & 25 Vict. c. 114 (*post*, \*308), though not

in the form required by the law of the place of the testator's domicile, may still be invalid, either because the testator is according to the law of his domicile incapable of making a will, or because the will is materially invalid or inoperative as containing provisions contravening the law of the testator's domicile. *Dacey on the Law of Domicil*, p. 306.

(z) 2 Curt. 855.

but by the law of the testator's own country : and it was held that the will, being valid according to the law of England, ought to be admitted to probate (*a*). So in *Maltass v. Maltass* (*b*), it appeared that by the law of Turkey no subject of that country can make a will : By treaty between Great Britain and the Ottoman Empire an English domiciled subject may make a will (*c*) : The deceased, John Maltass, was born at Smyrna of English parents, his father having been long settled as a merchant there ; the deceased was himself a member of a commercial firm at Smyrna and died there, having been constantly resident there, except that he passed his boyhood in England for the purposes of education : And it was held by Dr. Lushington (sitting for Sir H. Jenner Fust) that a will made by the deceased in \*1834, and which was good according to the law of England as it then stood, was entitled to probate : For if the testator was to be regarded as domiciled, in the legal sense, in Turkey, and if the law of domicil did prevail, the law of Turkey, in conformity with the treaty, says, that in such case the succession to the personal estate shall be governed by the British law ; if he was not domiciled in Turkey, but in England, then the law of England prevailed, *proprio vigore*.—But in either point of view, the will, in order to be valid, must have been made according to the testamentary law of England : And accordingly, Sir H. Jenner Fust refused to admit to probate a will of the same party deceased, which had been made after the year 1837, and had not conformed to the Wills Act (*d*).

Again, if the testator was a British subject, and at the time of his death domiciled in some other part of the British dominions, out of England, the court, upon application for probate, has felt itself bound to defer to the law of the place where the deceased was domiciled (*e*).

the rule is the same with respect to the wills of British subjects domiciled in the British dominions

(*a*) See the observations made on this case by Lord Wensleydale in *Bremer v. Freeman*, 10 Moo. P. C. 374. See also the observations of Sir J. Hannen in *Bloxam v. Favre*, 8 P. D. 103.

(*b*) 1 Robert. 67.

(*c*) See 3 Curt. 231.

(*d*) *Maltass v. Maltass*, 3 Curt. 231. There is no such thing as domicil arising from society and not from connection with a locality. Therefore where the testator, a member of the Chaldean Catholic community having

a Turkish domicil of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject, it was held that as Cairo was not a British possession governed by English law, the testator's permanent abode therein under British protection did not attach to him an English or Anglo-Egyptian domicil. *Abdul Meshih v. Farra*, 13 A. C. 431, approving *Re Tootal's Trusts*, 23 C. D. 532.

(*e*) But see now stat. 24 & 25 Vict. c. 114, s. 2, *post*, \*308.

Upon this ground it has been the practice, upon production of an exemplified copy of the probate granted by the proper court in the country where the deceased died domiciled, for the Prerogative Court here to follow the grant upon the application of the executor, in decreeing its own probate (*f*).

out of England, who died before Aug. 6, 1861 :

practice of the court here to follow the grant of the court of domicile :

court will grant ancillary letters of probate in cases of will of testator domiciled abroad :

When the court is satisfied that the testator died \*domiciled in a foreign country, and that his will, containing a general appointment of executors, has been duly authenticated by those executors in the proper court in the foreign country, it is the duty of the court in this country to clothe the foreign executors with ancillary letters of probate to enable them to get possession of that part of the personal estate which] was locally situate in England (*g*).<sup>48</sup> In *Laneuville v. An-*

(*f*) *Ante*, p. \*298. The doubt on this point expressed by Sir J. Nicholl in *Larpent v. Sindry*, 1 Hagg. 382, and in *In the Goods of Read*, 1 Hagg. 474, is now removed. See *Enohin v. Wylie*, 10 H. L. Cas. 14. Sir J. P. Wilde in the case of *In the Goods of Earl*, L. R. 1 P. & D. 450, after reviewing the cases of *Larpent v. Sindry*, *In the Goods of Read*, *In the Goods of the Countess Da Cunha*, 1 Hagg. 237 ; *In the Goods of H. R. H. the Duchess of Orleans*, 1 Sw. & Tr. 253 ; *Viesca v. D'Aramburu*, 2 Curt. 277 ; *In the Goods of Stewart*, 1 Curt. 904 ; *In the Goods of Rogerson*, 2 Curt. 656 ; and citing the observations of Lord Westbury in *Enohin v. Wylie*, *ubi sup.*, says : " I think that the Court acting on the special powers contained in the 73rd section of the 20 & 21 Vict. c. 77, ought " in all cases of wills of persons having a foreign domicile, " to make a grant to the person who has been clothed by the Court of the country of domicile with the power and duty of administering the estate, no matter who he is, or on what ground he has been clothed with that power." As to the practice of the court to grant probate of a copy of the original will when it is impossible to obtain such

original will, see *In the Goods of Lemme*, [1892], P. 89, *ante*, p. \*298, note (*f*). The grant will not necessarily be a grant of probate, if the person to whom the foreign court has made the grant is a person not entitled to the grant as executor by the law of England ; in such a case the grant will be of administration with the will annexed. *In the Goods of Earl*, L. R. 1 P. & D. 450 ; *In the Goods of Cosnahan*, L. R. 1 P. & D. 183 ; *In the Goods of Weaver*, 36 L. J. P. & M. 41 ; *In the Goods of Hill*, L. R. 2 P. & D. 89 ; *In the Goods of Dost Aly Khan*, 6 P. D. 6.

(*g*) *Enohin v. Wylie*, 10 H. of L. 14, by Lord Westbury.

48. In an application for ancillary letters testamentary, the facts conferring jurisdiction should be stated directly, and not left to inference. *Estate of Winnington*, 1 Civ. Pro. 267 ; *Estate of Thompson*, *Id.* 264.

An application for ancillary letters testamentary must be upon an exemplified copy of the will and not upon the original will, *Estate of Thompson*, 1 Civ. Pro. 264 ; and before such letters can be issued it must appear that the will has been admitted to probate within the proper jurisdiction by a competent

derson (*h*), it was held that where in the case of a domiciled Frenchman, the French court had decreed that the time limited by the French law for the execution of the executorship thereby created had passed, and that the executor had no more right to intermeddle in the estate of the testator, and that the parties beneficially interested were

court, *Estate of Winnington*, Id. 267 ; and where letters testamentary were issued in a foreign country the copy of such letters to accompany the petition must be authenticated in the manner provided by § 952, Code Civ. Pro., *Estate of Thompson*, *ubi supra* ; and the power of attorney upon which a petitioner makes application for ancillary letters must be such an instrument as is required by § 2667, Code Civ. Pro., Id. ; and it seems that the petition for such letters must show that the surrogate's court to which it is presented has jurisdiction of the estate of the testator, *Estate of Langbein*, 2 Civ. Pro. 226 ; it is not indispensable that it should appear that letters testamentary have been issued in the state where the will was admitted to probate. Id. ; *Estate of Wise*, 2 Civ. Pro. 230 ; *Wood v. Matthews*, 73 Mo. 477.

The chief object of ancillary administration of estates is to preserve and protect the claims of creditors in the jurisdiction where the ancillary administration is granted. *Moyer v. Weil*, 1 Dem. 71, 73 ; *Low v. Bartlett*, 8 Allen 259 ; *Jennison v. Hapgood*, 10 Pick. 77 ; *Clark v. Blackington*, 110 Mass. 369 ; *Goodall v. Marshall*, 11 N. H. 88.

It is purely a matter of discretion whether a court of competent jurisdiction, in the state where ancillary letters have been granted, will direct administration upon the local assets, or will order their transmission to the foreign jurisdiction. And unless there is some special reason for the adoption of a different course, it is manifestly wiser to

remit the funds of an estate to the place of the principal administration. *Moyer v. Weil*, *ubi supra* ; *Parsons v. Lyman*, 20 N. Y. 103 ; *Fox v. Carr*, 16 Hun 440 ; *Trimble v. Dzieduzyiki*, 57 How. Pr. 213 ; *Despard v. Churchill*, 53 N. Y. 192. But where parties interested in the distribution of an estate of one dying intestate, reside in the state where foreign administration is granted, the fund will be retained and distributed there. *Normand v. Grogard*, 2 C. E. Gr. 425. But when assets are not required in the place of domicile for the payment of debts, and no open account exists between the decedent and a distributee, they will not be remitted to the administrator or executor of the domicile, but distribution will be made, when asked for, within the ancillary jurisdiction. *Estate of Del Valle*, 17 Phila. 505. Nor will the share of a distributee be remitted for the purpose of subjecting it to the claims of creditors. Id. Where a petition is filed for ancillary administration alleging that the testator left personal property within the jurisdiction ; but there are no creditors, legatees or distributees residing within the jurisdiction, and no cause is shown why the petitioner cannot prove and collect his claim in the jurisdiction where the principal administration is being had, the prayer of the petition will be denied. *Putnam v. Pitney*, 45 Minn. 242.

Ancillary administration upon a will duly probated in the forum of the domicile, may be granted, in Alabama, as provided in § 2313 of the Code ; but neither the failure to give notice to

the only persons who had a right to interfere, the court held itself bound by such decree, and refused to grant probate (with respect to personalty in England) to such an executor.<sup>49</sup> So, in *Crispin v. Doglioni* (i), Sir C. Cresswell held, that \*the judgment of the court of domicile of the deceased is binding on the court of a foreign country, in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign court which have been decided by the court of domicile.<sup>50</sup>

When the deceased has left a will, valid by the law of his domicile, and probate either original or ancillary, has been obtained here, the duty of the court in administering the property, supposing a suit to be instituted for its administration, is to ascertain who by the law of domicile are entitled under the will, and that being ascertained,

parties in interest, nor the fact that the proof of execution and attestation, as shown by the required transcript, is defective, will render such ancillary probate void. *Dickey v. Vann*, 81 Ala. 425. And such administration will be granted, as matter of right, when the original probate is shown to have been granted by a court of competent jurisdiction, and it is properly authenticated. *Goodman v. Winter*, 64 Ala. 410; *Corrigan v. Jones*, 14 Col. 311.

The administration granted in the state of a decedent's domicile is the *principal* administration; that granted elsewhere is but ancillary. *Young v. Wittenmyre*, 123 Ill. 303; *Goodman v. Winter*, 64 Ala. 410. It is the duty of the ancillary administrator to collect all debts due the estate in his jurisdiction, and convert all assets there into money, pay all debts established against the estate there; and after all such debts are satisfied he should pay the balance to the domiciliary executor or administrator, to be disposed of under the authority of the court of his appointment. *Young v. Wittenmyre*, *ubi supra*.

The issuing of ancillary letters testa-

mentary to a foreign executor as prescribed by § 2695, Code Civ. Pro., confers upon him the same official and representative character in New York as that which was held by him in the state of his original appointment as executor. *Hopper v. Hopper*, 125 N. Y. 400.

The Orphans' Court has no jurisdiction to determine the validity of a foreign will admitted to probate in another jurisdiction. *Estate of Mackin*, 14 Phila. 328. Therefore if ancillary letters have been obtained by fraud upon the register, the proper remedy is to apply to him to revoke them. *Estate of Mackin*, *ubi supra*.

49. However, ancillary administration may be granted after the limit of time for granting the original administration. *Dolton v. Nelson*, 3 Dill. 469.

(i) 3 Sw. & Tr. 96.

50. A decree against a domiciliary executor binds, and is enforceable against, an administrator *cum testamento annexo* of the same decedent, in any other jurisdiction. *Garland v. Garland*, 84 Va. 181. But the domiciliary administrator cannot withdraw assets from the ancillary jurisdiction until the latter administration is settled. *Du Val v. Marshall*,

to distribute the property accordingly.<sup>51</sup> The duty of administration has to be discharged by the courts of this country, though in the performance of that duty they will be guided by the law of the domicile (*k*).

The rule above laid down (*l*) applies, lastly, to the case of the instance of a person not a native of this country, but domiciled here at the time of his death : in this case, the law of England is to regulate the decision as to the validity of a will of personal estate, or what are the rights under it (*m*).

Will of a person not a native, but domiciled here.

The rules of law for ascertaining the domicile are considered in a subsequent part of this work, conjointly with the \*rules of law as to the distribution of the effects of deceased persons, who have died domiciled in a foreign country (*n*).<sup>52</sup>

Rules for ascertaining domicile.

30 Ark. 230. And it seems that an assignment, by the foreign administrator, of a judgment recorded in the ancillary jurisdiction is void. *Id*.

51. Aside from and in addition to the preservation and protection of claims against the estate in the foreign jurisdiction, the duty of disposing of the assets that come into the hands of the ancillary administrator is one of the most important. Of different administrators, the domiciliary is the principal ; to him all others are subordinate ; therefore, after payment of debts in his state, the ancillary administrator must remit the balance to the domiciliary administrator for settlement and distribution. *Shegogg v. Perkins*, 34 Ark. 117 ; *Du Val v. Marshall*, 30 Id. 230 ; *Williamson v. Furbush*, 31 Id. 539 ; *Barry's Appeal*, 88 Pa. St. 131.

An ancillary administrator cannot pay claims to non-residents. *Shegogg v. Perkins*, *ubi supra* ; *Williamson v. Furbush*, *ubi supra*.

(*k*) *Enohin v. Wylie*, 10 H. of L. 19, by Lord Cranworth. It appears to have been laid down by Lord Westbury that the court of the domicile is the *forum concursus* to which legatees under the will of a testator, or the par-

ties entitled to distribution of the estate, are required to resort. (See also *Crispin v. Doglioni*, 3 Sw. & Tr. 99, by Sir C. Cresswell.) But unless the point in dispute has been already decided by the court of domicile, it is apprehended that the court of this country in which an administration suit is instituted must decide for itself what, *according to the law of the domicile*, is the true construction of the will, and what are the rights of the parties claiming to be interested in the estate in cases as well of intestacy as of testacy. As to raising the question of domicile, see *Duprez v. Veret*, L. R. 1 P. & D. 583

(*l*) *Ante*, p. \*302.

(*m*) *Price v. Dewhurst*, 8 Sim. 279. S. C. 4 Mylne & Cr. 76, 82. *Yates v. Thompson*, 3 Cl. & Fin. 544. See *post*, Pt. III. Bk. III. Ch. II. § I. as to the construction of the will of a testator domiciled abroad.

(*n*) *Post*, Pt. III. Bk. IV. Ch. I. § V.

52. The meaning of "inhabitant," as used in Code of Alabama, § 2304, is synonymous with "domiciliary resident." *Merrill's Heirs v. Morrissett*, 76 Ala. 433.

It seems that a person who went from Mississippi to Texas in 1862, for the express purpose of preventing the cap-

It must be here observed, that where a will is made disposing of personal property situate in this country, under a power of appointment, and it is duly executed in compliance with the requisites of the power, it has been held that such a will ought to be admitted to probate in this country, notwithstanding it be not properly executed according to the forms prescribed by the testamentary law of the country in which the testator was domiciled at the time of his death (*o*).

But a power to appoint "by a Will duly executed," is well exercised by a will good according to the law of the country of the testator's domicile, though ill executed according to the law of England (*p*). The above rules as to the validity of wills in point of form were rendered to a great extent inapplicable to wills made by British subjects dying after 6th August, 1861, by the statute 24 & 25 Vict. c. 114.

By the first section of that act, "every Will and other testamentary instrument (*q*) made out of the United Kingdom by a *British* subject (whatever may be the domicile of such person at the time of making the same, or at the time of his \*or her death), shall as regards personal estate, be held to be well executed for the purpose of being admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place

ture of his slaves, did not thereby lose his domicile in Mississippi. *Weaver v. Norwood*, 59 Miss. 665.

But as a general rule, the place where a person lives and dies is taken to be his domicile, *Will of Olson*, 63 Iowa 145; and courts will act on such assumption until facts are adduced to establish the contrary. *Id.*; *Merrill's Heirs v. Morrisett*, *ubi supra*.

(*o*) *Tatnall v. Hankey*, 2 Moo. P. C. 342. The opinion to the contrary expressed by Sir C. Cresswell in *Crookenden v. Fuller*, 1 Sw. & Tr. 441, 454, was declared by that judge to be incorrect: see *In the Goods of Alexander*, 29 L. J. P. M. & A. 93. But Lord Penzance, although he followed *In the Goods of Alexander* in the case of *In*

the Goods of Hallyburton, L. R. 1 P. & D. 90, expressed a strong opinion that *Crookenden v. Fuller* expressed a truer view of the law and was more in accordance with the judgment of the Privy Council in *Barnes v. Vincent*, 5 Moo. P. C. 201, which was subsequent to *Tatnall v. Hankey* (*ubi supra*), and, as he thought, inconsistent with the note to that case, the authority of which note he questioned.

(*p*) *D'Huart v. Harkness*, 34 L. J. Ch. 311. In the case, however, of a will which is only valid by reason of 24 & 25 Vict. c. 114, ss. 9 and 10 of the Wills Act must be complied with: *Re Kirwan's Trust*, 25 C. D. 373.

(*q*) In determining the question what papers are testamentary under the pro-



where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin (*r*). was domiciled or had his domicile of origin.

Sect. 2.—“Every Will and other testamentary instrument made within the United Kingdom by any *British* subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death), shall, as regards personal estate, be held to be well executed, and shall be admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, and if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made” (*s*). S. 2. Wills made by British subjects in this kingdom to be admitted if made according to local law.

Sect. 3.—“No Will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same” (*t*). S. 3. Change of domicile not to invalidate will.

\*Sect. 4.—“Nothing in this Act contained shall invalidate any Will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such Will or other testamentary instrument may be revoked or altered by any subsequent Will or testamentary instrument made valid by this Act.” S. 4. Nothing in the act to invalidate wills otherwise made.

visions of this statute the court will have regard to the law of one country only and will not mix up the legal precepts of different countries: *Pechell v. Hilderley*, L. R. 1 P. & D. 670.

(*r*) As to the application of this section to a will executed in France by a naturalized Englishman, see *In the Goods of Lacroix*, 2 P. D. 94. A will, however, of a foreigner executed abroad according to the formalities required by the English law is invalid, notwithstanding the provisions of this statute, and of the Naturalization Act, 1870, that property may be disposed of by an alien in the same manner in all respects as by a natural born British subject; *In the Goods of Von Buseck*, 6 P. D. 211. *Bloxam v. Favre*, 8 P. D. 101. 9 P. D. 130. This statute does

not touch or interfere with the provisions of sections 8 and 10 of the Wills Act, that no appointment made by will in the exercise of a power shall be valid unless the same be executed in the manner therein provided, *i. e.*, in the presence of, and attested by, two witnesses: *Re Kirwan's Trust*, 25 Ch. D. 373.

(*s*) A naturalized British subject, whilst domiciled in England, made a will according to the forms required by the law of England. At the time of his death he was domiciled in Italy. His will was admitted to probate under this section: *In the Goods of Gally*, 1 P. D. 438.

(*t*) A domiciled Scotchman made a will and afterward married in Scotland. He subsequently acquired an English

Sect. 5.—“This Act shall only extend to Wills and other testamentary instruments made by persons who die after the passing of this Act” (Aug. 6, 1861).

S. 5. Extent of Act.

## SECTION VII.

### *Practice of the court in certain other particulars as to granting probate.*<sup>53</sup>

Costs in the Probate Division are now governed, as in the other divisions of the High Court, by the Judicature Acts and the rules of the Supreme Court made thereunder, but, Costs in the Probate Division : inasmuch as by those acts and rules for the most part, except in cases where an action or issue is tried by jury, costs are in the discretion of the court, the result is that the rules as to costs, which formerly obtained in the Court of Probate, are still observed in the Probate Division, and that portion of this treatise which deals with such rules is therefore preserved, subject to such modifications as may have been introduced by recent decisions.

domicil, which he retained till his death. It was held that as the will was valid as long as he remained in Scotland, it was not revoked by his subsequent change of domicil, and was entitled to probate in England : In the *Goods of Reid*, L. R. 1 P. & D. 74.

53. A court of probate, unlike the Court of Chancery, cannot *ex mero motu*, invoke the aid of a jury to determine a disputed question. Therefore, as the statute of Alabama (Code 1876, § 2317), only authorizes the appointment of a jury, by the Probate Court, on the application of either party to an issue as to the validity of a will, the probate judge must himself hear the evidence and determine the issues, if neither party requires a jury. *Jaques v. Horton*, 76 Ala. 238. But even in chancery, a trial by jury cannot be claimed, as a matter of right, after the pleadings and proofs have been submitted to the chancellor for a decree. *Mathews v. Forniss*, 91 Ala. 157.

The verdict of a jury, in a case in

chancery, contesting a will, is to have the same force and effect as a verdict in a case at law under a like state of facts, and, where not manifestly against the weight of the evidence, the court is bound by it in the same manner and to the same effect as if it were a case at law. *Calvert v. Carpenter*, 96 Ill. 63 ; *Shevalier v. Seager*, 121 Id. 564.

And where issues of fact are tried in a probate court, findings of fact are proper, *Estate of Crosby*, 55 Cal. 574 ; and the findings of a jury upon issues directed by the Orphans' Court, under Code, Art. 93, § 250, are conclusive, and the court has no discretion, but must enter judgment in conformity with the findings. *Sumwalt v. Sumwalt*, 52 Md. 338 ; *Worthington v. Ridgely*, Id. 349. Such a verdict will not be set aside when there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize it, notwithstanding it may appear to be against the weight of the testimony. *Shevalier v. Seager*, *ubi supra*.

By the rules of the Supreme Court of Judicature by which the question of costs in the Probate Division of the High Court of Justice is now governed, it is enacted [ord. <sup>now governed by R. S. C. 1883, Ord. LXV., r. 1.</sup> LXV., r. 1], that "Subject to provisions of the Acts and these rules the costs of, and incident to, all proceedings in the High Court shall be *in the discretion of the Court or Judge*: but \*nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted, or carried on, or resisted any proceeding, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division, provided that where any action or issue is tried by a jury, the cost shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order." 54

The question of costs was in the discretion of the judge under the practice both of the Court of Probate and of the Prerogative Court, its predecessor.<sup>55</sup>

In framing the issues for the jury, it is the duty of the court to present them in a plain, clear manner, without multiplying issues; and it is obviously improper to present the same substantial question in two separate and distinct issues. *Sumwalt v. Sumwalt, ubi supra*. And where there are several issues framed, it is proper for the court to direct that they be all tried by one jury. *Worthington v. Ridgely, ubi supra*.

A party to a contested application for the probate of a will, begun in a county court, but subsequently transferred to a district court, is entitled, on demand, to a trial by jury in the district court, and such trial is not to be regarded as an appeal from the county court. *Cockrill v. Cox*, 65 Tex. 669.

In a case where necessary facts have been omitted from the petition, the judge of probate has power to allow the petition to be amended. *Danby v. Dawes*, 81 Me. 30. And probate courts have power to modify orders previously made by them, on proper showing therefor. *Ashlock v. Sherman*, 56 Iowa 311. But the provisions of the New

York statute of 1870 (1 Laws 1870, c. 359, p. 826), authorizing the court to open, vacate and modify orders and decrees was not designed to substitute a motion for the ordinary review by appeal. *Janssen v. Wemple*, 3 Redf. 229. But an order made without the county is void, under provisions of § 2313 of the Code. *Capper v. Sibley*, 65 Iowa 754.

In proceedings to prove a contested will, the Probate Court may open the case, after it has been closed, and allow a witness to change his testimony. *Martinhoff v. Martinhoff*, 81 N. Y. 641.

As a general rule, a probate court has no power to settle disputes between heirs or representatives and third persons, *Theller v. Such*, 57 Cal. 447; therefore the rights of the representatives or successors of several partners deceased can be determined only in a court of equity. *Id.*

54. In an action in chancery for the construction of a will, the executor is entitled to costs out of the estate. *Annin v. Van Doren*, 1 McCart. 136.

55. The power of the surrogates'

It was only under special circumstances that the Ecclesiastical Court directed costs to be paid out of the estate of the deceased (*u*). It did not follow that a party was entitled to his costs out of the estate, because there was "*justa causa litigandi*" (*x*): but the principle which guided the court in decreeing such costs was, that the party was led into the contest by

In what cases costs decreed out of the estate of the deceased.

courts, in the matter of awarding costs, is broad. *Estate of Goetschius*, 3 N. Y. Misc. 155. The surrogate's court has power in its discretion to award costs against the unsuccessful proponent of a will in favor of one or more of the contestants, and such exercise of discretion is not reviewable in the Court of Appeals. *Collyer v. Collyer*, 110 N. Y. 481.

In case a will is delivered to the daughter of the testatrix, who, because of her dissatisfaction with it, refuses to produce it, she will be compelled to pay the costs of a suit brought to compel its return. *Beckett v. Zane*, 14 Stew. (N. J.) 412.

The allowance of costs and fees to the caveators against the probate of a will is discretionary with the court. *Mallett v. Bamber*, 6 Stew. (N. J.) 253. When one contests the probate of a will in good faith, but unsuccessfully, the allowance of costs to such contestant under § 2558, Code Civ. Pro., is discretionary with the surrogate, and his refusal to make such allowance is not error. *Matter of Mandorf*, 110 N. Y. 450. But where an executor, in good faith and upon reasonable grounds, endeavors to procure probate of the will, but fails, he should be allowed his costs, including reasonable counsel fee. *Philips v. Philips*, 31 Ky. 328.

Costs will generally be denied where there is no reasonable ground for the litigation, or the litigation having been brought, is needlessly prolonged and expensive. *Mallett v. Bamber*, *ubi supra*. And if the will be probated,

the parties who contested the probate may be taxed with costs caused by their opposition. *Lawrie v. Lawrie*, 39 Kans. 480. But the caveators are entitled to costs and counsel fees in an exceptional case of doubt as to testamentary capacity and undue influence. *Matter of Eddy*, 6 Stew. (N. J.) 574. So too, in case where reasonable ground of contest exists, counsel fee will be allowed. *Mandeville v. Parker*, 7 Stew. (N. J.) 211. But under P. S. c. 156, § 35, the Probate Court, in Massachusetts, has no power to allow counsel fees as costs. *Brown v. Corey*, 134 Mass. 249. Nor can an orphans' court permit an executor to pay, as costs, the fee of counsel retained by the sole devisee to defend the will, after the filing of a caveat. *Gorton v. Perkins*, 63 Md. 589.

A statute which requires, as a condition precedent to probate proceedings, the payment of certain sums arbitrarily fixed without reference to the value of the estate, is unconstitutional. *State v. Gorman*, 40 Minn. 232.

(*u*) *Dean v. Russel*, 3 Phillim. 334. The court has still no jurisdiction to order costs to be paid out of the real estate. *Young v. Dendy*, L. R. 1 P. & D. 344. *Davies v. Reynolds*, L. R. 3 P. & D. 90. Except, it seems, by consent of the parties interested, in cases where the personal estate is insufficient: *Smith v. Hopkinson*, 4 P. D. 84.

(*x*) *Barwick v. Mullings*, 2 Hagg. 234. In *Nicholls v. Binns*, 1 Sw. & Tr. 239, 241, Sir C. Cresswell said that by the practice of the ecclesiastical courts,

the state in which the deceased left his papers (*y*), or that the validity of the will has been contested on a doubtful point of law (*z*).

\*Two rules were laid down by Sir J. P. Wilde for the guidance of the Court of Probate (*zz*):—First, if the cause of litigation takes its origin in the fault of the testator (*a*), or those interested in the residue (*b*), the costs may be properly paid out of the estate; secondly, if there be a sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator (*c*), or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent (*d*).

Although, generally speaking, an executor propounding a will will be entitled to his costs, yet sometimes he will be condemned in costs, as where without explanation he consented to a verdict against him on the morning of the

Cases in which executor propounding a will will be condemned in costs.

where there was a fair case for inquiry, the next of kin might call on the executors to prove the will in solemn form, and generally speaking, at the expense of the estate. But the same judge refused to allow the next of kin their costs out of the estate, when they had chosen to raise a question of domicile, which was likely to put the executors to great expense: *Onslow v. Cannon*, 2 Sw. & Tr. 136. See also *Seaton v. Sturch*, 29 L. J., P. & M. 195.

(*y*) *Hillam v. Walker*, 1 Hagg. 75.

(*z*) *Robins v. Dolphin*, 1 Sw. & Tr. 518. And the general proposition, that where a party entitled in distribution simply calls for proof of a will, and merely cross-examines the witnesses, without any misconduct in the suit, he is entitled to have his costs out of the estate, is fully supported by the authorities: *Prinsep v. Dyce, Sombre*, 10 Moo. P. C. 232. But it is otherwise where the proceedings were not taken simply for the purpose of getting the opinion of the court on the will, but were ancillary to another suit pending in respect of the real estate: *Swinfen v. Swinfen*, 1 Sw. & Tr. 283. For instances where the unsuccessful party

has not been condemned in costs, see *Ferrey v. King*, 3 Sw. & Tr. 51. *Bramley v. Bramley*, *ibid.* 430. *Tippett v. Tippett*, L. R. 1 P. & D. 54. See further as to costs, *Cleare v. Cleare*, 1 L. R. P. & D. 655.

(*zz*) *Mitchell v. Gard*, 3 Sw. & Tr. 275.

(*a*) See *Accord.*: *Boughton v. Knight*, L. R. 3 P. & D. 64. *Charter v. Charter*, L. R. 7 H. L. 364. *Jenner v. Ffinch*, 5 P. D. 106.

(*b*) *Williams v. Henery*, 3 Sw. & Tr. 471.

(*c*) *Frere v. Peacock*, 1 Rob. 456. *Waring v. Waring*, 5 Not. of Cas. 324.

(*d*) See *Accord.* *Davies v. Gregory*, L. R. 3 P. & D. 28. *Orton v. Smith*, *ibid.* 23. See further *Nash v. Yelloly*, 3 Sw. & Tr. 59, where a plaintiff who was the executor, was condemned in costs, the will having been refused probate on the ground of undue influence. But in cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a *bona fide*

trial (e), or knowing that the will had not been well executed (f), or where there is an inofficious instrument propounded by a person materially benefited (g).

The mere fact that a person who has improperly propounded a testamentary paper is a nude executor, is no ground for relieving him from his liability to condemnation in costs (h).

A legatee, performing the duty of an executor in proving the will or codicil, is entitled to his costs out of the estate (i). But the rule as to a legatee having his costs out of the estate on establishing a codicil, is not so general as in the case of a will (k): And if they are occasioned by his own delay in producing the paper, he must pay his own costs (l). 56

Where an executrix through her negligence lost a will, and proved a draft of it, she was ordered to pay the costs of the defendants, and was allowed out of the estate such costs only as she would have been entitled to if she had proved the original will in solemn form (m).

Where a party propounding a will became a bankrupt, Security for costs. the court directed him to find security for costs (n).

The rule of the common law courts as to the occasions on which

belief in the existence of a state of things which, if it did exist, would justify litigation and the opposition is unsuccessful, each party must pay his own costs: *Davies v. Gregory*, (*ubi supra*).

(e) *Richards v. Humphreys*, 29 L. J., P. & M. 137.

(f) *Clarkson v. Waterhouse*, 29 L. J. P. & M. 136.

(g) *Dodge v. Meech*, 1 Hagg. 612.

(h) *Rennie v. Massie*, L. R. 1 P. & D. 118.

(i) *Williams v. Goude*, 1 Hagg. 610. *Sutton v. Drax*, 2 Phill. 223. And just as an executor who proves a will is entitled to take the costs, which he has incurred, out of the estate without any order of the court, so a legatee, performing the duty of an executor, will be entitled to an order that his extra costs shall be paid out of the estate. See *Wilkinson v. Corfield*, 6 P. D. 27. The order will be *nomine expensarum*: *Bremer v. Freeman*, Dea. & Sw. 258. See also *Bewsher v. Williams*, 3 Sw. &

Tr. 62. So a next of kin who had successfully opposed a will propounded by the widow of the deceased as sole executrix named therein, the widow not being condemned in costs, was held to be entitled to costs out of the estate: *Critchell v. Critchell*, 3 Sw. & Tr. 41.

(k) *Headington v. Holloway*, 3 Hagg. 280, 283.

(l) *Ibid.*

56. In the calculation of time for the allowance of costs under § 2561, N. Y. Code Civ. Pro., which provides for a *per diem* compensation, time spent by an attorney in preparing pleadings, making briefs, ascertaining facts, appearing when the case is merely adjourned, or merely to settle the decree, cannot be regarded as part of the time occupied in the contest, and therefore costs cannot be computed for such time. *Matter of Brown*, 65 How. Pr. 461.

(m) *Burls v. Burls*, L. R. 1 P. & D. 472.

(n) *Goldie v. Murray*, 2 Curt. 797.

security for costs should be given, was adopted by the Court of Probate, *e. g.*, security for costs was required of a plaintiff to a suit when resident without the jurisdiction of \*the court, but was not required of a defendant in a similar position: *Robson v. Robson*, 3 Sw. & Tr. 568. It should be observed, that on the question as to the immunity of the defendant from giving security for costs, the substantial, and not only the nominal, position of defendant and plaintiff respectively in the suit should be considered, as in certain cases, in the Court of Probate, the nominal position of plaintiff or defendant depends on the mode in which the cause commenced: *Robson v. Robson*, *ubi sup.*

This question of giving security for costs in the Probate Division remains governed by the old common law rules. The amount of the security to be given is in the discretion of the court.

R. S. C. 1883, Ord. LXV., r. 6.

Married women suing as plaintiffs without their husband's being joined are not, since the Married Women's Property Act, 1882, liable to give security for costs (*n*).

Liability of married women to give security for costs.

As to the position of a party opposing a will, and giving notice under R. S. C. Order XXI., rule 18, with regard to his liability to pay costs under the practice of the Prerogative Court, the Court of Probate and the Probate Division of the High Court, respectively, see *ante*, p. \*281.<sup>57</sup>

Costs in case of a party opposing will after giving notice under R. S. C., Ord. XXI., r. 18.

There is no definite rule as to the payment of costs by or to interveners. Each particular case depends on its own circumstances (*o*).

Costs of interveners.

By the practice of the Prerogative Court, as it has been already pointed out (pp. \*280, \*281), the next of kin, a creditor who had obtained a grant of administration, or an executor under a former will, had a right to call upon the ex-

Costs of party calling on executor to prove a will.

(*n*) *Threlfall v. Wilson*, 8 P. D. 18.

57. Where objections filed to the probate of a will are withdrawn, before any trial is had before the surrogate, as to their merits, in New York, there has not been such a contest of the will as would bring the case within 2 R. S. 223, § 10, authorizing the surrogate to award costs or allowances in all cases of a contest. *Peck v. Peck*, 23 Hun 312.

(*o*) For an instance in which the interveners have been allowed costs out of

the estate, see *Cross v. Cross*, 3 Sw. & Tr. 300, but see *contra*. *Colvin v. Fraser*, 2 Hagg. 368. *Shaw v. Marshall*, 1 Sw. & Tr. 129. An heir at law who intervenes in a suit, not being cited, and opposes a will, is entitled to costs, if the will is pronounced against: *Rayson v. Parton*, L. R. 2 P. & D. 38. And where he is made a party by order of the court, even though he is ultimately unsuccessful: *Singleton v. Tomlinson*, 3 App. Cases, 404.

ecutor to prove the will in solemn form, without being liable for costs, provided that they did not do so vexatiously. If they \*exercised this right vexatiously, or pleaded, or attempted to set up, a case of fraud, which they were not justified by the evidence in doing, they were liable to be ordered to pay costs. This right, however, does not extend to a residuary legatee under a former will.

If they put an executor on proof after he had taken probate in common form, they did so at the risk of being condemned in costs.

What costs are included. In a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit (*p*).

Liability of party cited but who has not appeared to pay costs. The court, in a case where a defendant had destroyed the will the subject of proof, held that it had power to condemn the party who had been cited, but had not appeared, in the costs of the suit (*q*), so too a person who has not been cited, nor made himself a party to the suit, but who has entered a *caveat*, may be condemned in costs (*r*).

It is a necessary consequence of some of those rules of the Court of Probate, which there has already been occasion to notice, that a will may be in part admitted to probate, and in part may be refused. Thus, if the court shall be satisfied that a particular clause has been inserted in a will, by fraud, without the knowledge of the testator in his lifetime (*s*), or by forgery after his death (*t*), or, it should seem, if he has been induced by fraud to make it a part of his will (*u*), probate will be granted of the instrument with the reservation of that clause. Again, where a clause is introduced in a testamentary paper, *per incuriam*, and the deceased executes the paper, not having given any instructions for such clause, and it not having been read over to him, probate will be granted of the remainder of the paper, omitting such clause (*x*). \*So,

(*p*) *Fisher v. Fisher*, 4 P. D. 231.

(*q*) *King v. Gillard*, L. R. 1 P. & D. 539.

(*r*) *Ratliffe v. Barnes*, 31 L. J., P. & M. 61.

(*s*) *Barton v. Robins*, 3 Phill. 455, note (*b*).

(*t*) *Plume v. Beale*, 1 P. Wms. 388.

(*u*) *Allen v. McPherson*, 1 H. of L. 191.

(*x*) In the Goods of Duane, 2 Sw. & Tr. 590. In the Goods of Oswald, L. R. 3 P. & D. 162. See *Morrell v. Morrell*, 7 P. D. 68. The requirements of

the court before it will exclude from probate part of a will, and the *onus probandi* are much discussed in *Atter v. Atkinson*, L. R. 1 P. & D. 670. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109. *Fulton v. Andrew*, L. R. 7 H. L. 448. In the Goods of Bushell, 13 P. D. 7. In the Goods of Huddleston, 63 L. T. (N. S.) 255. In the Goods of Boehm [1891], P. 247. Sir J. Hannen in *Morrell v. Morrell*, *ubi supra*, ordered the word "40" to be struck out of the four places in which it occurred in the will, and in his judgment said, "In the



since part of a will may be established, and part held not entitled to probate, if actual incapacity be shown at the time of the execution of the latter part, the will shall, in such case, be engrossed without it, and so annexed to the probate (y). But the court cannot, even by consent, order a passage of the will to be expunged, which the testator, being of sound mind, intended to form part of it (z). But though the court \*cannot expunge any words from the original will, it has, it seems, allowed offensive passages, such as scurrilous imputations on the character of another man, to be excluded from the probate and copy kept in the registry (a).

but the court cannot expunge.

In a case where the executor and universal legatee had been, by a case of *Harter v. Harter*, L. R. 3 P. & D. 11, I held that the language of a Will could not be changed where the testator had seen the words and adopted them, but in *Fulton v. Andrew*, where a residuary bequest was introduced into the will without the knowledge of the testator, the clause containing the bequest was rejected. If so, the principle may be applied to a single word, and, therefore, on the ruling of the House of Lords in *Fulton v. Andrew* (L. R. 7 H. L. 448) I hold that the words may be struck out which have been introduced without the authority of the testator." But where the rejection of part alters the sense of the remainder, *quare*, whether there is a valid will within the meaning of 1 Vict. c. 26, s. 9. *Rhodes v. Rhodes*, 7 A. C. 192.

(y) *Billinghurst v. Vickers*, 1 Phill. 187. *Wood v. Wood*, *ibid.* 357. *Ante*, p. \*36.

(z) So where a legatee, at the request of the testator, signed her name to the will, and the testator subsequently duly executed the will in the presence of two witnesses, who attested it, a motion to strike out the name of the legatee was rejected: In the Goods of Mitchell, 2 Curt. 916. In the Goods of Forest, 2 Sw. & Tr. 334. In the Goods of Raine, 34 L. J., P. & M. 125. In the Goods of Smith, 3 Sw. & Tr. 589. In the Goods of Sharman, 1 L. R. P. & D. 661. Where a will had been executed in the

presence of two witnesses, and in addition to their signatures the signature of a third person, who was also residuary legatee, appeared at the foot of the will, the court received evidence to explain why such signature was written, and, being satisfied that it was not written with the intention of attesting the signature of the testator, ordered it to be omitted in the probate. This decision does not seem quite consistent with the earlier cases, and particularly not with In the Goods of Forest, *ubi supra*, in which case Sir C. Creswell pointed out that if the signature were omitted in the probate the next of kin would be unable in a court of construction to raise the question as to whether the signature was that of a subscribing witness so that persons signing would forfeit all interest under the will, whereas if the signature were retained it might still be shown that the signature was not that of a subscribing witness. The case of In the Goods of Sharman (*ubi sup.*) seems to have been followed in the case of In the Goods of Smith, 15 P. D. 2.

(a) *Curtis v. Curtis*, 33. The words sought to be expunged in that case were in the will of a husband reflecting severely on the conduct of his wife. In the Goods of Wartnaby, 1 Robert. 423. *Marsh v. Marsh*, 1 Sw. & Tr. 528. In the Goods of Honynood, L. R. 2 P. & D. 251.

mistake of the solicitor who drew the will, described therein by a wrong name; (*viz.*, "my nephew Barton Nicholas *Shuttleworth*" instead of "Barton Nicholas *Bayley*") probate was granted to him in his right name, the testator's next of kin consenting (*b*). But the court cannot, even by consent, alter the will by substituting one name for another, however cogent the evidence of mistake may be (*c*).

Probate granted in his right name to an executor wrongly named in the will:

but the will cannot be altered:

Nor has the court, under any circumstances, power to make any alteration in papers of which probate has been granted. Therefore, where the Vice-Chancellor of England had ordered, that two promissory notes, which, with certain testamentary indorsements on them, had been admitted to probate, should be paid in a certain way, and that having been done, he further ordered that the notes should be canceled, Sir H. Jenner Fust refused to direct that this order should be carried into effect (*d*).

nor canceled in part.

It is laid down by Swinburne, that if a testament be made in writing, and afterward lost by some casualty, if there be two unexceptionable witnesses who did see and read the testament written, and do remember the contents thereof, \*these two witnesses, so deposing to the tenor of the will, are sufficient for the proof thereof in form of law (*e*).<sup>58</sup> In such cases the court will grant

Probate of a lost will:

(*b*) In the Goods of Shuttleworth, 1 Curt. 911.

(*c*) In the Goods of Collins, 7 Notes of Cas. 278. In the Goods of Boehm [1891], P. 247.

(*d*) In the Goods of Hughes, 2 Robert. 341.

(*e*) Swinb. Pt. 6, s. 14, pl. 4.

58. In order to establish a will alleged to have been lost, if lost after the death of the testator, its existence at the time of his death must be proved; if lost before his death, it must be proved that it was destroyed fraudulently in his lifetime. Estate of Kidder, 57 Cal. 282; Foster's Appeal, 87 Pa. St. 67.

The old English rule that such a will must be established by the testimony of two unexceptionable witnesses prevails largely in the United States. Such

proof is necessary in New York, where at least two witnesses are required, Collyer v. Collyer, 17 Abb. N. C. 328; Sheridan v. Houghton, 6 Id. 234; S. C., 84 N. Y. 643; and their evidence must substantially agree as to the provisions of the will, Sheridan v. Houghton, *ubi supra*; and must be sufficient to show a compliance with the statute. Voorhees v. Voorhees, 39 N. Y. 463. The same rule prevails in Tennessee, Hunter v. Gardenhire, 13 Lea 658; and also in Colorado, Todd v. Rennick, 13 Col. 546; and in California, Estate of Kidder, 66 Cal. 487; however, in Alabama, the contents of a lost will may be proved by the testimony of one witness who has read it, and remembers its contents, notwithstanding the fact that a will must be attested by two subscribing witnesses, Jaques v. Horton, 76 Ala.

probate of the will "as contained in the depositions of the witnesses" (*f*): And, at this day, it is quite clear that the contents or

238; *Skeggs v. Horton*, 82 Id. 352; and this is so in some other states. *Lewis v. Lewis*, 6 Serg. & R. 488; *Dickey v. Malechi*, 6 Mo. 177; *Kearns v. Kearns*, 4 Harr. (Del.) 83; *Baker v. Dobyns*, 4 Dana 220; *Graham v. O'Fallon*, 3 Mo. 507.

It is said in New York that the same rule prevails in the case of a lost will as in the matter of a will actually presented for probate, and if the witnesses cannot be produced, their absence must be accounted for, and the fact that they signed the will, as witnesses, must be duly proved by competent testimony. *Collyer v. Collyer*, *ubi supra*. And in a case under G. S. c. 115, § 21, in Kansas, providing that the contents of a lost will shall be established by at least two witnesses, it was held that such a will could not be admitted to probate where three or four witnesses testified as to the contents of the will, but the testimony of no two of them agreed, it being requisite that the will, as an entirety, must be established by the united testimony of at least two witnesses, going to each and every part. *Todd v. Rennick*, *ubi supra*. And where two witnesses testified that an alleged will had been executed in the presence of themselves and a third witness, and such third witness testified that he did not sign it, it was held that the judge should not have charged that the will was sufficiently proved; but that such matter should be left to the jury to determine. *Bauskett v. Keitt*, 22 S. C. 187.

In such proceedings secondary evi-

dence is, of course, admissible, and the declarations of the testator may be testified to, to show whether he destroyed the will *animo revocandi*, as also his declarations as to whether he presumed the will to be in existence immediately before his death. *Southworth v. Adams*, 11 Biss. 256; *Foster's Appeal*, 87 Pa. St. 67; *Behrens v. Behrens*, 47 O. St. 323; *Matter of Marsh*, 45 Hun 107; *Matter of Simpson*, 56 How. Pr. 125; *Bauskett v. Keitt*, 22 S. C. 187; *Will of Foster*, 13 Phila. 567; *Durant v. Ashmore*, 2 Rich. 184; *Johnson's Will*, 40 Conn. 587; *Timon v. Claffy*, 45 Barb. 438. But the requirement, that the proponent must give evidence that the will was in existence at the testator's death, is not satisfied by proof of a declaration of the testator, seven months before death, that he had made such a will. *Collyer v. Collyer*, 17 Abb. N. C. 328. But declarations from time to time, and up to a short time prior to the death, are competent. *Matter of Marsh*, *ubi supra*.

But such evidence should be carefully scrutinized and cautiously weighed. *Grant v. Grant*, 1 Sandf. Ch. 237; *Matter of Marsh*, *ubi supra*.

Where a will, which cannot be found, is shown to have been last seen in the possession of the testator, the presumption is that he destroyed it for the purpose of revocation. *Matter of Nichols*, 40 Hun 387; *Jaques v. Horton*, 76 Ala. 238; *Collyer v. Collyer*, 17 Abb. N. C. 328. But such presumption may be rebutted, *Jaques v. Horton*, *ubi*

(*f*) *Trevelyan v. Trevelyan*, 1 Philim. 154. Where a will has been lost and evidence of its contents is supplied by the production of a draft and of the parol testimony of persons who had

read the will, the parol evidence must be placed side by side with the draft, and out of them the court will extract the contents of the will to be proved: *Burls v. Burls*, L. R. 1 P. & D. 472.

substance of a testamentary instrument may be thus established, though the instrument itself cannot be produced, upon satisfactory

*supra*; and the burden of rebuttal is on the proponent. *Id.* But such presumption is not rebutted by the fact that opportunity existed for fraudulent destruction of the will by persons to whose interests the will was inimical. *Collyer v. Collyer, ubi supra*; *Bauskett v. Keitt*, 22 S. C. 187; *Kaster v. Kaster*, 52 Ind. 531; *Mercer v. Mackin*, 14 Bush 434. But a lost will cannot be proved by such declarations unsupported by any other evidence. *Mercer v. Mackin, ubi supra*.

But evidence offered for the purpose of probating a lost will that the decedent had pointed out a paper on a table and said that it was his will, and that witness saw the name and seal of decedent at the end of the will, and that at the left hand and bottom of the paper were two or three other signatures, is not sufficient to show that decedent had made a will. *Matter of Russell*, 33 Hun 271; S. C., 98 N. Y. 633. But it seems that the draughtsman of a will, which has been destroyed by another than the testator, may testify to the contents of the will as drawn by him, although he cannot testify of his own knowledge that it is the same will, if the other evidence raises a reasonable inference that it was the same will. *Ford v. Teagle*, 62 Ind. 61.

As a general rule, the Court of Chancery has jurisdiction to establish a lost, suppressed or destroyed will. *Dower v. Seeds*, 29 W. Va. 113; *Hunter v. Gardenhire, ubi supra*; *Waggoner v. Lyles*, 29 Ark. 47; *Buchanan v. Mattock*, 8 Humph. 390. In Georgia, a lost will can be proved only in solemn form, and upon such proof equity will not interfere by injunction, to enable the proponent to test the memory or

prove the perjury of the witness, *Mosely v. Carr*, 70 Ga. 333; and when proved in a chancery court, the court should direct a certified copy of the decree to be recorded with the clerk of the Probate Court. *Dower v. Seeds, ubi supra*.

In proceedings to prove a will the surrogate has jurisdiction to inquire whether there was a subsequent testamentary instrument which has been lost or destroyed, and which revoked the will offered for probate. *Matter of Simpson*, 56 How. Pr. 125. And in an action to revoke the probate of a will on the ground that there is a later will which has been lost or suppressed, there is no presumption that the lost will was inconsistent with the first, because destroyed by someone interested against it. *Caeman v. Van Harke*, 33 Kan. 333.

And in proving a lost will the evidence must be the clearest and most stringent. *Hunter v. Gardenhire, ubi supra*; *Estate of Deaves*, 140 Pa. St. 242; *Estate of Kidder*, 66 Cal. 487; *Hale v. Monroe*, 28 Md. 98; *Will of Johnson*, 40 Conn. 587; *Jackson v. Hasbrouck*, 12 John. 192; *Rhodes v. Vinson*, 9 Gill 169; *Durfee v. Durfee*, 8 Met. 490 n.; *Erne v. Pittman*, 3 Hawks. 364; *Dun v. Brown*, 4 Cowen 483; *Fetherby v. Waggoner*, 11 Wend. 599; *Davis v. Sigourney*, 8 Met. 487. But in such a proceeding, a charge that, "unless the evidence is clear and positive, not vague and uncertain recollections, and of such character as to leave no reasonable doubt as to any of the essential parts of the paper, the jury should find for the contestant," is erroneous. *Skeggs v. Horton*, 82 Ala. 352. But it is not error to charge the jury that, where there are no corroborating circumstances, the

proof being given that the instrument was duly made by the testator, and was not revoked by him (g).<sup>59</sup> Thus, where the testator had delivered his will to A. to keep for him, and four years afterward died, when the will was found gnawn to pieces by rats, and in part illegible; on proof

or of a will canceled or destroyed by fraud or become illegible.

presumption that the loss of the will is due to the act of the testator belongs to the lowest order of proof, and has no other effect than that of obligating the proponent to establish his case by some affirmative proof. *Bauskett v. Keitt*, 22 S. C. 187.

(g) The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence. Declarations written or oral made by a testator both *before* and *after* the execution of his will are, in the event of its loss, admissible as secondary evidence of its contents: *Sugden v. Lord St. Leonards*, 1 P. D. 154. *Gould v. Lakes*, 6 P. D. 1.

In the case of *Sugden v. Lord St. Leonards*, Mellish, L. J., dissented from the judgment of the other members of the court as to the admissibility in evidence of declarations made by the testator *after* the execution of the will, and this same doubt was afterward expressed in the House of Lords in the case of *Woodward v. Gouldstone*, 11 App. Cas. 469, in which the case of *Sugden v. Lord St. Leonards* was considered.

The contents of a lost will may be proved by the evidence of a single witness though interested, whose veracity and competency are unimpeached: *Sugden v. Lord St. Leonards*, *vid. sup.*

See also the late case of *Harris v. Knight*, 15 P. D. 170, where the existence and contents of a lost will and the handwriting of testator and attesting witnesses who had died some time after the testator were proved by parol evidence. The circumstances of this case were very peculiar, and *Cotton, L. J.*,

dissented from the judgment of the rest of the court.

59. But if the proponent annex an alleged literal copy of the lost will to his petition, he will not on that account be barred from proving the contents of such will by any competent evidence. *Jaques v. Horton*, 76 Ala. 238. But a paper shown to be a correct copy of the lost instrument, should be admitted to probate. *Will of Foster*, 13 Phila. 567. However, the production of a copy is not essential. *Smith v. Steele*, 1 Harr. & McH. 419; *Jackson v. Russell*, 4 Wend. 543; *Happy's Will*, 4 Bibb 553. Proof of the contents of a lost will should be very clear, especially where the witnesses are interested. *Estate of Deaves*, 140 Pa. St. 242.

Where application is made for probate of a lost will, the proponent will not be permitted to show a witness an alleged copy of the lost will, to refresh his memory as to the contents of the will to be established, when there is no evidence to show by whom such copy was made, or from whom it was procured, or that it is known or recognized by the witness. *Jaques v. Horton*, *ubi supra*.

In New York, the provisions of Code Civ. Pro., § 1865, requiring the provisions of a lost or destroyed will to be clearly and distinctly proved by at least two creditable witnesses—a correct copy or draft being deemed equivalent to one—cannot be satisfied by the testimony of one witness to the provisions of the will, and a copy or draft proven to be correct by the testimony of the same witness. *Collyer v. Collyer*, 17 Abb. N. C. 328.

of the substance of the will, by the joining of the pieces, and the memory of witnesses, probate was granted (*h*). So if a will, duly \*executed, is destroyed in the lifetime of the testator, without his knowledge, it may be pronounced for, upon satisfactory proof being given of its having been so destroyed, and also of its contents (*i*).<sup>60</sup> And where, after the death of the testator, his will and codicil were wrongfully torn by his eldest son, the court, having by means of some pieces which were saved, and by oral evidence, arrived at the substance of the instruments, pronounced for them (*k*). But when allegations of this sort are made, they must be supported by the clearest and

Parol evidence to  
prove contents of  
a will.

most stringent evidence (*l*). In accordance with these decisions, it was held by the Court of Queen's Bench, in *Brown v. Brown* (*m*), that parol evidence was sufficient to prove the contents of a will and thereby establish it, so as to revoke a will of earlier date. And Lord Campbell laid it down generally that parol evidence of the contents of a lost instrument may be

(*h*) Toller, 70. As a general rule, the court requires the draft or copy of a lost or destroyed will to be propounded before admitting it to probate; but see *In the Goods of Barber*, L. R., 1 P. & D. 267.

(*i*) *Trevelyan v. Trevelyan*, 1 Philim. 149; see also *Parker v. Hickmott*, 1 Hagg. 211, as to granting probate, in its original state, of a will altered without the testator's concurrence. See also *In the Goods of Cooke*, 3 Curt. 737.

60. But in order to prove such a will, the evidence of the whole contents of the will must be most clear and satisfactory, *Davis v. Sigourney*, 8 Met. 487; and also the fact that it was unrevoked at the time of the death of the testator should be proved with equal clearness, *Will of Johnson*, 40 Conn. 587; but in some cases it is permissible to probate so much of the will as can be reproduced, in case the entire contents cannot be proved. *Steele v. Price*, 5 B. Mon. 58; *Dickey v. Malechi*, 6 Mo. 177.

And where it is shown that a codicil has been fraudulently destroyed, it may be proved, notwithstanding that there is

an undestroyed will admitted to probate. *Clark v. Wright*, 3 Pick. 67.

And where it is shown that the will of a testator was in existence, unrevoked, at the time of his death, and afterward lost or destroyed, its contents may be proved by parol, and the will, as thus reproduced, admitted to probate. *Foster's Appeal*, 87 Pa. St. 67. It seems that, upon probate of a lost or destroyed will, declarations of decedent as to the existence of the will are admissible, but not his declarations of its destruction. *Collyer v. Collyer*, 17 Abb. N. C. 328. See also *Estate of Deaves*, 140 Pa. St. 242.

(*k*) *Foster v. Foster*, 1 Add. 462. *Knight v. Cook*, 1 Cas. temp. Lee, 413. *In the Goods of Leigh* [1892], P. 82. See also *Martin v. Laking*, 1 Hagg. 244, where the widow, after the testator's death, caused his will to be destroyed, and probate of the draft of such will was granted.

(*l*) *Huble v. Clark*, 1 Hagg. 115. *Wharram v. Wharram*, 3 Sw. & Tr. 301, 307. *Moore v. Whitehouse*, 3 Sw. & Tr. 567.

(*m*) 8 E. & B. 876.

received as much when it is a will as if it were any other.<sup>61</sup> And this case was acted on on several occasions by Sir C. Cresswell (*n*), and recently by the Court of Appeal in *Sugden v. Lord St. Leonards* (*o*). But in *Wharram v. Wharram* (*p*), Sir J. P. Wilde appeared to doubt the soundness of the doctrine in *Brown v. Brown*, by reason of the \*provision in the 10th section of the Wills Act that “no Will shall be valid,” “unless it be in writing,” &c. And the learned judge seemed to think that the current of authorities had somewhat hastily flowed on past the period of the Wills Act, without any notice of that enactment. But with the greatest deference it may be observed that it is somewhat difficult to see how that enactment affects the question ; and the learned judge himself, on a subsequent occasion, where a case of suppression, or if not of destruction, of the will was made out, granted administration with the will annexed to the residuary legatee (*q*). So where a codicil had been burned by the testator’s order, but not in his presence, as required by the statute, Sir J. Dodson decreed probate of a draft copy (*r*). And it should seem, that unless in cases of this kind secondary evidence of the will were allowed to be sufficient, much injustice and impunity for fraud would be permitted. If a will be wholly or partially canceled, or destroyed, by the testator whilst of unsound mind, probate will be granted of it as it existed in its integral state, that being ascertainable (*s*).<sup>62</sup>

Probate of will canceled by testator while non compos.

61. And it is said in *Jaques v. Horton*, 76 Ala. 238, “We can conceive no valid reason why there should be any difference in the *quantum* of proof necessary to establish the contents of a lost will and the contents of a lost deed or other written instrument. In either case the proof must be satisfactory, and probably more caution should be observed in the case of a lost will, as the testator cannot be heard in respect to the disposition he has made of his estate, and as a will is required to be attested by two witnesses.”

(*n*) In the Goods of Gardner, 1 Sw. & Tr. 109, where the will had been left, during the Mutiny, in India, and probate was granted of the will as contained in the affidavits. See also In the Goods of Brown, 1 Sw. & Tr. 32, where

the facts were the same as those in *Brown v. Brown*. *Wood v. Wood*, L. R., 1 P. & D. 309.

(*o*) 1 P. D. 154. See *ante*, \*318. See also *Woodward v. Gouldstone*, 11 App. Cas. 469.

(*p*) 3 Sw. & Tr. 301, which case now seems to be overruled. See *per* Jessel, M. R., in *Sugden v. Lord St. Leonards*, 1 P. D. 154, at p. 239.

(*q*) *Podmore v. Whatton*, 3 Sw. & Tr. 449.

(*r*) In the Goods of Dadds, Dea. & Sw. 290.

(*s*) *Scruby v. Fordham*, 1 Add. 74.

62. Before dismissing the subject of the probate of lost wills, it may be well to notice a few matters as to the practice of the courts in regard thereto. In an action in a district court to re-

Probate granted to one of several executors, inures to the benefit of all (t). Where there are several executors, upon the grant of probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the probate already granted inures to their benefit and because they have a right to the grant, whether the power be reserved or not. There is, however, what in the Spiritual Court was called a double probate; which is in this manner: The first executor that comes in takes probate in the usual form, with reservation to the rest: Afterward, if another comes in, he also is to be sworn in the usual manner, and an engrossment of the original will is to be annexed to such probate in the same manner as the first; and in the second grant such first grant

Double probate where there are several executors.

What is "double probate."

voke the probate of a will upon the ground that there is a later will, which has been lost or suppressed, it is incumbent upon the plaintiff to show that the later will was signed and attested according to law. *Caeman v. Van Harke*, 33 Kan. 333. Where an action is brought to establish a will destroyed by another than the testator, the objection that oral evidence of the contents of the will was received before preliminary proof of its loss or destruction had been made, is obviated by an agreement between the parties as to that fact. *Ford v. Teagle*, 62 Ind. 61. And in an action to revoke probate on account of a later lost or suppressed will, the plaintiff cannot testify, against objection, under C. L. 1879, c. 80, § 322, as to personal communications between the decedent and himself concerning the will. *Caeman v. Van Harke*, *ubi supra*.

In Arkansas, a probate court has no jurisdiction to establish a lost will; such jurisdiction is lodged absolutely with the Court of Chancery; and an order of the Probate Court allowing such a will is absolutely void and can be attacked collaterally. *Waggoner v. Lyles*, 29 Ark. 47.

In a suit in chancery to establish a

lost or destroyed will, the court will direct an issue of *devisavit vel non* on the demand of either party, in like manner as a circuit court, while acting as an appellate probate court. *Dower v. Seeds*, 28 W. Va. 113.

In Ohio, five days' notice, in writing, of the proof of a lost will must be given to parties interested, if they reside in the county where application is to be made, or thirty days by publication if they reside out of the county; and without such notice no such will can be probated. *Baugarth v. Miller*, 26 O. St. 541.

But the Statute of Limitations is not applicable to proceedings on behalf of one *non compos*, to establish a will that has been fraudulently suppressed. *Arrington v. McLemore*, 33 Ark. 759.

Where an original will has been lost and there is a variance between the record of it in the surrogate's office and the record in the office of the county clerk, where a certified copy of the will had been filed, the question as to which record is correct is to be determined by the attending circumstances. *Feters v. Volmer*, 58 Hun 1.

(t) *Webster v. Spencer*, 3 Barn. & Ald. 363, by Bayley, J.



\*is to be recited. And so on, if there are more that come in afterward (x).

If there be several executors appointed with distinct powers, as one for one part of the estate, and another for another, yet there being but one will to be proved, one proving of it suffices (y). So if B. is made executor for ten years, and afterward C. is to be executor, and B. proves the will, and the ten years expire, C. may administer without any further probate (z).

Probate where there are several executors with distinct powers :

or for distinct portions of time.

The court may grant a limited probate where the testator has limited the executor (a). And it is laid down (b) that if a man makes and appoints an executor for one particular thing only, as touching such a statute or bond and no more, and makes no other executor, he dies intestate as to the residue of his estate, and as to this specialty only shall have an executor, and must have a will proved : but in case he makes another will for the residue of his estate, there must be two wills proved. However, where there is an executor appointed without any limitation, the court can only pronounce for the will, or for an absolute intestacy : It cannot pronounce the deceased to be dead intestate as to the residue, though the executor may eventually be considered only as a trustee for the next of kin (c).

Limited probate.

Where an executrix was appointed in a codicil, which gave her a legacy, and nominated her, together with an executor named in a previous will, executors of the will and codicil, declaring it to be a part of the will, and giving them the residue in moieties, it was held that she had a right to propound both the will and codicil, if she thought proper, though the other executor prayed probate of the \*will alone, and opposed the codicil ; for if the codicil was good, it was part of the will, and gave her an immediate interest in the will ; and if she propounded and proved the codicil alone, the next of kin might afterward oppose the will, and force her into a second suit, which would be unreasonable (d).<sup>63</sup>

An executor named in a codicil may propound both the will and codicil.

(x) 4 Burn, E. L. 310, Phillimore's edition. In the Goods of Bell, L. R., 2 P. & D. 247.

(y) Wentw. Off. Ex. 31, 14th edit. Bac. Abr. Exors. (C.) 4.

(z) Anon. 1 Freem. 313. Anon. 1 Chan. Cas. 265. See Watkins v. Brent, 1 Mylne & Cr. 104.

(a) 1 Cas. temp. Lee, 280. Davies v.

Queen's Proctor, 2 Robert. 413. In the Goods of Beer, *ibid.* 349.

(b) Wentw. Off. Ex. 30, 14th edit.

(c) Sutton v. Smith, 1 Cas. temp. Lee, 275 : See Spratt v. Harris, 4 Hagg. 408, 409.

(d) Miller v. Sheppard, 2 Cas. temp. Lee, 506.

63. The probate of a codicil, more

[\*321]

[\*322]

Probate of a will cannot be granted to the executor while a contest subsists about the validity of a codicil; for that being undetermined, it does not appear what is the will, and the executor cannot take the common oath (e).

Probate of a will cannot be had during a *lis pendens* as to a codicil:

In a case (f), however, where a question arose as to the validity of a codicil revoking the appointment of a co-executor, and the estate required an immediate representation, probate of the undisputed instruments was granted to the other executors, with consent of the co-executor, reserving all questions (g).

unless by consent.

If a will has been proved abroad, probate of the codicils, if any, must be granted by the court which granted probate of the will (h).

Probate of codicil where will has been proved abroad.

It has already appeared, that where there is a sole executor, or sole surviving executor, the office is transmissible, and his executor becomes the representative of the original testator (i): and in such a case, no new probate of the original will is requisite (k).

Executor of executor.

Where a married woman, before the Married Women's Property Act, 1882, made a will by virtue of a power, or of \*property enjoyed by her separately, such will, as there has been already occasion to show, might be admitted to probate, without the consent of her husband (l). Where the will sought to be established was made by her under a power, it was held that the instrument creating the power must be pleaded in the allegation of the executor, and exhibited (m). The probate, however, of the will of a feme covert before the act was not general, but limited to the property over which she had

Probate of the will of feme covert before Married Women's Property Act, 1882.

Limited form of probate.

than twenty years after that of the will, will be set aside, because it impeaches the validity of the will, which cannot be contested, under § 2000 of the Code of Alabama, after the expiration of five years. *Watson v. Turner*, 89 Ala. 220.

(e) *Neagle v. Castlehaven*, 2 Cas. temp. Lee, 246.

(f) *Fowles v. Davidson*, 4 Notes of Cas. 149.

(g) Where, however, there is no *lis pendens*, but the court is informed of the existence of codicils abroad, which cannot be produced, the court will, under special circumstances, grant probate of papers forming part only of the will,

the executor undertaking to prove the other papers or authentic copies thereof, when they arrive: In the Goods of Roberts, L. R., 3 P. & D. 110.

(h) In the Goods of Miller, 8 P. D. 167.

(i) *Ante*, p. \*204.

(k) *Wankford v. Wankford*, 1 Salk. 309.

(l) See *ante*, p. \*50.

(m) *Temple v. Walker*, 3 Phillim. 394. In the Goods of Monday, 1 Curt. 590. And by Rule 15 (1862), P. R. (non-contentious) now repealed, it must have been specified in the grant of the probate, &c. See *ante*, p. \*53.

a disposing power (*n*). And her husband was entitled to have a grant of administration *cæterorum* (*o*).

When the will of a married woman, made before the commencement of the act is tendered for probate on the ground that she had separate property, and the probate is contested, if the court is satisfied that there is separate property it has power to grant probate of all such property as the testatrix had power to dispose of without deciding what the property is, although, in general, it is the duty of the court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists (*p*).

Since the commencement of the Married Women's Property Act, 1882, the limitation in the probate of the will of a married woman, to which reference has been made above, is no longer required, and the court will make a general grant (*q*).

Probate of will of *feme covert* since the Married Women's Property Act, 1882:

\*The effect of the general probate is only to enable the executor to get in all the assets of the wife whether she has power to dispose of them or not, and it does not effect the beneficial title to them (*r*).

no longer limited but general grant.

In general cases, if the will be limited to any specific effects of the testator, the probate shall also be so limited, and an *administratio cæterorum* granted (*s*).

*Administratio cæterorum.*

(*n*) Tappenden *v.* Walsh, 1 Phillim. 352. Tucker *v.* Inman, 4 M. & G. 1049. Ledgard *v.* Garland, 1 Curt. 286. See In the Goods of Boswell, 3 Curt. 744. In the Goods of Martin, 3 Sw. & Tr. 1. In the Goods of De Pradel, L. R., 1 P. & D. 454. In the Goods of Richards, L. R., 1 P. & D. 156. In the Goods of Cubbon, 11 P. D. 169.

(*o*) Brenchley *v.* Lynn, 2 Robert. 441, 471. See 4 M. & G. 398, *per* Tindal, C. J.

(*p*) In the Goods of Tharp, 3 P. D. 76.

(*q*) In the Goods of Price, 12 P. D. 137. See also In the Goods of Homfray, *ib.* 138 n. Re Lambert, 39 C. D. 626. These cases were decided upon the New Rules of April, 1887. Rules 15 and 18, of which the following is the substance, as set out in In the Goods of Price, *ubi sup.*: "In a grant of probate of the Will of a married woman, or the Will of a widow made during

coverture, or letters of administration with such Will annexed, it shall not be necessary to recite in the grant, or in the oath to lead the same, the separate personal estate of the executrix, or the power or authority under which the Will has been, or purports to have been, made. The probate, or letters of administration with Will annexed, in such cases shall take the form of ordinary grants of probate or letters of administration with Will annexed, without any exception or limitation, and issue to an executor, or other person authorized in usual course of representation to take the same: a surviving husband, however, being entitled to the same in preference to the next of kin in case of a partial intestacy."

(*r*) Smart *v.* Tranter, 43 C. D. 587.

(*s*) Wentw. Off. Ex. 30, 14th edit. Toller, 67.

When the will is proved, the original is deposited in the registry (t), and a copy thereof in parchment is made out under the seal of the court, and delivered to the executor, together with a certificate of its having been proved; and such copy and certificate are usually styled the probate.

There has already been occasion to explain the nature of a probate in *fac-simile*, and the occasions on which such a probate is granted (u). The operation of it will be further \*considered hereafter, together with the subject of the effect of probate, and letters of administration generally (x).

If a will be in a foreign language, the probate is granted of a translation of the same by a notary public (y). But it should seem that the temporal courts are not bound by it, and may themselves correct any inaccuracy in it (z).<sup>64</sup>

Where the probate is lost, the Spiritual Court never granted a second, but merely an exemplification of the probate from their own records, and such exemplification was evidence of the will having been proved (a).<sup>65</sup>

The probate may be revoked either on suit by citation (*e. g.* where

(t) See stat. 20 & 21 Vict. c. 77, s. 66, by which provision is made for a place for the deposit of original wills when proved. *Ante*, p. \*262. On one occasion, an ordinary codicil, of which probate had been granted, containing an assignment of 10,000*l.* part of 15,000*l.* secured by a heritable bond in Scotland, was delivered out of the registry of the Prerogative Court, in order to its being registered in Scotland, and there finally deposited; this being necessary to carry the same into effect, and the codicil itself (termed in Scotland a deed of disposition or assignation) not relating to any property of the testator in this country: In the Goods of Nicholson, 2 Add. 333. See also In the Goods of Russell, 1 Hagg. 91. Re Napoleon Bonaparte, 2 Robert. 290.

(u) *Ante*, p. \*273.

(x) *Post*, Pt. I. Bk. VI. Ch. I.

(y) Toller, 72.

[\*325]

(z) *L'Fit v. L'Batt*, 1 P. Wms. 526. *Post*, Pt. I. Bk. VI. Ch. I.

64. In such case it is not error to admit the translation without proof that it is correct; because the court, having the instrument before it, is at liberty to translate it, or to have a correct translation made. *Caulfield v. Sullivan*, 21 Hun 227; S. C., 85 N. Y. 153.

(a) *Shepherd v. Shorthose*, 1 Stra. 412.

65. The presumption of probate of an ancient will, will not prevail until it is shown that the records are destroyed. *Lagow v. Glover*, 77 Tex. 448.

And where a suit was brought for the construction of a will, and the original will and will book having been destroyed, and a copy of it previously made from said will book, and exhibited in a former suit, having been withdrawn and recorded under Code 1873, c. 172, a copy from that copy, so recorded, must be taken *prima facie* as a

the executor, after proof in common form, is cited to prove the will in solemn form, or even after proof in solemn form, where the probate is shown to have been obtained by fraud, or the will of which it has been granted is proved to have been revoked, or a later will made) (b), or on appeal to a higher tribunal. But it will be more convenient to consider the mode of such revocation, and its consequences, at a future stage, conjointly with the revocation of grants of administration (c).

Revocation of probate on citation or appeal.

## SECTION VIII.

*Of mandamus to compel probate.*

As matters testamentary in which, before the passing of the Judicature Act, the Court of Probate had exclusive jurisdiction, are by that act assigned to the Probate Division of the High Court, it seems clear that the power to compel probate by mandamus no longer exists.

No longer power to compel probate by mandamus.

The Queen's Bench Division in which, as the successors of the old Court of Queen's Bench, the right to issue a *mandamus* is vested, is powerless to control by mandamus the proceedings of any but an inferior court; and thus it has no power to superintend or control the judges of another division of the same court, should they exceed their authority or decline to exercise the jurisdiction which they possess.<sup>66</sup>

In the former editions of this work, Pt. I. Bk. IV. Ch. II. § 8, will be found a reference to the power of the temporal courts, formerly existing over the ecclesiastical courts exercised by mandamus or prohibition.

true copy of the will. *Effinger v. Hall*, 81 Va. 94. So evidence that a will had been copied in a book, kept by the clerk of the proper court, according to the requirements of law, is competent evidence as to its existence and probate, when the records of the court in which the original will would have been probated have been destroyed. *Nelson v. Whitfield*, 82 N. C. 46.

And although the rule is that secondary evidence is admissible in the proceeding to establish the lost record of a will, it was held that although a witness who heard the will read may testify to

its contents after it has been lost where such evidence is the best the case admits of, though where such a witness is eighty-five years old, and states that she heard the will read sixty-eight years before, her evidence alone is insufficient to establish the will. *Apperson v. Dowdy*, 82 Va. 776.

(b) *Wentw. Off. Ex.* 111, 112, 14th edit.

(c) *Post*, Pt. I. Bk. VI. Ch. II.

66. In Illinois, the discretion of the Probate Court will not be interfered with by mandamus. *People v. Knickerbocker*, 114 Ill. 539.

## SECTION IX.

*Of what instruments probate is necessary, and what instruments ought not to be proved.*

If an instrument be testamentary (*d*), and is to operate on personal estate, whatever may be its form, probate of it must be obtained in the Court of Probate; otherwise its existence cannot be recognized in any court of law or equity.

Probate must be obtained of every testamentary instrument operating on personal estate, but not necessarily of one which does not operate on personal estate.

No probate of paper neither disposing of property nor appointing executor.

A codicil, however, merely revoking or confirming former wills, should be proved.

A paper which neither disposes of property nor appoints an executor generally speaking has no testamentary character so as to enable the court to grant probate of it (*e*).

But a codicil, not containing any disposition of property, but simply revoking all former wills, is of a testamentary nature, and, if proved, ought to be admitted to probate (*f*). So if the executor, after probate, discovers any testamentary paper, he ought to bring it into the Court of Probate, even though it be a mere confirmation of the will already proved (*g*).<sup>67</sup>

A will of lands only ought not to be proved in the Probate Court:

*secus*, of a mixed will of lands and goods:

Where, however, a will *clearly* respects land only, and no personal property, it ought not to be proved in the Court of Probate (*h*).<sup>68</sup>

\*But if a will is a mixed will concerning both lands and goods, it must be proved entirely in the Court of Probate (*k*).

(*d*) As to what is a testamentary instrument, see *post*, Pt. III. Bk. V. Ch. II. and *ante*, pp. \*93, \*94, *et seq*.

(*e*) Van Straubenzee v. Monck, 3 Sw. & Tr. 6.

(*f*) Brenchley v. Still, 2 Robert. 162.

(*g*) Weddall v. Nixon, 17 Beav. 160.

67. Newton v. Seaman's Friend Society, 130 Mass. 91.

(*h*) Habergham v. Vincent, 2 Ves. 230. by Buller, J. In the Goods of Drummond, 2 Sw. & Tr. 8. In the Goods of Bootle, L. R., 3 P. & D. 177. A will, however, disposing of freehold property which, by the doctrine of equitable conversion, is to be considered as person-

alty, is entitled to probate: In the Goods of Gunn, 9 P. D. 242. See In the Goods of Barden, L. R., 1 P. & D. 325.

68. But the probate is only presumptive evidence of the validity of the will as to land. Dater v. Wilson, 36 Hun 546; Holman v. Perry, 4 Met. 492; Parker v. Parker, 11 Cush. 530. But the will is no evidence of title thereunder until it has been probated. Wilamette v. Gordon, 6 Oreg. 175; Jones v. Dorr, Id. 188; Rogers v. Rogers, 78 Ga. 688; New v. Nichols, 73 Id. 143; Turner v. McDonald, 76 Cal. 177; Pettit v. Black, 13 Neb. 142.

(*k*) Partridge's Case, 2 Salk. 553.

So the nomination of executors in a testamentary paper, purporting to dispose of real property only, entitles the document to probate (*l*). And this notwithstanding the renunciation of the executor (*m*). This rule, however, does not hold good in the case of the will of a married woman made under a power of appointment, and disposing of real property only: 69 for the will, although it is in the form of a will as required by the instrument giving the power, is, in fact, a conveyance by means of the appointment exercised, and, although an executor is appointed, the executor takes nothing in his character of personal representative. If, however, a married woman making a will disposing of realty only, and appointing executors (*n*), has not only a power of appointment given her by the deed, but also a vested interest to her separate use in the real property apart from that power, and she really exercises, not only what rights she had under the power, but the rights which she has beyond it, she is in the position of a *feme sole* with regard to the real estate, and the will is entitled to probate (*o*).

or where executors are appointed in a will of lands only.

Probate of will of married woman made under power disposing only of real property:

exception to above rule:

In the case of such a mixed will, if there be occasion to prove the devise of the land, in an action concerning it, it was formerly necessary to give the will itself in evidence; but now if notice is given of the intention to put the probate in evidence, the probate is sufficient evidence of the will and its validity, unless the party, to whom such notice has been given, shall himself give notice that he intends to dispute the validity of the will (*p*).

When an original will is required to be produced in court, the attendance with it of the proper officer, in whose custody it is deposited, may be procured in the same

production of original will: how procured;

(*l*) *O'Dwyer v. Geare*, 1 Sw. & Tr. 465. In the Goods of Barden, L. R., 1 P. & D. 325. In the Goods of Leese, 2 Sw. & Tr. 442. *Brownrigg v. Pike*, 7 P. D. 61. In the Goods of Cubbon, 11 P. D. 169. In the Goods of Hornbuckle, 15 P. D. 149, 151. See also *Beard v. Beard*, 3 Atk. 72, *ante*, p. \*164. See further In the Goods of Lancaster, 1 Sw. & Tr. 464.

(*m*) In the Goods of Jordan, L. R., 1 P. & D. 555.

69. However, in Massachusetts, when such a power is exercised by a married woman by a testamentary paper, such paper should be approved and declared assuch by a court of probate. *Heath v. Withington*, 6 Cush. 497, 500.

(*n*) In the Goods of Tomlinson, 6 P. D. 209.

(*o*) In the Goods of Hornbuckle, 15 P. D. 149.

(*p*) Stat. 20 & 21 Vict. c. 77, sect. 64. See *ante*, p. \*263; *post*, p. \*481.

manner as in other cases where the production of an original record, or instrument in the nature of a record, is required.

If it should be *doubtful* whether some part of the property be freehold, the Ecclesiastical Court always held, that it ought to grant probate ; for the obvious reason that the probate may be necessary to the purposes of justice, and no evil can arise from the grant of it (*r*).

where it is doubtful whether all the property is freehold, probate ought to be granted.

When probate necessary of a will made in execution of a power.

Where a will is made in execution of a power, if it relates to personalty it must be proved in the Court of Probate (*s*).

There has already been occasion to show that this has been determined, in regard to an appointment by the will of a married woman, which it is now settled, the courts of equity will not read, until it has been duly proved as a proper will in the Court of Probate (*t*). But though a court of equity cannot give effect to testamentary papers without probate, it may, perhaps, when necessary, order an inquiry for the very purpose of sending such papers to be proved (*u*).

\*However, a will, simply in execution of a power affecting realty, and not even appointing an executor, will be dealt with in chancery without the interference of a court of probate (*x*).

In *Pelham v. Newton* (*y*), a testatrix directed her executor to deliver certain parcels sealed up, and directed to certain persons, which were in a small iron chest, to the persons to whom they were directed, unopened, and desired those persons would not tell one another what was contained in their respective papers : Sir G. Lee was of opinion that the executors could not safely deliver them unopened ; for if they should be called to an inventory, they could not give in one on oath, without knowing what was contained in those parcels ; and if they assented to them as legacies, and there should not be assets sufficient to pay the

Probate of sealed packets directed by the will to be delivered unopened to legatees.

(*r*) By Sir John Nicholl, in *Thorold v. Thorold*, 1 Phillim. 8, 9 : See also the case of *Durkin v. Johnstone*, Prerog. 1796, decided by Sir W. Wynne, and reported in a note to 1 Phillim. 8.

(*s*) See Sugd. on Pow. 21, 6th edition. *Tattnall v. Hankey*, 2 Moo. P. C. 342, 351, 352, 353. *Goldsworthy v. Crossley*, 4 Hare, 140.

(*t*) If, however, the will of a married woman, made under a power of ap-

pointment, disposes of real property only, it is not entitled to probate, even though it contains an appointment of executors : In the Goods of Tomlinson, 6 P. D. 209. But see In the Goods of Hornbuckle, 15 P. D. 149, for a qualification of this rule. See *ante*, p. \*327.

(*u*) See *Brenchley v. Lynn*, 2 Robert. 458, *et seq.*, by Dr. Lushington.

(*x*) *Per* Bayley, B., 4 Hagg. 64.

(*y*) 2 Cas. temp. Lee, 46.



debts, they would be guilty of a *devastavit*: The learned judge therefore decreed those parcels to be opened in the presence of the registrar, to see what was contained in them: they were accordingly opened in court, and they contained banknotes, some of 20*l.*, and some of 30*l.* each, of which a schedule was made, of the names of the persons, and of the sum contained under each person's name, to be added as a codicil to the will: and probate was decreed of the will, and all the afore-said papers, to the executors.<sup>70</sup>

In *Inchiquin v. French* (z), Lord Thomond by his will gave 20,000*l.* to Sir William Wyndham; and by a deed poll of the same date, which referred to his will, he declared that the legacy was given to him upon trust for Lord Clare: Sir William Wyndham died in the testator's lifetime, and the \*deed poll was not proved: The question was, whether, though the legatee named in the will had died before the testator, the person, who was the *cestui que trust* of the legacy, and was substantially the legatee, was entitled to the 20,000*l.* under the deed poll, which had not been proved as a testamentary paper: Lord Hardwicke held, that the deed poll, though never proved, sufficiently declared the trusts of the legacy of 20,000*l.*, and decreed accordingly.

Instruments of which probate is not necessary:

Declaration of trust;

In *Smith v. Attersoll* (a), a testator bequeathed a legacy to A. and

70. Where a codicil directed the payment of legacies in accordance with directions written in a book by A., which directions were signed by the testator, such book must be admitted to probate. *Newton v. Seaman's Friend Society*, 130 Mass. 91.

(z) 1 Cox, 1. This case is also reported in *Ambler*, p. 33, and it would seem from the judgment of Hall, V.-C., in *Re Fleetwood* (15 Ch. D. p. 603), that the report in 1 Cox, upon which Lord Giffard relied in his judgment in *Smith v. Attersoll*, is incorrect in that the question of whether there was a trust was not really decided; but as Hall, V.-C., points out, *Smith v. Attersoll* has been referred to in subsequent cases.

(a) 1 Russ. Chanc. Cas. 266. As to the cases in which a court of equity will give effect to a trust not disclosed,

or not fully disclosed, in the testamentary instrument, and as to what evidence is admissible, see *Moss v. Cooper*, 1 J. & H. 352, 367; *Irvine v. Sullivan*, L. R., 8 Eq. 673. The whole of the cases are reviewed by Hall, V.-C., in *Re Fleetwood*, 15 C. D. 603.

The ground upon which effect is given to non-testamentary documents is not as acts of the testator, but rather as trusts binding on the conscience of the legatee.

If the trust is expressed on the face of the will, but the trusts are not fully declared, no trust afterward declared by a paper not executed as a will could be binding. *Johnson v. Ball*, 5 De G. & Sm. 85; *Briggs v. Penny*, 3 Mac. & G. 546; *Singleton v. Tomlinson*, 3 App. Cas. 404. But the legatee will not, in such a case, take a beneficial interest,

B., in trust for certain purposes, which the will stated to have been fully explained to them ; on the same day a paper writing was signed by A. and B. in which they declared that the bequest was upon trust for six persons, whose names were stated ; and after their signature, some lines were added in the handwriting of the testator, by which a seventh person (an unborn child) was admitted to a share of the legacy : Upon a bill, filed by one of the six persons named in the body of the paper writing, Lord Gifford, M. R., recognized the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper.

From the decisions which have taken place, it is quite \*clear that it is not necessary that a will simply appointing testamentary guardians should be proved in the Court of Probate (*b*).

Nor is it necessary to prove a will in the Court of Probate, to entitle a legatee to recover a legacy out of real estate (*c*).

As a court of equity considers money directed to be laid out in land, as land, the Court of Probate has no jurisdiction over a devise disposing of property so converted (*d*).

And where freehold property is by the doctrine of equitable conversion to be considered as personalty, a will, disposing of it, is entitled to probate (*e*) : but the proceeds of real property sold under the Settled Estates Acts, and not yet converted into realty, have not become personal property in respect of which the Court of Probate has jurisdiction (*f*).

but will be treated as trustee for the next of kin. In *Re Boyes*, 26 Ch. Div. 535.

On the same principle the court will enforce the trust where no trust appears on the face of the will, provided the court is satisfied that there has been a communication by the testator and acceptance by the legatee. *Re Boyes*, 26 Ch. D. 531. And it would appear that a trust by communication with the legatee may be created by a communication subsequent to the will. *Moss v. Cooper*, 1 J. & H. 352, 367 ; but the trust must be communicated in the lifetime of the testator. *Re Boyes*, 26 Ch. Div. 531.

It was at one time supposed that parol evidence was not admissible to prove the trusts in cases where the trust is re-

ferred to in the will, and that such evidence was excluded by the effect of the Wills Act, but it would appear from *In re Fleetwood*, *ubi sup.*, that this distinction between the case of a trust mentioned on the face of the will and a trust, the existence of which is undisclosed, cannot be supported.

(*b*) *Gilliat v. Gilliat*, 3 Phillim. 222. *Lady Chester's Case*, 1 Ventr. 207. *In the Goods of Morton*, 3 Sw. & Tr. 422.

(*c*) *Tucker v. Phipps*, 3 Atk. 361.

(*d*) By Lord Hardwicke, in *Pullen v. Ready*, 2 Atk. 590.

(*e*) In the *Goods of Gunn*, 9 P. D. 242. See In the *Goods of Barden*, L. R. 1 P. & D. 325.

(*f*) In the *Goods of Lloyd*, 9 P. D. 65.

## \*CHAPTER THE THIRD.

### OF THE MAKING AND PROBATE OF THE WILLS OF SEAMEN AND MARINES.

It has already been stated, that the Statute of Frauds contains an exception as to wills made by "any soldier being in actual military service, or any mariner or seaman being at sea" (*a*). This exception is continued by the 1 Vict. Wills of seamen and marines. 1 Vict. c. 26, s. 11; c. 26, by the 11th sect. of which it is provided and enacted, "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act" (*b*).

With regard to the wills of seamen and marines and the disposal of their effects, various statutes have been passed from 28 & 29 Vict. c. 72. time to time. Those which are now in force are 28 & 28 & 29 Vict. c. 111. 29 Vict. c. 72, 28 & 29 Vict. c. 111, and an Order in Council of Dec. 28th, 1865.

By stat. 28 & 29 Vict. c. 72, s. 2, the term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in Stat. 28 & 29 Vict. c. 72, s. 2. any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval Interpretation clause. or marine force, exclusive of commissioned, warrant and subordinate officers, and assistant engineers, and of kroomen (*d*).

3. "A Will made after the commencement of this Act by any person at any time previously to his entering into \*service as a seaman or marine shall not be valid to pass any Sect. 3. Will made before entry ineffectual as to wages, &c. wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty."

4. "A Will made after the commencement of this Act by any per-

(*a*) See *ante*, pp. \*103, \*104.

(*b*) See *ante*, pp. \*63, \*104, \*105.

(*d*) This definition is not so wide as the meaning which has been put upon

the term "mariner or seaman" within sect. 11 of the Wills Act. See *ante*, p. \*105.

son while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment or instrument with a power of attorney." (e)

Sect. 4.  
Will invalid if  
combined with  
power of attorney.

5. "A Will made after the commencement of this Act by any person while serving as a seaman or marine, or when he has ceased so to serve, shall not be valid to pass any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:—

Sect. 5.  
Regulations for  
wills of seamen,  
&c., as to wages,  
&c.

(1.) Every such Will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea ;

(2.) Where the Will is made on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain or warrant or subordinate officer belonging to her Majesty's naval or marine or military force ;

(3.) Where the Will is made elsewhere than on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain, or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate or minister of a church or place of \*worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public.

A Will made in conformity with the foregoing provisions shall, as regards such wages, money or effects, be deemed to be well made for the purpose of being admitted to probate in England ; and the person taking out representation to the testator under such Will shall exclusively be deemed the testator's representative with respect to such wages, money or effects."

6. "Notwithstanding anything in this or any other Act, a Will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:—

Sect. 6.  
As to wills made  
by prisoners of  
war.

(1.) If it is in writing and is signed by him, and his signature thereto

(e) See *ante*, p. \*44.

is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's navy, or the agent of a naval hospital, or a notary public ;

(2.) If the Will is made according to the forms required by the law of the place where it is made ;

(3.) If the Will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea."

7. "Notwithstanding anything in this Act, in case of a Will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or a seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty or any effects or money in charge of the Admiralty, to any person claiming to be \*entitled thereto under such will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with."

Sect. 7.  
Payment under  
will not in con-  
formity with act.

By the Order in Council of December 28th, 1865, it is provided :  
Sect. 3, that in the office of the inspector of seamen's wills there shall be a repository for the wills of seamen and marines. Sect. 4, that such wills intended to pass naval assets (defined by Sect. 2 to be all property affected by 28 & 29 Vict. c. 111) may, as soon as practicable after execution, be sent to the secretary of the admiralty to be examined by the inspector. Sect. 5, that the will is to be registered by the inspector, together with certain particulars therein mentioned. Sect. 6 provides for the return to the intending testator of a will, which appears to the inspector to be invalid on account of any informality or of non-accordance in any respect with 28 & 29 Vict. c. 72, or otherwise, and for the statement in writing of his objection and the mode of removing it. Sect. 7 provides for the stamping of a will which appears valid, for its being placed under seal in the repository provided, and for the issue of a receipt for it to the testator. Sect. 8 provides that : " With reference to every such Will the inspector shall also proceed as follows :—(1) He shall,

Order in Coun-  
cil, December 28,  
1865.

S. 3:

S. 4:

S. 5:

S. 6:

S. 7:

S. 8:

with all convenient speed, issue to the person appointed executor, if any, a check of the will, not giving any information respecting the testator's disposition of his property, but containing directions as to the steps to be taken on the testator's death. (2) If there is not any person appointed executor, then, with the assent of the testator, either implied by the mode of transmission of the Will to the admiralty office or expressed, but not otherwise, he shall with all convenient speed issue to the residuary or the universal legatee, or other person most beneficially interested under the Will, a check in lieu of the Will, containing directions as to the steps to be taken on the testator's death. (3) If in any such last mentioned case, by reason of the absence of such assent, a check is not issued \*in the testator's lifetime then he shall, with all convenient speed, after the testator's death issue to the residuary or the universal legatee, or other person most beneficially interested under the Will, a check in lieu of the Will, containing directions as to the steps to be taken in consequence of the testator's death."

Sect. 9 provides for the case of a will not deposited by the testator in his lifetime that it shall be sent as aforesaid by the  
 s. 9: executor or other person having possession of it. Sect.  
 s. 10: 10 contains the same provisions for wills deposited after  
 s. 11: the testator's death as Sect. 5. Sect. 11 provides in  
 cases where the will appears invalid, as in Sect. 6, that the inspector shall as soon as may be give notice in writing to the executor, or if none to the residuary or universal legatee, or other person most beneficially interested under the alleged will, informing him that it is  
 s. 12: stopped and stating the reason. Sect. 12 provides that  
 where the will appears valid the inspector shall have it stamped and issue to the executor, or if none to the residuary or universal legatee, or other person most beneficially interested under the will, a check in lieu of the will containing directions as to the steps  
 s. 13: to be taken in consequence of the testator's death. Sect.  
 13. "Where a seaman or marine dies leaving a Will, and a check has been issued in pursuance of the foregoing provisions, the following steps shall be taken (in cases where this course of proceeding is applicable) by and with respect to the holder of the check:—  
 (1) The officiating minister of the parish or district parish wherein the holder of the check resides shall on his request examine him and two inhabitant householders of the parish produced by him for the purpose. (2) In the presence of the minister, the holder of the check shall sign the application, and the householders shall sign the certifi-

cate, subjoined to the check (all blanks being first filled up according to truth, and the minister having first read over to the holder of the check and householders the caution printed on the check), for which purpose the holder of the check and householders shall attend at such time and place as the \*minister appoints. (3) The minister being, on examination of the holder of the check and householders, satisfied of the truth of their statements, and of the holder of the check being the executor, or other person therein described as qualified to act, and of the persons certifying being inhabitant householders of the parish, and having seen the parties sign the application and certificate respectively, shall add a description of the height, complexion, color of eyes and hair and age of the holder of the check and of any observable peculiarities of person about him, and shall certify to the several particulars by subscribing his signature thereto. (4) The holder of the check shall, before signing the application, pay to the minister a fee of 2s. 6d. for his trouble in the matter. (5) The application and certificates being completed, the minister shall return them with the check addressed as directed."

Sect. 14. "If the inspector, on the return of the check, application, and certificates, is satisfied of the right of the claimant he shall proceed as follows:—(1) In case representa- s. 14:  
tion is required or intended to be taken out, he shall indorse on the original Will a certificate (in such form and to such effect as he thinks fit) to enable the claimant to take out representation, and shall deliver the Will to the claimant; and probate, obtained in accordance with the certificate, being produced to the inspector and registered and being indorsed by him as available for receipt of naval assets, shall be so available. (2) In case representation is not required or intended to be taken out, the inspector shall issue to the claimant a certificate, which shall be available for receipt of naval assets, without probate."

Sect. 15. "If the inspector, on the return of the check, application and certificates, is not satisfied of the right or fitness of s. 15.  
the claimant, he may (by indorsement on the original Will) certify to that effect, and that he declines to interfere; or if he thinks fit, he may (by indorsement on the original Will) certify his objections for the information of the court out of which representation would be taken, and if the court \*thinks fit to grant probate to the claimant, the same, being produced to the inspector and registered, shall be indorsed by him as available for receipt of naval assets and shall be so available accordingly."

Sect. 16 provides that the minister shall advise the admiralty by letter of his reasons if he is not satisfied that the holder of the check is the person qualified to act according to it. Sect. 17 provides that, where probate has been obtained without the inspector's certificate, and naval assets form part of the effects, the inspector may, if satisfied that representation has been obtained by the proper person, admit the probate as authority for the receipt of naval assets by indorsement thereon, and that it shall be available accordingly.

For further information as to the disposal of money and effects under the control of the admiralty belonging to deceased officers, seamen and marines of the Royal Navy, and marines and other persons, see stat. 28 & 29 Vict. c. 111, the Order in Council just referred to and Tristram & Coote's Probate Practice, Pt. I. Ch. IV. With regard to the wills of merchant seamen, the Merchant Shipping Act (17 & 18 Vict. c. 104) provides, by sections 200 and 201, for the mode of payment by the Board of Trade of the money and effects of deceased seamen and apprentices.



## \*BOOK THE FIFTH.

### OF THE ORIGIN OF ADMINISTRATION: AND OF THE APPOINTMENT OF ADMINISTRATORS.

#### CHAPTER THE FIRST.

IN WHAT COURT ADMINISTRATION MUST BE TAKEN OUT: AND THERE-  
WITH OF WHAT MAY BE DONE BY THE ADMINISTRATOR BEFORE  
LETTERS OF ADMINISTRATION ARE GRANTED.

In case a party makes no testamentary disposition of his personal property, he is said to die intestate (*a*): the consequences of which it is now proposed to consider.

#### SECTION I.

*In what court the letters of administration shall be obtained.*†

In ancient time, when a man died without making any disposition of such of his goods as were testable, it is said that the king, who is *parens patriæ*, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate, to the intent that they should be preserved and disposed for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood (*b*). This prerogative the king continued to exercise for some time by his own ministers of justice, and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who had, until \*the passing of the Court of Probate Act, a prescriptive right to grant administration to their intestate tenants and suitors in their own courts baron and other courts (*c*). Afterward the crown, in favor of the Church, invested the prelates with this branch of the prerogative: for it was said, none could be found more fit to have

Ancient prerogative of the crown:

transferred to the prelates:

(*a*) 2 Black. Comm. 494.

(*b*) Hensloe's Case, 9 Co. 38, *b*.

† See American note at end of this Section.

(*c*) 2 Black. Comm. 494; see *ante*, p. \*236.

such care and charge of the transitory goods of the deceased, than the Ordinary, who all his life had the cure and charge of his soul. The goods of the intestate being thus vested in the Ordinary, as trustee (*d*) to dispose of them *in pios usus*, it has been said that the clergy took to themselves (under the name of the Church and poor,) the whole residue of the deceased's estate, after the *partes rationabiles* of the wife and children had been deducted, without paying even his lawful debts and charges thereon : until by stat. Westm. 2,

(13 Edw. I. c. 19), it was enacted that the Ordinary should be bound to pay the debts of the intestate as far as his goods extended, in the same manner that execu-

tors were bound in case the deceased had left a will (*e*). However, in Snelling's Case, it was resolved that, if the Ordinary took the goods into possession, he was chargeable with the debts of the intestate at common law, and that the stat. West. 2 was made in affirmance of the common law (*f*). But though the Ordinary was (either at common law, or by force of this statute,) liable to the creditors for their just and lawful \*demands, yet the *residuum*, after payment of debts, remained still in his hands, to be applied to whatever purposes the conscience of the Ordinary should approve. The flagrant abuses of which power occasioned the legislature to interpose, in order to prevent the Ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents : and

31 Edw. III. stat. 1, administration to be granted to the next and most lawful friends ; whence originated administrators.

therefore the statute of 31 Edw. III. st. 1, c. 11, provides, " that in case where a man dieth intestate, the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods :

which persons so deputed shall have action to demand and recover, as executors, the debts due to the said deceased intestate, in the King's Court, to administer and dispend for the soul of the

(*d*) The clergy had never, at any time, in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession for the latter purpose ; Dyke v. Walford, 5 Moo. P. C. 434.

(*e*) 2 Black. Comm. 495. The 32nd article of the Magna Charta, extorted from King John, expressly provides against these abuses ; but it is a curious

fact, and one which strongly marks the influence of the papal power in England at that period, that this article was wholly omitted in the Magna Charta of Hen. III. : Note to Warwick v. Greville, 1 Phillim. 124, by the learned reporter.

(*f*) 5 Rep. 82, *b*. See also Hensloe's Case, 9 Rep. 39, *b*, where Lord Coke lays down the same law, and cites several authorities in support of it : Com. Dig. Administrator (A.).

dead : and shall answer also in the King's Court, to others to whom the said deceased was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the Ordinaries as executors be in the case of testament, as well as of the time past as the time to come."

This is the original of administrators, as they stood at the time of the passing of the Probate Act (1857), 20 & 21 Vict. c 77 (*g*). They were the officers of the Ordinary, appointed by him in pursuance of the statute (*h*), and their title and authority were derived exclusively from the ecclesiastical judge, by grants which are usually denominated letters of administration.

But there has already (*i*) been occasion to show that by the 3rd section of the Court of Probate Act (1857), the jurisdiction of the ecclesiastical and all other courts to grant letters of administration of the effects of deceased persons was abolished ; and by sect. 4 (*k*), that jurisdiction was to be exercised in the queen's name by the Court of Probate.

By the Court of Probate Act (1857), s. 3, jurisdiction of ecclesiastical courts to grant administration is abolished. By sect. 4 to be exercised in the Court of Probate:

The jurisdiction of the Court of Probate is now exercised \*by the Probate Division of the High Court of Justice to which it was transferred by the Judicature Act (*l*).

and now exercised by Probate Division of High Court.

(*g*) 2 Black. Comm. 495.

(*h*) *Ibid.*

(*i*) *Ante*, p. \*237, *et seq.*

(*k*) *Ante*, p. \*237.

(*l*) 36 & 37 Vict. c. 66, sect. 16. See *ante*, p. \*239.

† Jurisdiction in administration and probate matter is vested in the Probate Court in each county in Alabama, Arizona, Dakota, Idaho, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, Ohio, South Carolina, Vermont, Wyoming, and in the Probate Court of a district composed of a town or group of towns in Connecticut ; in the county courts in Arkansas, Colorado, Florida, Illinois, Kentucky, Oregon, Tennessee, Texas, West Virginia, Wisconsin, and in the county or corporation courts in Virginia ; in the superior courts in California and Washington ; in the clerk of the Superior Court in North Carolina, Stancell

*v. Gay*, 92 N. C. 455 ; *Edwards v. Cobb*, 95 N. C. 4 ; in the register of the county in Delaware and Pennsylvania ; in the Ordinary of the county in Georgia ; in the circuit courts in Indiana ; in the district courts in Iowa ; in the Orphan's Court in Maryland, and in contested cases in New Jersey ; in the chancery courts in Mississippi, and (if no administrator appointed for six months) in Tennessee ; in the surrogate of the county in New York, New Jersey, and also in the Prerogative Court in New Jersey ; and in the town councils or a probate judge elected by them in Rhode Island. For more particular statement of the several statutes as to courts and jurisdiction see p. 341, n. 1, and p. 3 *ubi supra*.

Statutory facts giving jurisdiction to grant letters in any county are : (1) The death of a resident of the state, in *Alabama* (1886 Code, §§ 1976, 2013), *Arizona* (1887 R. S. § 966), *Arkansas* (1884 Dig. Stats. §§ 2, 6508), *California* (Code C. P. § 1294), *Colorado* (1891 An. Stats. §§ 4664, 4695), *Dakota* (1887 C. L. § 5656), *Delaware* (1874 R. C. c. 89, §§ 1, 8), *Georgia* (1882 Code, §§ 2421, 2502), *Idaho* (1887 R. S. § 5290), *Kansas* (1889 G. S. § 2785), *Kentucky* (1889 G. S. c. 113, § 29, c. 39, § 1), *Maine* (1883 R. S. c. 63, § 6), *Massachusetts* (1882 P. S. c. 156, § 2), *Mississippi* (1892 An. Code, §§ 1813, 1850), *Missouri* (1889 R. S. § 4), *Montana* (1887 R. S. p. 276, § 6), *Nevada* (1885 G. S. § 2668), *New Hampshire* (1891 P. S. c. 182, § 8), *New Jersey* (1877 Rev. 755, 758), *New York* (Code C. P. § 2476), *North Carolina* (1883 Code, § 1374), *Ohio* (1890 R. S. § 5994), *Oregon* (1892 An. Laws, § 1083), *Pennsylvania* (1883 Purd. Dig. p. 509, § 13), *Rhode Island* (1882 c. 179, § 3), *Tennessee* (1884 Code, §§ 3010, 3042), *Texas* (1888 R. S. Art. 1792), *Vermont* (1880 R. S. § 2019), *Virginia* (1887 Code, §§ 2533, 2639), *Washington* (1891 G. S. § 851), *West Virginia* (1887 Code, c. 77, § 22, c. 85, § 4), *Wyoming* (1889 An. Stats. § 2806); and for administration only, in *Indiana* (1888 R. S. § 2228), *Maryland* (1888 P. G. L. Art. 93, § 14), *Michigan* (1882 An. Stats. § 5848), *Nebraska* (1893 C. S. c. 23, § 177), and *Wisconsin* (1889 An. Stats. § 3806). If inhabitant of more than one county, jurisdiction lies in either, *North Carolina* (1883 Code, § 1374), *Tennessee* (1884 Code, §§ 3010, 3042); or in that of principal or family residence, *Pennsylvania* (1883 Purd. Dig. p. 509, § 13).

(2) The death therein of a non-resident. *Arkansas* (1884 Dig. Stats. §§ 2, 6508), *Kentucky* (1887 G. S. c. 113, § 26, c. 39, § 1), *Mississippi* (1892 An. Code, §§ 1813, 1850), *Missouri* (1889 R.

S. § 4), *Texas* (1888 R. S. Art. 1792), *Virginia* (1887 Code, § 2533), *West Virginia* (1887 Code, c. 77, § 23, c. 85, § 4), *Wyoming* (1887 R. S. § 1984).

(3) The death therein of a non-resident leaving estate therein. *Alabama* (1886 Code, §§ 1976, 2013), *Arizona* (1887 R. S. § 966), *California* (Code C. P. § 1294), *Dakota* (1887 C. L. § 5656), *Idaho* (1887 R. S. § 5290), *Montana* (1887 R. S. p. 276, § 6), *Nevada* (1885 G. S. § 2668), *New York* (Code C. P. § 2476), *North Carolina* (1883 Code, § 1374), *Oregon* (1892 An. L. § 1083), *Washington* (1891 G. S. § 851).

(4) The existence of estate of a non-resident therein, *Delaware* (1874 R. C. c. 89, §§ 1, 8), *Georgia* (1882 Code, § 2502), *Indiana* (1888 R. S. § 2228), *Kansas* (1889 G. S. § 2785), *Kentucky* (1887 G. S. c. 113, § 26, c. 39, § 1), *Maine* (1883, R. S. c. 63, § 6), *Maryland* (1888 P. G. L. Art. 93, § 14), *Michigan* (1882 An. Stats. § 5848), *Mississippi* (1892 An. Code, §§ 1813, 1850), *New Hampshire* (1891 P. S. c. 182, § 8), *North Carolina* (1883 Code, § 1374), *Rhode Island* (1882 P. S. c. 179, § 3), *Tennessee* (1884 Code, § 3043), *Vermont* (1880 R. L. § 2020), *Virginia* (1887 Code, § 2533), *West Virginia* (1887 Code, c. 77, § 23, c. 85, § 4), *Wisconsin* (1889 An. Stats. § 3806); or of a non-resident not dying therein, *Alabama* (1886 Code, §§ 1976, 2013), *Arizona* (1887 R. S. § 966), *California* (Code C. P. § 1294), *Dakota* (1887 C. L. § 5656), *Idaho* (1887 R. S. § 5290), *Indiana* (1888 R. S. § 2228), *Massachusetts* (1882 P. S. c. 156, § 2), *Michigan* (1882 An. Stats. § 5848), *Montana* (1887 R. S. p. 276, § 6), *New Jersey* (1877 Rev. p. 758, § 31), *New York* (Code C. P. § 2476), *Oregon* (1892 An. L. § 1083), *Washington* (1891 G. S. § 891); or the existence of the greater part of the estate of a non-resident therein, *Arkansas* (1884 Dig. Stats. §§ 2, 6508), *Colorado* (1891 An. Stats. §§ 4664, 4695), *Missouri*

(1889 R. S. § 4), *Pennsylvania* (1883 Purd. Dig. p. 509, § 13), *Texas* (1888 R. S. Art. 1792), *Wyoming* (1887 R. S. § 1984); or of estate therein of a non-resident not leaving estate in the county of his death. *Arizona* (1887 R. S. § 966), *California* (Code C. P. § 1294), *Dakota* (1887 C. L. § 5656), *Idaho* (1887 R. S. § 5290), *Montana* (1887 R. S. p. 276, § 6), and *Nevada* (1885 G. S. § 2668).

(5) The first application for letters in unenumerated cases. *Arizona* (1887 R. S. § 966), *California* (Code C. P. § 1294), *Dakota* (1887 C. L. § 5656), *Idaho* (1887 R. S. § 5290), *Montana* (1887 R. S. p. 276, § 6), *Nevada* (1885 G. S. §§ 2668-69). And generally in any county, in *Missouri* (1889 R. S. § 4) and *Wyoming* (1887 R. S. § 1984).

Other jurisdictional facts are the existence of lands of non-residents in the county, *Arkansas* (1884 Dig. Stats. §§ 2, 6508), *Colorado* (1891 An. Stats. §§ 4664, 4695), *Kentucky* (1887 G. S. c. 113, § 26, c. 39, § 1), *Mississippi* (1892 An. Code, §§ 1813, 1850), *Missouri* (1889 R. S. § 4), *New York* (Code C. P. § 2476), *Virginia* (1887 Code, § 2533), *West Virginia* (1887 Code, c. 77, § 23, c. 85, § 4), *Wyoming* (1887 R. S. § 1984); or of a debt owing to him there, *Arkansas* (1884 Dig. Stats. § 6508), *Kentucky* (1887 G. S. c. 113, § 26, c. 39, § 1), *Tennessee* (1884 Code, § 3043); the coming of assets therein after death of decedent, *Alabama* (1888 R. S. §§ 1976, 2013), *Indiana* (1888 R. S. § 2228), *Maine* (1883 R. S. c. 63, § 6), *New York* (Code C. P. § 2476), *North Carolina* (1883 Code, § 1874), *Oregon* (1892 An. L. § 1883); or residence of nearest of kin, *Texas* (1888 R. S. Art. 1792). See also p. 345, n. 3, *ubi supra*.

The jurisdictional facts should appear on the face of the petition for letters of administration, *Shipman v. Butterfield*, 47 Mich. 487; *Potwine's Appeal*, 31 Conn. 381; and where the facts do appear on the record, it is conclusive

against the jurisdiction afterward assumed, and the letters granted, in another county, *Oh Chow v. Brockway* (Or.), 28 Pac. Rep. 384; or against any collateral attack. *Turner v. Malone*, 24 S. C. 398. But the letters are themselves *prima facie* evidence of the adjudication of the necessary facts. *Epping v. Robinson*, 24 Fla. 36; *Johnson v. Smith*, 25 Hun 171; *Lyme v. Sanford*, 82 Tex. 58; *Brubaker v. Jones*, 23 Kan. 411. If jurisdiction appears, every intendment must be made in favor of the validity of the proceedings. *Reeves v. Townsend*, 2 Zab. 396; *Wright v. Ware*, 50 Ala. 549; *Plume v. Howard Savings Institution*, 17 Vt. 211, 229. And this is true of an order of appointment which fails to show such facts, where its regularity is attacked collaterally. *Mills v. Herndon*, 77 Tex. 89; *Martin v. Robinson*, 67 Tex. 378. See too p. \*242, n. 4 *ubi supra*. To subject it to collateral attack the want of jurisdiction must appear on its face. *Bradley v. Love*, 60 Tex. 472.

As to presumptions and conclusions in support of letters and other probate proceedings, see Am. note on p. \*486 *infra*. The jurisdiction of the Probate Court is exclusive of other courts, *Quidort v. Pergeaux*, 3 C. E. Gr. 472, and continues as such throughout subsequent proceedings to appoint an administrator *de bonis non*, although other counties might originally have had equally good claim to jurisdiction, *People v. White*, 11 Ill. 341. Such courts cannot create two separate co-ordinate administrations on the same estate. *Brubaker's Appeal*, 98 Pa. St. 21; *Ex parte Crafts*, 28 S. C. 281; *Ryno v. Ryno*, 12 C. E. Gr. 522. The office and authority of an administrator runs over the whole state, *Donohue v. Daniel*, 58 Md. 595; but not beyond the jurisdiction of the state. *Normand v. Brognard*, 2 C. E. Gr. 425.

In general, the residence of the de-

ceased is a material jurisdictional fact, and should appear in the petition for letters of administration. *Abel v. Love*, 17 Cal. 233; *Townsend v. Gordon*, 19 Cal. 188; *Estate of Sargent*, 62 Wis. 130. But if he had no fixed residence, the place of his death is *prima facie* that of his domicil. *Leake v. Gilchrist*, 2 Dev. 73. And the letters cannot be collaterally attacked by evidence that the residence of the deceased was in another county. *Irwin v. Scribner*, 18 Cal. 499.

There must be assets of some kind within the jurisdiction in order that the court may grant administration. *Pinney v. McGregory*, 102 Mass. 186; *Lawrence's Appeal*, 49 Conn. 411; *Estate of Gavin*, 15 Civ. Pro. 390; *Crosby v. Leavitt*, 4 Allen 410; *Boughton v. Bradley*, 34 Ala. 694; *Miller v. Jones*, 26 Id. 247; *Henderson v. Clarke*, 4 Litt. 277; *Grimes v. Talbert*, 2 Met. (Ky.), 306; *Estate of Harlan*, 24 Cal. 182; *Wright v. Gilbert*, 51 Md. 146; *Welch v. Adams*, 152 Mass. 74; *Young v. Wittenmeyer*, 22 Ill. App. 496; *Luce v. Manchester &c. Railroad Co.*, 63 N. H. 588; *Graves v. Tilton*, Id. 192; *Boon v. Chapman*, 119 U. S. 587; *Burnett v. Meadows*, 7 B. Mon. 277; *Banta v. Moore*, 2 McCart. 97; *Emerson v. Ross*, 17 Fla. 122; *Weaver v. Norwood*, 59 Miss. 665; *Prescott v. Durfee*, 131 Mass. 477; *Van Giessen v. Bridgford*, 83 N. Y. 348; *Estate of Sargent*, 62 Wis. 130. In Maine, the assets must amount to at least \$20. *Bean v. Bumpass*, 22 Me.

549. And see, as to amount of assets, *Temples v. Cain*, 60 Miss. 478; *Prescott v. Durfee*, 131 Mass. 477. An administrator cannot be appointed merely to make a defendant in a suit to quiet title, there being no estate. *Estate of Murray*, Myrick's Prob. 208. A policy of insurance held by the intestate on the life of another constitutes sufficient assets within the meaning of the New York statute. *Johnston v. Smith*, 25 Hun 171. So, debts due to the deceased—at the residence of the debtor, *Merrill v. New England Insurance Co.*, 103 Mass. 245; *Beers v. Shannon*, 73 N. Y. 292; *Kohler v. Knapp*, 1 Bradf. 240; *Wheat v. Fuller*, 82 Ala. 572; *Estate of Schley*, 11 Phila. 139; although the debtor acquired such residence after the death of the intestate. *Pinney v. McGregory*, 102 Mass. 186. So, a pending suit brought on a note is jurisdictional assets *in loco fori*. *Barclift v. Treece*, 77 Ala. 528; *Murphy v. Creighton*, 45 Ia. 179. So, railroad stock—in the place where the stock-books are kept. *Arnold v. Arnold*, 62 Ga. 627. So, land is assets, if it is subject to sale for debts, *Prescott v. Durfee*, 131 Mass. 477; *Spraybury v. Culbertson*, 32 Ga. 299; *Temples v. Cain*, 60 Miss. 478; *Bishop v. Latourette*, 67 Ala. 197; *Nicrosi v. Greeley*, 85 Ala. 365; whether the land will have to be sold for the debts, *Temples v. Cain*, *ubi supra*; or not, *Prescott v. Durfee*, *ubi supra*. And see p. 338, n. 1, *ubi supra*.

## SECTION II.

*What may be done by an administrator before letters of administration are granted.†*

It has been shown that an executor may perform most of the acts appertaining to his office, before probate (*m*). But with respect to an administrator, the general rule is, that a party entitled to administration can do nothing as administrator before letters of administration are granted to him ; inasmuch as he derives his authority, not like an executor from the will, but entirely from the appointment of the court (*n*).

Generally an administrator cannot act before letters :

Thus it was always held at law that an executor might commence an action before proving the will, and it was sufficient if he had probate in time for his declaration (*o*), yet letters of administration must issue before the commencement of a suit at law by an administrator ; for he has no right of action until he has obtained them (*p*).

he cannot commence action at law :

In chancery, however, the practice was not quite so strict, for a bill in chancery could be filed before a plaintiff had taken out letters of administration and it was sufficient to have them at the hearing (*q*), but the bill had to allege that \*they were already obtained (*r*). This difference of practice seems to remain notwithstanding the Judicature Act.

although he may commence action in Chancery Division.

So if an executor releases before probate, such act will bind him after he has proved the will (*s*) ; but if a man releases and afterward takes out letters of administration, it will not bar him : for the right was not in him at the time of the release (*t*).

A release by an administrator before letters not binding.

† See American note at end of this Section.

(*m*) *Ante*, p. \*249, *et seq.*

(*n*) *Wankford v. Wankford*, 1 Salk. 301, by Powys, J.

(*o*) See *ante*, pp. \*254, \*255.

(*p*) *Martin v. Fuller*, Comb. 371. Com. Dig. Admin. B. 9 ; 1 Salk. 303, by Powell, J. *Wooldridge v. Bishop*, 7 B. & C. 406. An administrator with the will annexed has no more right in this respect than any other administrator. *Phillips v. Hartley*, 3 C. & P. 121.

(*q*) *Fell v. Lutwidge*, Barnard.

Chanc. Cas. 320, by Lord Hardwick, who observed that it was different at law. *Horner v. Horner*, 23 L. J. Ch. 10. See also as to the relation of the letters obtained after bill filed. *Humphreys v. Humphreys*, 3 P. Wms. 351 ; *Bateman v. Margerison*, 6 Hare, 496. But see *Simons v. Milman*, 2 Sim. 241 ; *Jones v. Howells*, 2 Hare, 353. See *ante*, p. \*256, note (*q*).

(*r*) *Humphreys v. Ingledon*, 1 P. Wms. 753 ; *Moses v. Levi*, 3 Y. & Coll. 359, 366.

(*s*) *Ante*, p. \*250.

(*t*) *Middleton's Case*, 5 Co. 28, b.

So though an executor may assign a term for years of the testator, before probate, yet an assignment by an administrator before letters is, it seems, of no validity (*u*). Again, if the deceased was a tenant from year to year, a surrender of this leasehold interest cannot be made by a next of kin before taking out letters of administration (*v*).

In *Doe v. Glenn* (*x*), the lessee of premises, under a condition of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances: his brother administered *de son tort*; and agreed with the landlord to give him possession, and to suffer the lease to be canceled, on his abandoning the rent, which was twenty-eight days in arrear: The brother afterward took out letters of administration: And it was held, that his agreement as administrator *de son tort* did not include him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made demand of the rent according to the common law, or proceeded by ejectment according to stat. 4 Geo. II. c. 28.

Accordingly it was held in a subsequent case (*y*), that an administrator was not estopped by a mortgage he had made of the premises in dispute at a time prior to his having become administrator.

\*Where it had been agreed by articles of partnership that the executor or administrator of a deceased partner should have the option of succeeding to the share of the deceased in the partnership business and effects on giving notice within three calendar months of the decease to the surviving partners, it was held that a notice given by the administrator of the deceased partner within the three months of his death, but before taking out letters of administration, was not an effectual notice within the meaning of the indenture, for that the letters of administration had not relation back to the act of giving notice, so as to clothe him with the character of administrator at that time (*z*).

Yet cases may certainly be found, where the letters of administration have been held to have a relation to the death of the intestate, so as to give a validity to acts done before the letters were obtained. Thus if a man takes the goods of the intestate as executor *de son tort*, and sells them, and

Assignment or  
surrender by ad-  
ministrator be-  
fore letters not  
valid.

Notice to be given  
as administrator  
not effectually  
given before let-  
ters.

Instances of valid  
acts, though done  
before adminis-  
tration granted:

(*u*) 3 Preston on Abst. 146. See *Bacon v. Simpson*, 3 Mees. & W. 87, *per* Parke, B.

(*v*) *Rex v. Great Glenn* (Inhabitants of), 5 B. & Adol. 188.

(*x*) 1 Adol. & Ell. 49.

(*y*) *Metters v. Brown*, 1 Hurls. & C. 686.

(*z*) *Holland v. King*, 6 C. B. 727.



afterward obtains letters of administration, it seems the sale is good (a). So in *Whitehall v. Squire* (b), where an intestate had delivered to the defendant a horse to depasture, and the plaintiff, before administration granted, desired the defendant to bury the intestate decently, who thereupon buried him, and the plaintiff agreed that the defendant should keep the horse in part satisfaction of the charges; and afterward the plaintiff took administration, and brought trover for the horse; it was held by Dolben and Eyre, Justices, (Holt, C. J., *dissentiente*), that the plaintiff was bound by the agreement, and could not maintain the action. The principle, however, of this decision appears to have been, that the plaintiff, being a *particeps criminis* in the very act of which he complained, should not be permitted to recover upon it against the person with whom he colluded (c).

\*Other instances, of the relation of the letters of administration to the death of the intestate, will be found in a subsequent part of this treatise (d).

But it may here be observed, that it has been lately laid down that such relation exists only in those cases where the act done is for the benefit of the estate: And accordingly, in the case where the widow of an intestate had remained in the possession of her husband's property for some time after his decease, and the intestate's son had not interfered in any way with the property, which was seized under a writ of *fi. fa.* issued against the widow, and the son afterward took out administra-

only when done  
for the benefit of  
the estate.

(a) *Kenrick v. Burgess*, Moor. 126. *Godolph. Pt. 2, c. 8, s. 5, p. 99*, 4th edition. *Hill v. Curtis*, L. R. 1 Eq. 90, 100, *ante*, p. \*215, note (n).

(b) 1 Salk. 295.

(c) *Mountford v. Gibson*, 4 East, 446, by Lord Ellenborough. In *Stewart v. Edmonds*, Sittings after Hil. Term, 1828, *coram* Abbott, C. J., the intestate had sent some plate to the defendant, a silversmith, for safe custody, and was at the same time indebted to him in a sum exceeding the value of the plate: The plaintiff, after the death of the intestate, and before he obtained letters of administration, assented to the defendant retaining the plate, in satisfaction of his debt; he afterward took out administration, and brought trover

for the plate: For the defendant, *Whitehall v. Squire* was cited; but the C. J. held that the assent was not binding upon the administrator. See further, *Accord. Morgan v. Thomas*, 8 Exch. 305, by Parke, B. See also *Parsons v. Mayesden*, 1 Freem. 152, where it was laid down, that if a man takes the goods of the deceased by the consent of him to whom administration is afterward granted, this is no defense, if he is sued as executor *de son tort*. But see *Hill v. Curtis*, *ubi sup.*

(d) *Post*, Pt. II. Bk. I. Ch. I. As to the right, founded on mere possession, to bring actions against wrongdoers, without producing letters of administration, see *ante*, p. \*253.

tion, it was held that there was no evidence from which the administrator's assent to the widow's taking the property could be implied: And by Parke, B., even if there had been, the estate was not bound by it, as the act to which the assent was given did not benefit the estate (*e*).

Where a question was pending in the Ecclesiastical Court, as to a party's right to a grant of letters of administration, and such party possessed himself of a portion of the goods of the deceased before he had established his title, Sir G. Lee decreed that he should give such security for the safety of the goods as the court should approve (*f*).

Security demanded by the Ecclesiastical Court from parties possessing the assets before administration granted.

(*e*) *Morgan v. Thomas*, 8 Exch. 302.

(*f*) *Jones v. Yarnold*, 2 Cas. temp. Lee, 570.

† "An administrator can do nothing, though entitled to administration, before administration granted to him." Shaw, C. J., in *Rand v. Hubbard*, 4 Met. 252, 256. But the issuing of letters after the order making the appointment is a mere ministerial act. *Glover v. Lyon*, 57 Ala. 365. And when appointed his title relates back to the death of the intestate, *Gilkey v. Hamilton*, 22 Mich. 283; *Pinkham v. Grant*, 78 Me. 158; and in many cases legalizes his intermediate acts, *Walker v. May*, 2 Hill Eq. 23; *Cook v. Cook*, 24 S. C. 204; *Tucker v. Whaley*, 4 R. I. 543. He may take his oath and give bond before appointment. *Morris v. Chicago &c. Railway Co.*, 65 Iowa 727. So, he may pay funeral expenses where necessary. *Matter of Butler*, 1 Connoly 58. The test has been said to be "whether such acts would have been valid had he been the rightful administrator." *Woerner on Admn.* § 187; *Outlaw v. Farmer*, 71 N. C. 31. This does not seem to be supported by the authorities. Subsequent appointment renders liable as administrator for moneys previously received. *Croswell on Exrs.* § 248; and his prior receipt for the price of goods sold by him before appointment will protect his purchaser, *Alvord v. Marsh*, 12 Allen 604. He

can, as administrator, ratify his prior sale and sue the purchaser for the unpaid price, *Hatch v. Proctor*, 102 Mass. 351; or disclaim the sale and recover the goods. *Gilkey v. Hamilton*, 22 Mich. 283. But if he has assumed to act as administrator, he cannot deny his appointment on being cited to account as such. *Damouth v. Klock*, 29 Mich. 289. So, after compromising a suit in another state, he cannot take out letters there and disavow the compromise as unauthorized. *Vroom v. Van Horne*, 10 Paige 549. But he cannot before appointment bind the estate by a promise of payment, so as to bar the Statute of Limitation, *Haselden v. Whitesides*, 2 Strobh. 353; or raise an implied waiver of interest due the intestate by requiring payment of the debt to be made to himself only, *Esmond v. Brown*, 25 Atl. Rep. 652; or bring a foreclosure suit and be appointed administrator during its progress, *Gatfield v. Hanson*, 57 How. Pr. 331; or issue execution on a judgment recovered by his intestate. *Bellinger v. Ford*, 21 Barb. 311. Although it has been held that an executor *de son tort* may set up in defense to a judgment against him as such his subsequent due appointment and administration. *Shillaber v. Wyman* 15 Mass 322.

## \*CHAPTER THE SECOND.

OF THE GRANT OF GENERAL ORIGINAL ADMINISTRATION IN CASES OF  
TOTAL INTESTACY.

## SECTION I.

*To whom general administration is to be granted.†*

It has already appeared that the stat. 31 Edw. III. stat. 1, c. 11, provides, that, in cases of intestacy, "the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods" (a). The power of the ecclesiastical judge was a little more enlarged by the statute 21 Hen. VIII. c. 5, s. 3, which provides, that in case any person die intestate, or that the executors named in any testament refuse to prove it, the Ordinary shall grant administration, "to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same Ordinary shall be thought good : " and the same section goes on to enact, that "where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator, or person deceased, and where any person only desireth the administration, as next of kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration."

Stat. 31 Edw. III. stat. 1, c. 11, administration to be granted to the nearest and most lawful friends :

Stat. 21 Hen. VIII. c. 5, s. 3, to the widow or next of kin, or both at discretion.

Before inquiring into the rights of those persons expressly pointed out in the above statutes, it is proper to consider the right of the husband to be the administrator of his wife.† This right belongs to the husband exclusively of all other persons (b), and the Ordinary has no power or election to \*grant it to any other (c). The foundation of this claim has been variously stated : By some it is said to be derived from the statute of 31 Edw. III. on the ground of the husband's being "the next and

Exclusive right of the husband to be the wife's administrator :

† See American note at end of this Section.

(b) *Humphrey v. Bullen*, 1 Atk. 459.

(c) *Sir George Sand's Case*, 3 Salk.

(a) *Ante*, p. \*341.

most lawful friend" of his wife (*d*) : while there are other authorities, which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes (*e*). But the right, however founded, is now unquestionable ; and is expressly confirmed by the statute 29

29 Car. II. c. 3 : Car. II. c. 3, which enacts, that the Statute of Distributions (22 & 23 Car. II. c. 10,) "shall not extend to the estates of *femes covert* that shall die intestate, but that *their husbands may demand and have administration* of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act."

The Married Women's Property Act, 1882, has not altered the devolution of the undisposed separate personalty of a married woman. Accordingly, on the death of a married woman without disposing of her separate personalty, the quality of separate property ceases, and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed.

Thus, where a married woman, who had a power of appointment over certain trust funds, and was also possessed of separate estate, her title to which had accrued before the Married Women's Property Act, 1882, but including also a considerable amount of savings of the income of such estate accrued since the act, died in 1887, having in the same year made a will, by which she exercised her power of appointment over the trust fund and appointed executors, but made no disposition of her separate property, it was held that on \*the death of the testatrix the title of her husband to her undisposed of separate estate accrued, and that the executors of her will became trustees for him, and not for the next of kin of the testatrix (*f*).

The separate use, whether created by statute or settlement, is exhausted when the wife dies without making a disposition (*g*).

This right of administration to the wife is not an ecclesiastical, but a civil right of the husband, though it is a right to be administered in the Court of Probate (*h*).

(*d*) 3 Salk. 22. *Elliott v. Gurr*, 2 Phillim. 19 ; and it would seem that this is the right view. *Fettiplace v. Gorges*, 1 Ves. 46 : *Re Lambert's Estate*, 39 C. D. 626. It is to be remembered that administration was not necessary to enable the husband to take his deceased wife's chattels or chattels real though it was necessary to enable him

to take her outstanding choses in action.

(*e*) Com. Dig. Administrator (B, 6). *Watt v. Watt*, 3 Ves. 247.

(*f*) *Re Lambert's Estate*, *Stanton v. Lambert*, 39 C. D. 626.

(*g*) *Cooper v. Macdonald*, 7 C. D. 288.

(*h*) By Sir J. Nicholl, in *Elliott v. Gurr*, 2 Phillim. 19, 20.

Though a marriage be voidable, by reason of some *canonical* disability (*e. g.* on account of corporal infirmities and formerly as being within the prohibited degrees of consanguinity or affinity) yet the husband is entitled to the administration of the wife, unless sentence of nullity was declared before her death (*i*). But where the marriage took place under one of the *civil* disabilities (such as prior marriage, want of age, idiotcy, and the like, and since 5 & 6 Will. IV. c. 54, by being within the prohibited degrees of consanguinity or affinity), the contract of marriage is absolutely void *ab initio*; and consequently the husband cannot be entitled to take administration. Thus, where it appeared that the woman was of unsound mind at the time of the celebration of the marriage, the husband was refused administration of her effects, and condemned in costs (*k*).

where the marriage was voidable the husband is entitled to administration:

*secus*, where it was void.

Where a wife, having been deserted by her husband, has obtained a protection order, under stat. 20 & 21 Vict. c. 85, s. 21 (*l*), afterward dies in the lifetime of her husband, intestate, the court will decree administration, limited to such personal property as she acquired since the desertion (without specifying of what that property consisted), to the next of kin of the wife (*m*).

Administration to wife dying after a protection order.

\*Upon the bankruptcy of the husband his right to administer to his wife's estate is not such a right as will vest in the trustee under his bankruptcy (*n*).

Husband a bankrupt.

Where a husband agreed by deed of separation that if his wife died intestate her next of kin should be entitled to her property, and she died intestate, leaving separate property of which she had become possessed by virtue of the deed, the court, notwithstanding the husband objected, granted letters of administration to her father limited to that property (*o*).

Administration to wife living apart from husband under separation deed.

(*i*) *Elliott v. Gurr*, 2 Phillim. 19.

(*k*) *Browning v. Reane*, 2 Phillim. 69.

(*l*) See *ante*, p. \*55.

(*m*) In the Goods of Worman, 1 Sw. & Tr. 513. See also In the Goods of Faraday, 2 Sw. & Tr. 369; In the Goods of Weir, 2 Sw. & Tr. 451; In the Goods of Stephenson, L. R. 1 P. & D. 289. It is necessary, generally speaking, that the husband should be cited: In the Goods of Brighton, 34 L. J., P. & M. 55. He has no right to the administration if

the marriage has been dissolved on the ground of his adultery and desertion. In the Goods of Hay, L. R. 1 P. & D. 51; 35 L. J., P. & M. 3. Nor it seems, in cases where the wife has obtained a decree of judicial separation. See 20 & 21 Vict. c. 85, sect. 21.

(*n*) In the Goods of Turner, 12 P. D. 18.

(*o*) *Allen v. Humphrys*, 8 P. D. 16. See also In the Goods of Moore [1891] P. 299.

It should seem that a man convicted of bigamy, in respect of his marriage with the intestate, may, nevertheless, propound his interest as the lawful husband of the deceased, in a suit touching the administration of her effects in the Ecclesiastical Court : and may succeed in such suit on proof shown of his not having been guilty of the crime, notwithstanding his said conviction be pleaded and proved (*p*).

In case the wife died intestate, and afterward the husband died without having taken out administration to her, the Ecclesiastical Court at one time considered itself bound by the statute to grant administration to the next of kin of the wife, and not to the representatives of the husband (*q*). But such administrator was considered in equity as a trustee for the representatives of the husband (*r*).

\*For according to the course of decisions of courts of equity, and the practice of the ecclesiastical courts, and of the Court of Probate, the title of the husband to the undisposed of personalty of the wife has uniformly prevailed (*s*).

In the case of *In the Goods of Gill* (*t*), Sir John Nicholl adverted to the inconvenience of this rule of granting administration to those who have no beneficial interest, and its defiance of all principles : and added that he felt inclined, if the point should come before the court in a contested form, to send it up to the Court of Delegates for a deliberate reconsideration. If the persons, who, at the time of the wife's death, were her next of kin, die before the grant of administration, it has always been held that the court may exercise its discretion, and grant administration to the party who has the interest (*u*).

And in a subsequent case (*x*) that learned judge granted administration *de bonis non* of a feme convert to the representatives of the husband, an appearance having been entered, and administration prayed by the next of kin of the wife, and observed that he should have done the same if the husband had not taken out administration, unless it could be shown that he had not the interest, but that the

(*p*) *Wilkinson v. Gordon*, 2 Add. 152. See 1 Phillips on Evidence, 336 *et seq.*, 7th edition.

(*q*) *Reece v. Strafford*, 1 Hagg. 347. See also the other cases reported in the Appendix to 2 Haggard.

(*r*) *Cart v. Rees*, cited in *Squib v.*

*Wyn*, 1 P. Wms. 381. *Humphrey v. Bullen*, 1 Atk. 458.

(*s*) *Re Lambert's Estate*, 39 C. D. 626, 635.

(*t*) 1 Hagg. 341.

(*u*) *Id.*, 341, 344.

(*x*) *Fielder v. Hanger*, 3 Hagg. 769.

property belonged to the wife's next of kin : And the learned judge desired that it might be understood in the registry that this was to be the rule for the future, unless special cause to the contrary be shown (*y*). And the course in the courts now is in all \*cases where the wife has predeceased her husband, to grant to the representatives of the husband alone letters of administration to the wife (*z*). But if the next of kin are entitled to the beneficial interest (as by settlement), the administration is still to be decreed to them ; because the principle is that the grant ought to follow the interest (*a*).

It must be observed, however, that the husband's next of kin must constitute themselves his legal personal representatives before they have any claim to administer to the wife's estate (*b*).

husband's next of kin must first constitute themselves his legal personal representatives :

The case of *Gutteridge v. Stilwell* (*c*), in which Lord Brougham appears to have acted inconsistently with this doctrine, must be considered overruled (*d*).

It appears to have been ruled in the Prerogative Court, that where the husband and wife are drowned in the same ship, they must be presumed to have perished at the same moment unless proof can be obtained as to the exact time of the death of either (*e*). At all events, in such cases, in order

husband and wife drowned in the same ship.

(*y*) Administration of the effects of a former wife was refused to the representatives of a second wife who had taken out administration to her husband, the next of kin of the husband not having been cited : In the Goods of Sowerby, 2 Curt. 852. See In the Goods of Bell, 1 Sw. & Tr. 288. If the husband's representatives are several administrators, they must all join in taking out the administration to the wife ; for it is not the practice to make a subsequent grant to one alone of co-administrators : *Secus* as to co-executor : In the Goods of Naylor, 2 Robert. 409.

(*z*) *Per* Lord Hatherley in *Partington v. Att.-Gen.*, L. R. 4 H. L. 100, 109.

(*a*) In the Goods of Pountney, 4 Hagg. 289.

(*b*) In the Goods of Crause, 1 Sw. & Tr. 146. *Attorney-General v. Partington*, 3 Hurlst. & C. 193, 206 ; L. R., 4 H. L. 100. In the Goods of Harding,

L. R., 2 P. & D. 394. See *post*, Pt. II. Bk. III. Ch. I. § III.

(*c*) 1 M. & K. 486.

(*d*) *Partington v. Att.-Gen.*, L. R., 4 H. L. 100. See also *Loy v. Duckett*, 1 Cr. & Ph. 312. His lordship there said that Sir J. Leach's view was more correct than Lord Brougham's, because it would follow from Lord Brougham's that even where an executor had assented to a legacy he might still sue for the fund out of which the legacy was to be paid on the strength of his legal title without making the legatee a party which would in fact be administering the fund in the absence of the owner. See also *Pennington v. Buckley*, 6 Hare, 459, by Wigram, V.-C.

(*e*) In the Goods of Selwyn, 3 Hagg. 784. 1 Curt. 705. But see *Underwood v. Wing*, 4 De G. M. & G. 633. *Post*, Pt. III. Bk. III. Ch. II. § V. where this subject is more fully considered.

to entitle the husband to the wife's property it must be proved that he survived her; and consequently the administration thereof must be granted to her next of kin, if his representative cannot give any such proof (*f*).

\*It has already appeared that in several cases, even before the Married Women's Property Act, 1882, a feme covert might make a will: and it remains to consider to what extent her will operated as a bar to the husband's right to be her administrator.

In such cases the husband's right was wholly or partially barred according to the extent of the power, or the husband's agreement as the case might be.

Since the passing of the Married Women's Property Act, 1882, these authorities have become of no moment except in cases excluded from the operation of that act (*g*). As has been pointed out, a grant of probate of the will of a married woman is now unlimited, and there is no *cæterorum* grant (*h*).

If the wife be executrix to another, and dies intestate, then, as to the goods which she had in that capacity, administration must not be granted, generally speaking, to her husband (*i*). In fact, in this case, the administration is not of the goods of the wife but *de bonis non* of her testator, *cum testamento annexo*. Consequently, the administration must be granted according to the rules established with respect to that species of grant, which will be explained in the subsequent chapter (*k*).

The subject now proceeds to the right of the widow and next of kin under the statutes. And first, as to the right of the widow,† the stat. 21 Hen. VIII. c. 5, s. 3, directs that the Ordinary shall grant administration "to the widow or the next of kin or to both" at his discretion (*l*): Therefore, \*where it was moved for a mandamus to the official of the Bishop of Gloucester to commit administration to the

(*f*) *Satterthwaite v. Powell*, 1 Curt. 705. In the Goods of Wheeler, 31 L. J., P. M. & A. 40. *Post*. Pt. I. Bk. V. Ch. III. § I.

(*g*) For those cases see Williams Exors., 8th ed., pp. 420 and 421.

(*h*) See *ante*, p. \*323.

(*i*) *Smith v. Jones*, Bulstr. 45. *Jones*

[\*352]

*v. Roe*, W. Jones, 176. Anon. 3 Salk. 21.

(*k*) Sections 1, 2.

† See American note at end of this Section.

(*l*) Sir C. Cresswell in the case of *In the Goods of Browning*, 2 Sw. & Tr. 634, held that the court is precluded by

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widow of an intestate, the court refused the motion, saying, that it would be to deprive the Ordinary of his election in granting it to her, or the next of kin (*m*).

The statute further directs the Ordinary, in his discretion, to grant administration to *both* the widow and the next of kin ; and it has been held that the grant may be to them both jointly, or both separately, by committing several administrations of several parts of the goods of the intestate (*n*). Thus in a case where a man died intestate, leaving a wife and brother, the Ordinary granted the administration of some particular debts to the brother, and of the residue to the wife : And a mandamus was moved for, to grant administration to the wife : But by the court : The Ordinary may grant administration to the brother as to part, and to the wife for the rest ; in which case neither can complain, since the Ordinary need not have granted any part of the administration to the party complaining : But if the intestate leave a bond of 100*l*., the Ordinary cannot grant administration of 50*l*. to one person and 50*l*. to another, because this is an entire thing. (*o*).

But the court prefers a sole to a joint administration (*p*), \*and never forces a joint one: and the election of the judge is in favor of the widow, under ordinary circumstances (*q*). But the court has always held that administration may be granted to the next of kin, and the widow be set aside

administration  
may be granted to  
them both jointly  
or both separately:

the election of the  
court is in favor  
of the widow :

widow set aside  
for good cause :

this statute from making a joint grant to a widow and one of the persons entitled in distribution (but not next of kin), even with the consent of the next of kin, and of all the other persons entitled in distribution, and that the 73rd section of the Court of Probate Act, 1857 (see *post*, pp. \*383, \*384), did not, under the circumstances of the case, enable him to do so. But in a later case Sir J. P. Wilde held that the court had power under sect. 73 of the Probate Act, 1857, to make a joint grant of administration to the next of kin and to a person entitled in distribution, the next of kin consenting to the grant, and there being special circumstances rendering such joint grant convenient. In the Goods of Grundy, L. R., 1 P. & D. 459.

(*m*) Anon., 1 Stra. 525.

(*n*) 1 Roll. Abr. tit. Exor. (D.) pl. 1, p. 908. 4 Burn, E. L. 361, Phillimore's edition.

(*o*) Fawtry v. Fawtry, 1 Salk. 36.

(*p*) Where a joint grant is made to the widow and one of the next of kin, all the other next of kin must consent that the grant shall be so made. In the Goods of Newbold, L. R. 1 P. & D. 285. But the consent of a minor of twenty years and six months was acted upon in In the Goods of Dickinson [1891] P. 292.

(*q*) Stretch v. Pynn, 1 Cas. temp. Lee, 30. Goddard v. Goddard, 3 Phillim. 638. See also Atkinson v. Barnard, 2 Phillim. 317. But administration of the effects of a domiciled Scotchman was granted to the brother (the next of

upon good cause (*r*); for instance, if she has barred herself of all interest in her husband's personal estate by her marriage settlement (*s*), or where she is a lunatic (*t*), or where she has eloped from her husband, or cohabited in his lifetime with another man (*u*), or has lived separate from her husband (*x*). But the circumstance of the wife having married again is no valid objection (*y*). However, if the deceased left children, one of whom, supported by the rest, applies for administration, the second marriage *might* induce the court to prefer the child (*z*).

Where the intestate had married a first wife in Denmark, both parties being domiciled there, from whom he was divorced by a contract of separation and other proceedings amounting to a divorce *a vinculo matrimonii* according to the Danish law, and then married a second wife; such second wife was \*allowed by the Prerogative Court to take out administration to the husband (*a*).

a divorce according to foreign law allowed in a question of granting administration to a second wife: If a wife has been divorced *a mensa et thoro*, for adultery on her part, she forfeits, it should seem, her right to the administration (*b*).

It now becomes necessary to inquire, who are the "next and most lawful friends," and the "next of kin," entitled to the grant of the administration under the statutes.†

kin of the deceased) without citing the widow, a similar grant having already been made in Scotland: In the Goods of Rogerson, 2 Curt. 656.

(*r*) See *Accord*. In the Goods of Anderson, 3 Sw. & Tr. 489.

(*s*) Walker *v.* Carless, 2 Cas. temp. Lee, 560.

(*t*) In the Goods of Williams, 3 Hagg. 217. In the Goods of Dunn, 5 Notes of Cas. 97. See, however, Alford *v.* Alford, Dea. & Sw. 322, where Sir J. Dodson held the committee of a lunatic widow entitled preferably, as the widow herself would be, unless good cause is shown by the next of kin.

(*u*) Fleming *v.* Pelham, 3 Hagg. 217, note (*b*). Conyers *v.* Kitson, 3 Hagg. 556. It should be noticed that where an application is made for a grant of administration to a person other than the widow on the ground of the widow's misconduct, the court will require the

widow to be cited. In the Goods of Middleton, 14 P. D. 23.

(*x*) Lambell *v.* Lambell, 3 Hagg. 568. See Chappell *v.* Chappell, 3 Curt. 429.

(*y*) Webb *v.* Needham, 1 Add. 494.

(*z*) *Ibid.* 496.

(*a*) Ryan *v.* Ryan, 2 Phillim. 332.

(*b*) Pettifer *v.* James, Bunbury, 16. In the Goods of Davies, 2 Curt. 628. And as a divorced wife has forfeited all interest in the estate of the deceased, so there is no necessity for citing her before granting administration to the next of kin. See In the Goods of Nares, 13 P. D. 35. But the court will not, at any rate without notice, pass over the widow who has been legally separated from her husband by reason of his cruelty, in granting administration to his estate. In the Goods of Ihler, L. R. 3 P. & D. 50.

† See American note at end of this Section.

Lord Coke describes them to be, “the next of blood who are not attainted of treason, felony, or have any other lawful disability” (e).

Who are the next of kin entitled to administration under the statutes.

It may here be observed, that it is an established principle in the Ecclesiastical Court, that the right to the administration of the effects of an intestate follows the right to the property in them (d). Whence it seems to follow, that all the cases which have decided what persons are next of kin, so as to be entitled to a share of the intestate’s personal estate under the Statute of Distribution, are authorities upon the question, as to what parties are next of kin, so as to be entitled to administration under the Statutes of Administration.

Right to administration follows the right to the property.

It has been laid down, that the Statute of Distribution must be construed according to the common law (e). Nevertheless, the more modern cases seem to have fully established that its construction, as to the proximity of degrees of kindred at least, shall be according to the rules of the civil law (f).

Construction of Statute of Distribution by modern cases according to rules of civil law.

\*Consanguinity, or kindred, is defined by the writers on these subjects to be “*vinculum personarum ab eodem stipite descendantium*,” the connection or relation of persons descended from the same stock or common ancestor (g). The consanguinity is either lineal or collateral.

Definition of consanguinity.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between the Propositus and his father, grandfather, great-grandfather, and so upward in the direct ascending line, or between the Propositus and his son, grandson, great-grandson, and so downward in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upward or downward: The father of the Propositus is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line; and therefore, universally obtains, as well in the civil and canon, as in the common law. This lineal consanguinity, it may

Lineal consanguinity.

(e) Hensloe’s Case, 9 Co. 39, b.

(f) Lock v. Lake, 2 Cas. temp. Lee,

(d) By Sir John Nicholl, In the Goods of Gill, 1 Hagg. 342.

420. 4 Burn, E. L. 543, Phillimore’s edition.

(e) Blackborough v. Davis, 1 P. Wms.

(g) 2 Black. Comm. 203.

be observed, falls strictly within the definition of *vinculum personarum ab eodem stipite descenditium*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor (*h*).

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such, then, as literally spring from one and the same ancestor who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issue are lineally descended from John Stiles as their common ancestor: and \*they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineous* (*i*).

It must be carefully remembered, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus Titius and his brother are related; why? because both are derived from one father: Titius and his first cousin are related; why? because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this: that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by Holy Writ, that there is one couple of ancestors belonging to us all from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other (*k*).

The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of kin, so as to be entitled to administration, conforms, as it has been above observed, to that of the civil law, and is as follows: to count upward from either of the parties related to the common stock, and then downward again to the other, reckoning a degree for each person, both ascending and descending (*l*); or, in other words, to take the sum of the degrees in both lines to the common ancestor (*m*).

(*h*) *Ibid.*

(*i*) 2 Black. Comm. 204.

(*k*) 2 Black. Comm. 205.

(*l*) 2 Black. Comm. 207. Toller, 88.

(*m*) *Ibid.* and Mr. Christian's note to 2 Black. 207. According to the canon

\*The Propositus and his cousin-german are related in the fourth degree—because, following the rule of computation, from the Propositus ascending to his father, is one degree: from him to the common ancestor, the grandfather, two: then, descending from the grandfather to the uncle, three: and from the uncle to the cousin-german, four. Again, the second cousin of the Propositus is related in the sixth degree; because, from the Propositus, ascending to his father is one degree; from his father to his grandfather, two; from his grandfather to his great-grandfather, the common ancestor, three: then, descending, from the great-grandfather to the great-uncle of the Propositus, four; from the great-uncle to the great-uncle's son, five; from his great-uncle's son to his second cousin, six.—It will be observed, that kindred are found distant from the Propositus by an equal number of degrees, although they are relations to him of very different denominations. Thus, a granddaughter of the sister, and a daughter of the intestate's aunt, (*i. e.* a great-niece and a first cousin), are in equal degree, being each four degrees removed (*n*).

In the further consideration of this mode of computing proximity of kindred, and the rights to administration derived from it, several remarkable distinctions may be observed, with reference to the corresponding rules of the common law, respecting succession to inheritances.

1st. Relations by the father's side and the mother's side are in equal degree of kindred; and, therefore, equally entitled to administration: for, in this respect, dignity of blood gives no preference (*o*). Hence it may happen that relations are distant from the intestate by an equal number of \*degrees, and equally entitled to the administration of his effects, who are no relations at all to each other.

Relations by  
mother's side  
equally entitled  
with those of  
father's.

law, the mode of computation is to begin at the common ancestor, and reckon downward, and in whatsoever degree the two persons, or the more remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. It is obvious, that the degrees by this calculation are fewer than by the mode of the civilians: And Sir J. Jekyl, in *Prec. Chanc.* 593, and Lord Hardwicke, in 1 Ves. Sen. 335, attribute the establishment of the mode of canonists to this circumstance;

inasmuch as the nearer they brought the relation, the greater was their trade of dispensations of marriage.

(*n*) *Thomas v. Ketteriche*, 1 Ves. Sen. 333. *Thirt v. Robinson*, cited *Ambl.* 192. So a first cousin twice removed is in the same degree as a second cousin; for they are both in the sixth degree of consanguinity: *Silcox v. Bell*, 1 Sim. & Stu. 301. *Lock v. Lake*, 2 Cas. temp. Lee, 421.

(*o*) *Moor v. Barham*, cited in *Black-borough v. Davis*, 1 P. Wms. 53.

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2ndly. The half-blood is admitted to administration as well as the whole (*p*); for they are kindred of the intestate, and have been excluded from the inheritance of land only on feudal reasons: Therefore, the brother of the half-blood shall exclude the uncle of the whole blood (*q*); and the Ordinary *may* grant administration to the sister of the half or the brother of the whole blood, at his discretion (*r*).

3rdly. As younger children must stand in the same degree of kindred as the eldest, primogeniture can give no *right* to preference in the grant of administration (*s*).

4thly. The right to administration will follow the proximity of kindred, though ascendant: and, therefore, when a child dies intestate, without wife or child, leaving a father, the father is entitled to the administration of the personal effects of the intestate as next of kin, exclusive of all others (*t*). Indeed, anciently, that is, in the reign of Henry I., a surviving father could have taken even the real estate of his deceased child (*u*). But this law of succession was altered soon afterward; for we find by Glanville, that in the time of King Henry II. the father could not take the real estate of his deceased child, the inheritance being then carried over to the collateral line: and it was subsequently held an inviolable maxim, that an inheritance could not ascend: But this alteration of the law never extended to personal estate (*x*). So with

respect to the mother, if a child dies intestate without a wife, child, or father, the mother is entitled to administration (*y*): and before the statute of 1 Jac. II. c. 17, she *\*could* claim as next of kin the whole personal estate; but by that statute, every brother and sister shall have an equal share with her (*z*).

Again, if a man dies intestate, leaving no nearer relations than a grandfather or grandmother, and an uncle or 'aunt, the grandfather or grandmother, being

(*p*) Smith *v.* Tracey, 1 Vent. 323.

(*q*) Collingwood *v.* Pace, 1 Vent. 424.

(*r*) Brown *v.* Wood, Aleyn, 36. 2 Black. Comm. 505. But see *post*, p. \*363.

(*s*) Warwick *v.* Greville, 1 Phillim. 124; but see *post*, p. \*363.

(*t*) Ratcliffe's Case, 3 Co. 40, *a*.

(*u*) Blackborough *v.* Davis, 1 P. Wms. 60.

(*x*) 1 P. Wms. 51. And now, by stat. 3 & 4 Will. IV. c. 106, s. 6, every lineal ancestor shall be capable of being heir to any of his issue.

(*y*) Ratcliffe's Case, 3 Co. 40, *a*, where the well-known case of the Duchess of Suffolk, Bro. Admor. pl. 47, was denied.

(*z*) See *infra*, Pt. III. Bk. IV. Ch. I. § IV.

in the second degree, though ascendant, will be entitled to administration to the exclusion of the uncle or aunt, who are related only in the third degree (*a*). So a great-grandmother is equally entitled as an aunt (*b*).

However, though the ecclesiastical law of England acknowledges the rights of ascendants generally, yet it does not recognize them to the extent of the civil law, according to which, ascendants, of whatever degree, shall be preferred before all collaterals, except in the case of brothers and sisters. But our law prefers the next of kin, though collateral, before one, who, though lineal, is more remote (*c*).

5thly. With respect to the right to administration, those in equal degree are equally entitled, subject to the discretionary election of the court, whether males or females (*d*). The preference of males to females, which exists in the succession to inheritances, seems to have arisen entirely from the feudal law; and has never been applied to rights respecting personal estate (*e*).

Females equally entitled with males, at the discretion of the court.

It remains to notice certain exceptions to the rule of computation, above stated, of the proximity of kindred and consequent right to administration.

Exceptions in our law to the rules of proximity of blood:

1st. The parents of an intestate are as near akin to him as his children; for they are both in the first degree: but in our law children are allowed the preference (*f*), and so are their lineal descendants to the remotest degree (*g*).

Children of intestate preferred to his parents:

2nd. Where the nearest relations according to the above computation, are a grandfather or grandmother, and brothers or sisters of the intestate, although these are all related in the second degree, yet the latter are entitled to the administration to the exclusion of the former (*h*).

Brother to grandfather.

To recapitulate, in the first place the children, and their lineal

(*a*) *Mentney v. Petty*, Prec. Chanc. 593. *Blackborough v. Davis*, 1 P. Wms. 41.

(*b*) *Burton v. Sharp*, cited in 1 Lord Raym. 686. Lutw. 1055.

(*c*) 1 P. Wms. 51, by Lord Holt. *Stanley v. Stanley*, 1 Atk. 458, by Lord Hardwicke.

(*d*) *Brown v. Wood*, Aleyn, 36. S. C. Style, 74.

(*e*) But see *post*, p. \*363.

(*f*) 2 Black. Comm. 504. But by this preference it is not to be understood that they are not considered as perfectly equal in degree of proximity. *Withy v. Mangles*, 4 Beav. 358. S. C. in Dom. Proc. 10 Cl. & Fin. 215.

(*g*) *Carter v. Crawley*, Sir T. Raym. 500. *Evelyn v. Evelyn*, Amb. 192.

(*h*) *Evelyn v. Evelyn*, 3 Atk. 762.

descendants to the remotest degree : and on failure of children, the parents of the deceased are entitled to the administration : then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins (*i*). A more particular discussion of some parts of the present subject will be found in a subsequent part of this treatise, where the rights of the next of kin of an intestate, under the Statute of Distributions, are considered (*k*).

If the sole next of kin is a married woman, and renounces, the grant is made to the husband:—for he has an interest, and the grant must follow the interest, and the wife cannot, by renouncing, deprive her husband of his right to the grant (*l*).

Where two parties contest the right to administration before any grant has been made, both are to propound their interests, and to proceed *pari passu* : and this whether the mutual interests are denied, or whether an interest is denied and a will opposed : nor does the rule vary, whether the asserted next of kin are in the same or different degrees of \*relationship (*m*). In *Waller v. Heseltine* (*n*) ; the Prerogative Court decided that the question concerning a will and the question of interest between the crown and the next of kin, must all go on together.

Where there are several persons standing in the same degree of kindred to the intestate,† the statute, we have seen, gives the Ordinary his election to accept any one or more of such persons (*o*). It remains to inquire by what principles and rules of practice his discretion, in making such election, has been guided in the ecclesiastical court.

(*i*) 2 Black. Comm. 505.

(*k*) *Post*, Pt. III. Bk. IV. Ch. I. § IV.

(*l*) *Haynes v. Matthews*, 1 Sw. & Tr. 460. *Wenham v. Wenham*, 6 Notes of Cases, 17.

(*m*) *Dabbs v. Chisman*, 1 Phillim. 159. It is otherwise when a party is in the possession of the administration. See *post*, p. \*378, note (*i*).

(*n*) Cited by Sir John Nicholl in 1 Phillim. 159 ; reported 1 Phillim. 170.

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† See American note at end of this Section.

(*o*) By rule 28 P. R. 1862 (noncontentious): "Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the registrars may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin."



The court have considered it their first duty to place the administration in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution : the primary object being the interest of the estate (*p*). But where there is no material objection on one hand, or reasons for preference on the other, the court, in its discretion, puts the administration into the hands of that person, amongst those of the same degree of kindred, to whom the majority of parties interested are desirous of intrusting the estate (*q*). On this principle, in a case as early as 1678 (*r*), it was \*decided by the two Chief Justices, the Chief Baron *et aliis*, that, where the deceased left four grandchildren, whereof one was of age and the other three minors, the administration should be granted to the mother as guardian to the three *durante minore ætate*, in preference to the grandchild who was of age : because, since the statute (22 & 23 Car. II. c. 10), which entitled them all to distribution, the interest of the three preponderated.

But, although, when the contest for an administration is between two persons in equal degree of the whole blood, the general rule has been to grant it to that person in whom the majority of those entitled to distribution concur ; yet that rule does not hold when the contest is between one of the whole blood and one of the half blood : for, in that case, the whole blood is preferable in the grant of administration to the half-blood, though the majority of interests concur in the latter, unless material objections can be proved against him of the whole blood (*s*).

Primogeniture, as it has been already observed, gives no right to preference, so as to weigh against the wish of the majority of interests ; yet if things are precisely equal,—if the scale is exactly poised, being the elder brother would incline the balance (*t*).

(*p*) Warwick *v.* Greville, 1 Phil. 125.

(*q*) Elwes *v.* Elwes, 2 Cas. temp. Lee, 573. Budd *v.* Silver, 2 Phillim. 115. However, administration is not always granted to the majority of interests : Wetdrill *v.* Wright, 2 Phil. 248. See also In the Goods of Stainton, L. R. 2 P. & D. 212.

(*r*) Cartwright's Case, 1 Freem. 258.

See also Sawbridge *v.* Hill, L. R. 2 P. & D. 219.

(*s*) Mercer *v.* Moorland, 2 Cas. temp. Lee, 499. Stratton *v.* Linton, 31 L. J., P. M. & A. 48.

(*t*) Warwick *v.* Greville, 1 Phillim. 125. S. P. as to an elder of two sisters, Coppin *v.* Dillon, 4 Hagg. 376.

Again, by the practice of the court, a son has the preference to a daughter, unless there are material objections to him ; and it has been held not enough to divest him of that preference, to show that he has intermeddled with the effects of the deceased without competent authority (u).

A man used to business preferred : \* *Cæteris paribus*, a man accustomed to business is preferred by the court to be administrator (x).

next of kin also creditor : The fact of one of several next of kin being also a creditor is rather adverse to, than in favor of, his being preferred in a contest for the administration (y).

In a case where the administration was contested between two in an equal degree of relationship, one of whom was objectionable, but the other had been twice a bankrupt, the court granted the administration to the former, and condemned the latter in costs (z).

husband a bankrupt : A husband's right to administration to his wife's estate is not such a right as will vest in the trustee under his bankruptcy (a).

Where the sole next of kin of an intestate was a lunatic, and her committee renounced, the court upon the consent of the next of kin of the lunatic being filed, granted administration to a stranger in blood (b).

The court prefers, *cæteris paribus*, a sole to a joint administration, because it is much better for the estate, and more convenient for the claimants on it (c) ; and, *a fortiori*, the court never forces a joint administration upon unwilling parties (d).

When an administrator is once appointed, another of same kindred, have, during the life of the administrator, no

(u) Chittenden v. Knight, 2 Cas. temp. Lee, 559. The rule that males are to be preferred to females is not so stringent as the rule that the grant will follow the majority of interests : *Iredale v. Ford*, 1 Sw. & Tr. 305. Again the former rule may be met by another rule, viz., that the grant will be made *priori petenti* : *Cordeux v. Trasler*, 34 L. J., P. M. & A. 127.

(x) Williams v. Wilkins, 2 Phillim. 100.

(y) Webb v. Needham, 1 Add. 494.

(z) Bell v. Timiswood, 2 Phillim. 22.

(a) In the Goods of Turner, 12 P. D. 18.

(b) In the Goods of Hastings, 4 P. D. 73.

(c) Warwick v. Greville, 1 Phillim. 126. Stanley v. Bernes, 1 Hagg. 222.

In the Goods of Nayler, 2 Robert. 409. *Ante*, p. \*350, note (y).

(d) Bell v. Timiswood, 2 Phillim. 22.

title to a similar grant; so different in this case from that of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, "*qui prior est tempore potior est jure*," applies in the former but not in the latter \*instance (e). But a next of kin who has even renounced may, upon the death of the party appointed administrator, come in and take administration *de bonis non* (f).

degree of kindred cannot come into the administration till the administrator is dead.

Where a person entitled to administration is resident in a foreign country,† the court will expect that due diligence shall be used to give him notice of the application, before it will grant administration to another party. Thus where the intestate died in the department of Oise, in France, leaving a widow resident there, and application was made for administration by the next of kin, the court held, that service of the decree in the then usual manner on the Royal Exchange was insufficient (g).

Where a party entitled to administration is resident abroad.

If the intestate left personal property, as well in the colonies as in this country, the grant of administration obtained here will not extend to the colonies, though the intestate died and was resident here (h). So a defendant who had been arrested in Ireland, by a writ of *ne exeat regno* issued out of chancery there, for a debt due to an intestate, was discharged, on the ground that the plaintiff had not obtained administration in that country (i).

Administration of property out of this country.

In the case of a foreigner dying intestate within the British dominions, it should seem, that if no question is raised, the court will grant administration to the person entitled to the effects of the deceased, according to the law of his own country (k). If the legal title be disputed, the question will

Administration of the effects of a foreigner.

(e) Toller, 98.

(f) Skeffington v. White, 1 Hagg. 700, 702, 703.

† See American note at end of this section.

(g) Goddard v. Cressonier, 3 Phillim. 637. The same, where the next of kin is resident in the West Indies: Miller v. Washington, 3 Hagg. 277. As to the present practice of service of citations, see *post*, p. \*379.

(h) Burn v. Cole, Ambl. 416. Atkins v. Smith, 2 Atk. 63, by Lord Hard-

wicke. But the *rights* of such an administrator will extend to the property there, if the deceased was domiciled here: and the judge of probate in the colonies ought to follow the English grant. See *ante*, p. \*302.

(i) Swift v. Swift, 1 Ball & Beat. 326.

(k) In the Goods of Beggia, 1 Add. 340. In the Goods of the Countess Da Cunha, 1 Hagg. 237. Administration of the effects of a deceased, who died domiciled in Scotland, was granted to a party entitled to them according to

\*depend on the fact whether the deceased was domiciled within the British dominions, or only a temporary resident there (*l*).

If the intestate was domiciled in a foreign country,† or within the king's dominions out of England, and left assets in this country, administration must be taken out here, as well as in the country of domicile (*m*). But if he left no assets in this country, the Court of Probate has no jurisdiction to make any grant of administration in respect of his estate (*n*). If the party applying for administration here has already obtained a grant in the proper court of the country where the domicile was, it should seem that the court here, generally speaking, would follow that grant (*o*): But if an original administration be applied for here, in such case, whether the deceased were a British subject, or an alien, since, in either event, the distribution of his personal property is to be regulated according to the law of the country in which he was a domiciled inhabitant at the time of his death (*p*), it appears \*to be a necessary consequence that the grant should be made to the person entitled to the effects of the deceased according to the law of that country (*q*).

the Scotch law, on proof of the law by affidavit from a Scotch solicitor: In the Goods of Stewart, 1 Curt. 904. See also In the Goods of Hill, L. R. 2 P. & D. 89. The regular course seems to be that the ambassador should certify the law of the country he represents: In the Goods of Dormoy, 3 Hagg. 767.

(*l*) 1 Add. 342. And see *ante*, p. \*302, *et seq.*, and *infra*, Pt. III. Bk. IV. Ch. I. § V. Where a party applies for administration, as the agent of a foreigner resident abroad, and entitled to administration, the application cannot be supported, without exhibiting to the court a proper authority from the person so entitled: In the Goods of the Elector of Hesse, 1 Hagg. 93.

† See American note at end of this Section.

(*m*) See *ante*, p. \*298. *Le Briton v. Le Quesne*, 2 Cas. temp. Lee, 261. *Attorney-General v. Bouwens*, 4 Mees. & W. 193.

(*n*) In the Goods of Tucker, 3 Sw. & Tr. 585. *Evans v. Burrell*, 28 L. J., P. & M. 82. In the Goods of Fittock, 32 L. J., P. & M. 157. See also In the Goods of Coode, L. R. 1 P. & D. 449.

(*o*) See *ante*, p. \*305. *Viesca v. D'Aramburu*, 2 Curt. 277. In the Goods of Rogerson, 2 Curt. 656. In the Goods of Henderson, 2 Robert. 144. As to whether the court will grant administration limited to the pendency of a suit in the foreign court to a person duly appointed by that court, see In the Goods of Morgan, 2 Robert. 415.

(*p*) See *post*, Pt. III. Bk. IV. Ch. I. § V.

(*q*) See In the Goods of Johnston, 4 Hagg. 182. But see also In the Goods of Veiga, 3 Sw. & Tr. 13. But administration of the effects of a domiciled American dying in this country, *in itinere*, limited to the purpose of paying his debts, &c., and transmitting the balance to the Treasury of the United States, was refused to the Amer-

By stat. 24 & 25 Vict. c. 121, s. 4, "Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette, it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul or consular agent of such foreign state, within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul or consular agent shall immediately apply for and shall be entitled to obtain from the proper Court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such Court shall seem fit."

Stat. 24 & 25 Vict. c. 121, s. 4.

When subjects of foreign states shall die in her Majesty's dominions and there shall be no person to administer to their estates, the consuls of such foreign states may administer.

It may here be remarked, that although it is fully settled \*(as there will hereafter be occasion to show) (r), that the right of succession to the personal estate of an intestate is to be regulated by the law of the country in which he was domiciled at the time of his death, yet the administration of the estate must be in the country in which possession of it is taken and held under lawful authority.† Thus, by the law of England, the person to whom administration is granted by the Court of Probate is by statute bound to administer the estate, and to pay the debts of the deceased: The letters of administration, under which he acts, direct him to do so, and he takes an oath that he will well and truly administer all and

Rights and liabilities of foreign administrators.

ican consul, the crown opposing the grant, though none of the next of kin appeared to show cause against it: *Aspinwall v. The Queen's Proctor*, 2 Curt. 241. See *In the Goods of Wyckoff*, 3 Sw. & Tr. 20. The law of this country will not, it should seem, recognize the right of a foreign consul to

take possession of the property of a foreigner dying here, *in itinere*, domiciled in his own country: 2 Curt. 247. See stat. 24 & 25 Vict. c. 121, s. 4. *supra*.

(r) *Post*, Pt. III. Bk. IV. Ch. I. § V.

† See American note at end of this Section.

every the goods of the deceased, and pay his debts so far as his goods will extend, and exhibit a full and true account of his administration : And these duties remain the same, notwithstanding the intestate may have died domiciled elsewhere.—Accordingly, in *Preston v. Lord Melville* (s), the persons named as trustees and executors in the will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in England from the proper ecclesiastical court there, and afterward consented to the appointment, by the Court of Session of Scotland, of other persons as trustees and executors in place of those named in the will, with all the powers that had been thereby given to them : These trustees so appointed raised an action in the Court of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, and offering her a full release from liability ; and it was held by the House of Lords (reversing the decree of the Court of Session), that the personal estate in England must be administered there by the administratrix, by virtue of the letters of administration (t).

\*Again, with respect to all the property of which the intestate died possessed in the queen's dominions out of England, the administrator, under the letters granted there, has, it should seem, a right to hold it against an administrator under a grant obtained in this country. Thus in *Currie v. Bircham* (u), the widow of an officer who died intestate in India obtained letters of administration of her husband's effects in the recorder's court at Bombay, and remitted the proceeds of the effects in government bills to her agent in England : A creditor of the intestate took out letters of administration to him in this country, and brought an action against the widow's agent for money in his hands, part of such proceeds so remitted : It was held that the wife was entitled to all the effects of which the husband died possessed in India, by virtue of the letters of administration granted to her in that country, and that therefore no action lay against her agent

(s) 8 Cl. & Fin. 1.

(t) See *Accord. per* Lord Cranworth in *Enohin v. Wylie*, 10 H. of L. 19. See also Lord St. Leonards' observations on this case in the *Carron Iron Company v. Maclaren*, 5 H. of L. 456. *Stirling Maxwell v. Cartwright*, 9 C. D. 173 ; 11 C. D. 522. *Eames v. Hacon*, 16 C. D. 407 ; 18 C. D. 347. *Ewing v. Orr-*

*Ewing*, 9 App. Cas. 34 ; 10 App. Cas. 453. But the principal administrator, that is to say, the administrator in the country of the domicil, is entitled to call on all limited administrators to pay over the net surplus. See *Eames v. Hacon* (*ubi sup.*)

(u) 1 Dowl. & Ryl. 35.

at the suit of the plaintiff, under the letters he had obtained in the Prerogative Court here (x). However, in *Hervey v. Fitzpatrick* (y), it was held by Wood, V.-C., that where the foreign administrator remits a part of the assets to England to be sold and the proceeds to be carried to the account of the intestate's estate, and comes himself to this country, he may be sued in a court of equity here by a next of kin of the deceased, who has taken out administration here, in respect of those assets: and that the court has a right to deal with them, and to appoint a receiver, if there is danger of their being taken out of the jurisdiction.

If a bastard, who, as *nullius filius* has no kindred, or any other person having no kindred, die intestate, and without wife or child, it has formerly been holden, that the Ordinary \*could seize his goods, and dispose of them to pious uses; but it is now settled that the king is entitled to them as *ultimus hæres* (z), not in a fiduciary character but beneficially (a); subject, nevertheless, to the debts of the intestate (b). Yet in such case it is the practice to transfer the royal claim by letters patent, or other authority, from the crown, with a reservation, as it is said, of a tenth, or other small proportion of the property, and then the court of course grants to such appointee the administration (c). It has indeed been asserted, that such letters patent are merely in the nature of a recommendation; and that though it be usual for the court to admit such patentee, yet it is rather out of respect to the king, than strictly of right (d). But if the court chose to grant administration to any other person, the right of the crown would remain the same. The administrator, whoever he might be, would be a trustee for the crown (e).

Where a bastard or other person having no kindred dies intestate,

(x) See also *Jauncey v. Sealey*, 1 Vern. 397. Story's Conf. of Laws, Ch. xiii. s. 518. *Ante*, p. \*296, *et seq.*

(y) *Kay*, 421.

(z) *Jones v. Goodchild*, 3 P. Wms. 33. *Rutherford v. Maule*, 4 Hagg. 213. *Dyke v. Walford*, 5 Moo. P. C. 434. In this last case it was held that the right of administration to the goods of a bastard, who died intestate and unmarried, in the county of Lancaster, belonged to the queen in right of her Duchy of Lancaster and not in right of her crown.

(a) *Kane v. Reynolds*, 4 De G. M. & G. 571, by Lord Cranworth.

(b) *Megit v. Johnson*, 2 Dougl. 548, by Lord Mansfield.

(c) *Stote v. Tyndall*, 2 Cas. temp. Lee, 394.

(d) *Manning v. Knapp*, 1 Salk. 37.

(e) 5 Moo. P. C. 495. Where a case is not within the Statutes of Administration, the court, in the exercise of its discretion, usually grants the administration to the interest. See *post*, Ch. III. § I. p. \*400.

leaving a widow but no children, the widow is not entitled to the whole of his personal estate, but to one moiety only, and the crown is entitled to the other (*f*).

Where a bastard having no relations makes a will disposing of a part only of his or her property, the crown has a right to a grant, save and except, or to a *cæterorum* grant, but not to a general grant of administration, and the legatees have a right to a grant of administration with the will annexed limited to the property disposed of by the will (*g*).

Where bastard without relations disposes by will of part only of his property.

By stat. 39 & 40 Vict. c. 18, The Treasury Solicitor Act, 1876 [which by sect. 9 repeals the former statute, 15 Vict. c. 3], the Treasury solicitor is constituted a corporation sole with certain powers and liabilities (sect. 1).

Stat. 39 & 40 Vict. c. 18, s. 1.

Where the crown becomes entitled to the personal estate of an Administration where crown entitled to personal estate of intestate. intestate, and the court has power to grant administration to a nominee of the crown, and where the crown nominates for that purpose the Treasury solicitor, the court may grant administration for the use of the crown to the Treasury solicitor (by his official name) and his successors, or to some person nominated by the Treasury solicitor (sect. 2).

The administration, when granted to the Treasury solicitor, and the office of administration under such grant, and all the estate, rights, duties, and liabilities of such administrator vest in and are imposed on the Treasury solicitor for the time being without any further grant of administration (*Ib.*).

The Treasury solicitor may be nominated as administrator either in any particular case or class of cases, or in all cases, and such nomination may be limited as to her Majesty may seem fit, and the Treasury solicitor may be authorized to nominate some other person to take out administration in any particular case or class of cases.

The Treasury solicitor notwithstanding that he does not give the bond which, if such administration were granted to him as a private individual, he would be required by law to give, is subject as regards the administration to the liabilities and duties imposed by such bond (*Ib.*).

(*f*) *Cave v. Roberts*, 8 Sim. 214. But it should be noticed that in all cases where an intestate dies after 1st September, 1890, the provisions of the Intestates Estates Act, 1890, 53 & 54 Vict. c. 29, apply, and the widow in the case of estates under £500 takes

the whole to the exclusion of the crown and in the case of estates over £500 a charge for £500 in addition to her share of the residue.

(*g*) In the Goods of Rhoades, L. R. 1 P. & D. 119.



Section 4 deals with the disposal of money and property received under an administration or forfeiture, and of unclaimed grants. sect. 4.

Section 5 provides for the making of rules by the Treasury. sect. 5.

\*Section 6 applies the act to previous administrations, &c. sect. 6.

Section 9 (1) provides for the re-enactment of sect. 2 of stat. 15 & 16 Vict. c. 3 (repealed as above stated) viz., that "where the administration of the personal estate of any deceased person has been granted to the Solicitor for the affairs of Her Majesty's Duchy of Lancaster, for the use of Her Majesty, that solicitor shall, notwithstanding that he does not give the bond which, if such administration had been granted to him as a private individual, he would be required by law to give, be subject, as regards the administration, to the liabilities and duties imposed by such bond." sect. 9 (1).

Where a person died in Cornwall intestate without known relations, the court granted letters of administration of his estate for the use of H. R. H. the Prince of Wales as Duke of Cornwall, but without prejudice to the rights of the crown (*h*).

By the Intestates Estates Act, 1884, "where the administration of the personal estate of any deceased person is granted to a nominee of Her Majesty (whether the Treasury Solicitor or a person nominated by the Treasury Solicitor, or any other person) any action or proceeding by or against such nominee for the recovery of the personal estate of such deceased person, or any share thereof, shall be of the same character, and be brought, instituted, and carried on in the same manner, and be subject to the same rules of law and equity (including the rules of limitation under the Statutes of Limitation or otherwise) in all respects as if the administration had been granted to such nominee as one of the next of kin of such deceased person" (sect. 2). Intestates Act,  
1884, 47 & 48 Vict.  
c. 71, s. 2.

Section 3 enacts that "after the passing of this Act an information or other proceeding on the part of Her Majesty shall not be filed or instituted, and a petition of right shall not be presented in respect of the personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject." sect. 3.

(*h*) Solicitor of the Duchy of Cornwall *v.* Canning, 5 P. D. 114.

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\*Section 4 enacts that “from and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditaments, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments.”

Section 5 gives to the court a power of sale of the interest of the crown in any hereditament corporeal or incorporeal, and directs that the proceeds of such sale shall be paid, invested, and disposed of in manner provided by sect. 4 of the Treasury Solicitor Act, 1876.

15 & 16 Vict. c. 55, s. 1. It further applies the provisions of sect. 1 of the Trustee Act, 1850, to such sale.

Section 6 gives to the crown power to waive its right to the real estate of an intestate in certain cases.

Section 7 defines an intestacy for the purposes of the act as “where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person was legal or equitable, is, owing to the failure of the objects of the devise or other circumstances happening before or after the death of such person in whole or in part not effectually disposed of, such person shall be deemed to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of.”

Section 8 applies the act to the Duchy of Lancaster.

Section 9 applies the act to Ireland.

In the case of a felon convict, and of a *felo de se*, the law of forfeiture being abolished by stat. 33 & 34 Vict. c. 23, s. 1, administration is now no longer granted as formerly to a nominee of the crown, but follows the ordinary course of the law of succession *ab intestato*.

It has always been considered, both in the common law and spiritual courts, that the object of the statutes of administration (31 Edw. III. c. 11, and 21 Hen. VIII. c. 5) is to \*give the management of the property to the person who has the beneficial interest in it (*k*). And the inclination has been so strong to effectuate this object, by granting the administration to the interest that, in some instances, not only the practice of

(*k*) *Wetdrill v. Wright*, 2 Phillim. 248.

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the ecclesiastical court, but the decisions of the judges delegate, have not scrupled to disregard the express words of the statute (*l*). Thus in *Bridges v. The Duke of Newcastle* (Delegates, 1712), Lord Hollis died intestate, and Bridges claimed administration as next of kin : The effects were vested by Act of Parliament in the Duke of Newcastle, to pay the debts of the deceased : the judge of the Prerogative Court (Sir Charles Hedges) and afterward the delegates, held that the next of kin was excluded, on the ground that he had no interest, and granted administration to the Duke of Newcastle (*m*). So in *Young v. Pierce* (*n*), administration was refused by the prerogative and the delegates to a next of kin, on the ground that she had released all her interest, and the letters were granted to the party beneficially entitled to the personal estate (*o*). Another strong instance will be found in the next section, with respect to administration *cum testamento annexo* : in granting which, it has been established by the decisions both of common lawyers and civilians, contrary to the words of the act, that the next of kin is to be excluded from the administration when there is a residuary legatee who desires it.

Again, the statutes of administration (31 Edw. III. c. 11, and 21 Hen. VIII. c. 5) provide that the Ordinary shall grant administration to the next of kin, or the widow, or to both : and therefore these parties have a statutory right to the administration. But the obligation of the statutes has, in \*several adjudged cases, as well as in practice, been considered to extend only to such persons as are next of kin *at the time of the intestate's death* (*p*) ; and therefore the court is not bound to grant administration to one who is not entitled to a beneficial interest in the effects, although by the death of intermediate persons, he may have become next of kin at the time the grant is required. Accordingly it was the established practice and course of the Prerogative Office, that if all those who were next of kin at the time of the death of the intestate are dead, then the representative of such next of kin, being entitled to the beneficial interest, is also entitled to the administration,

If the next of kin die before administration granted, his representative is entitled to it.

(*l*) See the judgment of Lord Cottenham, in *Withy v. Mangles*, 10 Cl. & Fin. 248 : *Accord*.

(*m*) Cited by the court in *West v. Willby*, 3. Phillim. 381.

(*n*) 1 Freem. 496.

(*o*) This was a case of administration *de bonis non* : but it will appear in a subsequent section, that, with respect to

the obligation of the statute, there is no difference between an administration *de bonis non* and an original administration.

(*p*) *Savage v. Blythe*, 2 Hagg. Appendix, 150. *Almes v. Almes*, *ibid*. 155 ; and see the observations of the learned reporter, *ibid* p. 156.

whether original or *de bonis non*: with this limitation, however, in both cases, that a person originally in distribution is preferred to the representative of the next of kin (*q*).

But it is no defense to an action brought by such representative, as administrator to the original intestate, against a debtor to his estate, that the defendant paid the debt in question to the next of kin, who died without taking out letters of administration (*r*).

A next of kin cannot be compelled to take out administration, though he has intermeddled with the effects.

There is a distinction between a person appointed executor, and one entitled to the administration as next of kin, with respect to the obligatory consequences of administering the goods of the deceased: An executor, it has been shown, after an act of administration, cannot refuse to accept the executorship, and take probate (*s*): but although a next of kin may have intermeddled with the effects, and made himself liable as executor *de son tort*, he cannot be compelled by the court to take upon himself the office of administrator (*t*).

\*Administration may be granted to the attorney of all the next of kin, provided they reside out of the country; and if the effects are under twenty pounds, such administration may be granted whether they are so resident or not (*u*). By rule 32, P. R. 1862 (non-contentious), "In the case of a person residing out of England, administration, or administration with the Will annexed, may be granted to his attorney acting under a power of attorney." But where a person solely entitled to the grant is resident in this country, and able to take it himself, the court will decline to decree it to his attorney, for his use and benefit (*x*).

On one occasion the court granted, to the agent of the Elector of Hesse, an administration limited to substantiate proceedings in chancery respecting a debt due to the late elector; but declined to

(*q*) 2 Hagg. Appendix, 157.

(*r*) *Mitchell v. Moorman*, 1 Young & Jerv. 21; *Mitchell v. Holmes*, L. R. 8 Ex. 119: and it shall make no difference, though the grant of administration to the plaintiff be, in its terms, of the goods, &c., "*left unadministered*" by the next of kin: *Mitchell v. Moorman*, *ubi sup*.

(*s*) *Ante*, p. \*227.

(*t*) *Ackerley v. Oldham*, 1 Phillim.

248. *Ackerley v. Parkinson*, 3 M. & S.

411. In the Goods of Fell, 2 Sw. & Tr. 126.

(*u*) Toller, 108. As to what shall constitute a proper authority to apply for the grant, as the attorney of the party entitled to it, see *Lucas v. Lucas*, 3 Cas. temp. Lee, 576. In the Goods of Reitz, 3 Hagg. 766. In the Goods of Elderton, 4 Hagg. 210.

(*x*) In the Goods of Burch, 2 Sw. & Tr. 139.

extend the administration to the receipt of the debt, without a power of attorney from the proper authorities (y).

Where letters of administration are granted to persons under a power of attorney from the party entitled to the representation, the letters express that they are granted "for the use and benefit" of the latter (z). But these words do not exclude the claim of other persons to share in the personal estate (a). It was, indeed, held, in the case of *De la Viesca v. Lubbock* (b), that where administration has been \*granted to the attorney of a person abroad for the use and benefit of that person, the latter may sue the administrator in this country without making the parties beneficially interested parties to the suit, and without taking out letters of administration in this country; for that as the letters were expressly granted to the administrator as the attorney of the party abroad, he might safely pay over to that party the moneys received under the authority of the letters. However, in the subsequent case of *Chambers v. Bicknell* (c), it was held that such an administrator is liable to be sued, in respect of the estate of the intestate, by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right (d).

The general rule is, that where a person is authorized by a simple power of attorney to take out administration, the court ought to decree him such administration as it would have granted to the person who conferred the power, if he had applied for it himself (e).

If the attorney be resident out of the jurisdiction, the sureties to the bond must be resident within the kingdom (f).

(y) In the Goods of the Elector of Hesse, 1 Hagg. 93; see also In the Goods of Beggia, 3 Add. 340.

(z) The form of such letters will be found at full length in 10 Sim. 629. 2 Hare, 537, note (a). See also In the Goods of Cassidy, 4 Hagg. 360. *Post*, p. \*407.

(a) *Anstruther v. Chalmers*, 2 Sim. 5.

(b) 10 Sim. 629. The case of *De la Viesca v. Lubbock* was approved by Jessel, M. R., in *Eames v. Hacon*, 18 C. D. 347, 352, in the argument of which case, *Chambers v. Bicknell*, and *Att.-Gen. v. Kohler* (*ubi infr.*), were cited, but, as pointed out by Jessel, M. R., in his judgment, it does not follow because such an administrator is liable to be sued

by the next of kin that he cannot, when he has not been sued, hand over the money to the person for whose use and benefit the letters were granted. The two propositions are not correlative.

(c) 2 Hare, 536.

(d) See also *Accord*. Re *Dewel*, *Edgar v. Reynolds*, 4 Drew. 269. *Attorney-General v. Kohler*, 9 H. of L. 654.

(e) In the Goods of *Goldsborough*, 1 Sw. & Tr. 295.

(f) In the Goods of *Leeson*, 1 Sw. & Tr. 463. But see In the Goods of *Reed*, 3 Sw. & Tr. 439, in which case the court accepted sureties resident in Jersey where the person to whom a limited grant of administration was made was resident without the jurisdic-

If none of the next of kin will take out administration a creditor may,† by custom, do it (*g*) : on the single ground \*that he cannot be paid his debt until representation to the deceased is made (*h*) ; and therefore administration is only granted to him, failing every other representative (*i*). So letters of administration may be granted to the executors of a creditor (*k*).

It was decided that a creditor is entitled to a grant of administration, although his right of action is barred by the Statute of Limitations, but the court made it a condition that he should give a bond to distribute the estate, rateably and without preference of his own debt (*l*) : and it is now the practice that a creditor on taking out administration must in all cases, whether other creditors are present or not to make objection, enter into a bond conditional to administer the estate rateably amongst the creditors of the deceased (*m*).

The necessary course is, when a creditor applies for administration to issue a citation for the next of kin in particular, and all others in general, to accept or refuse letters of administration, or show cause why administration should not be granted to such creditor (*n*). In point of practice it is not uncommon, upon a decree issuing to show cause why administration should not be committed to A. B., a creditor, to substitute C. D.

tion, and was unable to procure justifying sureties within the jurisdiction. See also *In the Goods of Ballingal*, *ib.* 441. *Post*, Pt. I. Bk. V. Ch. IV.

† See American note at end of this section.

(*g*) 2 Black. Comm. 505. He has no right to the administration except by the practice of the court. He is the appointee of the court : And if circumstances showed that the creditor was not a proper person, *non constat* that the court might not appoint another : *Menzies v. Pulbrook*, 2 Curt. 850.

(*h*) *Elme v. Da Costa*, 1 Phillim. 177.

(*i*) *Webb v. Needham*, 1 Add. 494. A creditor cannot deny an interest or oppose a will : *Dabbs v. Chisman*, 1 Phillim. 159. *Elme v. Da Costa*, 1 Phillim. 177. *Menzies v. Pulbrook*, 2 Curt. 845. *Ante*, p. \*280, *post*, p. \*382.

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(*k*) *Jones v. Beytagh*, 3 Phillim. 635. The husband of a woman, who before marriage has partly administered as a creditor, on her death is not entitled in his own right as creditor, but only as representative of his wife. In the *Goods of Risdon*, L. R. 1 P. & D. 637.

(*l*) *Coombs v. Coombs*, L. R. 1 P. & D. 288.

(*m*) In the *Goods of Brackenbury*, 2 P. D. 272.

(*n*) Whenever a party has a right to the administration, the court always requires that he should be cited or consent : In the *Goods of Barker*, 1 Curt. 592. A creditor may cite the next of kin although his right of action is barred by the Statute of Limitations. In the *Goods of Coombs*, L. R. 1 P. & D. 193.

another creditor, on the day assigned for the appearance of the parties interested, and to \*suffer administration to pass to C. D., though not the person in whose name the decree originally went (*o*). The next of kin may appear to the citation, and will then be preferred to the creditor; but if the next of kin has unduly delayed to take out administration (as where six months elapse from the death of the intestate), the creditor will be allowed his costs (*p*). If there are no next of kin, as in the case of an intestate bastard, notice of the application for letters of administration must be given to her Majesty's Procurator General (*q*).

Citations must be served personally, when that can be done, by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do. If a citation cannot be served personally, it must be served by insertion of the same, or of an abstract settled and signed by one of the registrars of the court, as an advertisement in such morning and evening London newspapers and such local newspapers and at such intervals as the judge or registrar may direct (*r*).

citation must be personally served if possible :

if not possible, by advertisement in newspapers :

The court does sometimes grant administration to more creditors than one, but it prefers that one should be fixed upon (*s*).

Before granting letters of administration to a creditor, the court always requires an affidavit as to the amount of the property to be administered : unless where there has been a personal service of the usual citation on the parties entitled to the administration in the first instance (*t*). An affidavit \*is also necessary of the amount of the debt, and that the creditor has no other security (*u*) ; and also of the time the debt became due, in order that it may be seen that the debt is not barred by the Statute of Limitations (*x*).

one creditor preferred to the rest upon terms :

affidavit of the amount of property, &c. :

(*o*) Talbot *v.* Andrews, 1 Hagg. 697. Andrews *v.* Murphy, 30 L. J., P. & M. 37.

(*p*) Cole *v.* Rea, 2 Phillim. 428. See Jones *v.* Beytagh, 3 Phillim. 635.

(*q*) See rule 75, P. R. 1862 (non-contentious).

(*r*) Rules 69 and 70, P. R. 1862 (non-contentious).

(*s*) Harrison *v.* All persons in general, 2 Phillim. 249. See as to the preference of one creditor to another, by

reason of the superior nature, or larger amount of the debt, Kearney *v.* Whitaker, 2 Cas. temp. Lee, 324. Carpenter *v.* Shelford, *ibid.* 502. As to the bond to be entered into, see In the Goods of Brackenbury, 2 P. D. 272, *ante*, p. \*378.

(*t*) Martineau *v.* Rede, 2 Add. 455. Briggs *v.* Roope, 29 L. J., P. & M. 96.

(*u*) Aitkin *v.* Ford, 3 Hagg. 193.

(*x*) Rawlinson *v.* Burnell, 3 Sw. & Tr. 479.

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The court will grant administration to a bond creditor, who has also a mortgage on the leasehold property : but if the grant were prayed by a mortgagee of real property, there might be a reason why the administration should not pass to him, because it would give him a priority, and exclude simple contract creditors (y).

A person who was joint assignee of the estate of a bankrupt with the deceased, out of which the latter had applied a sum of money to his own use, for which he had not accounted at the time of his death, is not a creditor to the estate of the deceased so as to be entitled to pray administration to him (z).

On one occasion (a) where a partner died leaving the partnership accounts unsettled, an eminent civilian (b), before whom a case was laid by the direction of Sir John Leach, V.-C., gave his opinion that a person to whom one of the surviving partners had assigned his share of the profits of the partnership had not such an interest in the effects of the deceased partner as would entitle him to be considered a creditor, and in that character to cite the next of kin to accept or refuse administration of his effects : but that the Ecclesiastical Court would grant a limited administration to a person nominated by him, for the purpose of substantiating proceedings in chancery, on the refusal of the next of kin after citation, and upon showing the necessity for such a representation.

It is the established practice of the Court of Probate to refuse to grant administration as creditor to a person who has bought up a debt after the death of the deceased (c).

But this practice is not inconsistent with a grant being made to a creditor of the party beneficially entitled to an interest in the estate of the deceased, who has

(y) *Roxburgh v. Lambert*, 2 Hagg. 557. But see now stat. 3 & 4 W. 4, c. 104. *Post*, Pt. IV. Bk. I. Ch. II. § I.

(z) *Snape v. Webb*, 2 Cas. temp. Lee, 411.

(a) *Cawthorn v. Chalie*, 2 Sim. & Stu. 129.

(b) Dr. Jenner.

(c) *Depit v. Dellerieuse*, 2 Sw. & Tr. 131. In the Goods of Coles, 3 Sw. & Tr. 181. S. C. *nomine* *Macnin v. Coles*, 33 L. J., P. M. & A. 175. *Day v. Thompson*, 3 Sw. & Tr. 169. *Downward v.*

*Dickinson*, 3 Sw. & Tr. 564. But where a creditor who had obtained administration of the estate of an intestate died a bankrupt, without having fully administered and leaving the debt due to himself still unsatisfied, and after his death his trustee in bankruptcy assigned the unsatisfied debt due to his estate from the intestate's estate to one of his creditors ; the court made a grant of administration *de bonis non* to such assignee limited to the interest in the intestate's estate which had been as-



assigned it, by way of mortgage or otherwise, to the parties seeking the grant (*d*).

It has been held, that a surety who, after the death of the principal, pays off the debt, is entitled to be regarded as a creditor of the estate of the deceased, so as to be entitled to pray administration to him (*e*).

*secus*, as to surety who has paid off debt after death of principal:

In the case of *Aitkin v. Ford* (*f*), administration, as to a creditor, was decreed to the mother of an intestate, who had been advanced by her; the father, though alive, having been divorced in the Commissary Court of Scotland, and married again. In *Hudleston v. Hudleston* (*g*), administration to the effects of a wife who had lived with her husband until her death, was granted to an antenuptial creditor of the wife (*h*).

When a creditor administrator has been duly appointed, \*the next of kin cannot, during his lifetime, take the administration from him: but upon his death they may come in, and claim administration *de bonis non* (*i*).

next of kin cannot oust a creditor administrator during his life:

Although, before administration granted, a creditor cannot deny an interest or oppose a will, yet, when he has obtained administration, he has a right to maintain it against the executor or the next of kin; and it is not to be revoked on mere suggestion (*k*). And where administration has been granted to a creditor, and a will is afterward produced, he is entitled to contest it in the same manner that the next of kin might have done, without being subject to costs (*l*).

a creditor in possession of administration may oppose an interest or contest a will.

For want as well of creditors, as of next of kin, desirous to take out

signed. In the Goods of *Burdett*, 1. P. D. 427. As to administration being granted to an undertaker as a creditor for funeral expenses, see *Newcome v. Beloe*, L. R. 1 P. & D. 314.

(*d*) In the Goods of *Godfrey*, 2 Sw. & Tr. 133; In the Goods of *Coles*, 3 Sw. & Tr. 181. *Downward v. Dickinson*, *ubi supra*: nor with a grant to the assignee of a creditor where he is assignee in bankruptcy, *ibid*.

(*e*) *Williams v. Jukes*, 34 L. J., P. & M. 60.

(*f*) 3 Hagg. 193.

(*g*) 2 Robert. 424.

(*h*) A decree had been personally

served on the husband, but no appearance was given.

(*i*) *Skeffington v. White*, 1 Hagg. 702, 703.

(*k*) *Elme v. Da Costa*, 1 Phillim. 173. *Menzies v. Pulbrook*, 2 Curt. 851. *Ante*, p. \*280. And he is not bound to bring in the administration till an admissible allegation has been brought in, either propounding a will, or propounding an interest: *Dabbs v. Chisman*, 1 Phillim. 159, 160.

(*l*) *Norman v. Bourne*, 1 Phillim. 160, note (*c*) to *Dabbs v. Chisman*, 2 Curt. 851. *Ante*, p. \*280, note (*l*).

administration, the court may grant it to any person at its discretion (*m*). In a case where the brother and only next of kin renounced, the court granted administration to the nephew, although he had no interest (*n*). Or the court may, *ex officio*, grant to a stranger letters *ad colligendum bona defuncti*, to gather up the goods of the \*deceased. When administration may be granted to a person without interest: letters *ad colligendum*. In a case, where a sole next of kin refused to take administration, the court decreed letters of administration to a person who had been her agent, limited "to the collection of all the personal property of the deceased, and giving discharges for the debts which might have been due to the estate on the payment of the same, and doing what further might be necessary for the preservation of the property aforesaid, and to the safe keeping of the same, to abide the directions of the Court" (*o*). So, in a subsequent case (*p*), the court, under special circumstances, made a grant to a creditor *ad colligendum bona*, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises, which would expire before a general grant could be made. But the court refused to include in the grant a power to dispose of the lease and good will of the business, or a power to carry on the business (*q*). Or the court may take the goods of the deceased into its own hands, to pay the debts of the deceased in such order as an executor or administrator ought to pay them; but he, or the

(*m*) See the judgment of Sir H. Jenner Fust, 1 Robert. 274, 275. In the Goods of Chanter, *Davis v. Chanter*, 14 Sim. 212. In a case where the widow and all the next of kin and persons entitled in distribution, having been cited, did not appear, the court made a general grant of administration to the receiver. In the Goods of Mayer, L. R. 3 P. & D. 39. Where the sole next of kin of an intestate was a lunatic, her committee having renounced, a stranger in blood applied for a grant of administration. The court, upon the consent of the next of kin of the lunatic being filed, ordered the grant to be made, the Master in Lunacy and the next of kin of the lunatic approving of the application. In the Goods of Hastings, 4 P. D. 73. And see stat. 20 & 21 Vict. c. 77, s. 73, *post*, p. \*384.

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(*n*) In the Goods of Keane, 1 Hagg. 692. See also In the Goods of Blagrove, 2 Hagg. 83. In the Goods of Johnson, 2 Sw. & Tr. 595. But see In the Goods of Allen, 3 Sw. & Tr. 559.

(*o*) In the Goods of Radnall, 2 Add. 232. Where it is for the benefit of the absent or unknown next of kin the court will direct an administrator *ad colligenda bona* to dispose of the property or of any portion of it by sale. In the Goods of Schwerdtfeger, 1 P. D. 424.

(*p*) In the Goods of Clarkington, 2 Sw. & Tr. 380. In the Goods of Ashley, 15 P. D. 120.

(*q*) See also In the Goods of Wyckhoff, 3 Sw. & Tr. 20, where a similar grant was made under the 73rd section of the Court of Probate Act, 1857, *infra*.

stranger who has letters *ad colligendum*, cannot sell them without making themselves executors of their own wrong : The court has only an authority, and no such power itself, and therefore it cannot give that power to any other (*r*).

The power of the court in making grants of administration, and in deciding to whom they should be granted, has been much enlarged by the 73rd section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77). 20 & 21 Vict. c. 77, s. 73.

\*It is thereby enacted, that “where a person has died or shall die wholly intestate as to his personal estate, or leaving a Will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof ; but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit” (*s*).

where a person shall die intestate or without an executor willing and competent to take probate :

or where the executor is resident out of the United Kingdom :

if it shall appear to be necessary, the court may appoint a person administrator who would not be otherwise entitled to the grant :

on giving security, and limited as the court shall think fit.

(*r*) 11 Vin. Abr. 87, Exors. (K.) pl. 19.

(*s*) The court will not make a grant under this section, unless there are special circumstances to justify it : In the Goods of White, S. W. & Tr. 457. It cannot pass over an executor by reason only of his bad character : he must also be resident out of the United Kingdom. In the Goods of Samson, L. R. 3 P. & D. 48. In order to satisfy the court that it is “ necessary and con-

venient” that the extraordinary power given by the section should be used by the court, a general statement that “ it is necessary for the preservation of the personal estate and effects of the deceased that the grant should be made ” is not sufficient : In the Goods of Cooke, 1 Sw. & Tr. 267. In the Goods of Bateman, L. R. 2 P. & D. 242. In the following cases, where the court has thought that the circumstances have warranted such a grant, it has been

\*By rule 31, P. R. (non-contentious), "whenever the Court, under sect. 73, appoints an administrator other than the \*person who, prior to the Court of Probate Act, 1857, would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration and in the administration bond."

Rule 31, P. R.  
(non-contentious).

made: i. To a *creditor*. In the Goods of Fraser, L. R. 1 P. & D. 327. In the Goods of Farrands, 1 P. D. 439. In the Goods of Wensley, 7 P. D. 13. ii. To a *trustee of the marriage settlement of the sole next of kin*. In the Goods of Maychell, 4 P. D. 74. iii. To the *trustee appointed by the will*. In the Goods of Cosnahan, L. R. 1 P. & D. 183. In the Goods of Stewart, 3 P. & D. 244. iv. To the *trustee in bankruptcy of sole next of kin*. In the Goods of Turner, 12 P. D. 18. v. To the *nominee of a married woman*, on the objection by her husband to her taking probate or administration. In the Goods of Warren, L. R. 1 P. & D. 538; *Clerke v. Clerke*, 6 P. D. 103. vi. To the *nominee of a married woman*, residuary legatee, without notice to husband. In the Goods of Pine, L. R. 1 P. & D. 388. vii. To the *guardians of minors*. In the Goods of Hagger, 3 Sw. & Tr. 65. In the Goods of Burgess, 4 Sw. & Tr. 188. In the Goods of See, 4 P. D. 86. In the Goods of Batteredbee, 14 P. D. 39. viii. To a *residuary legatee test. annex*. In the Goods of Sawtell, 2 Sw. & Tr. 448. ix. To the *executor under a foreign will*. In the Goods of Earl, L. R. 1 P. & D. 450. x To a *sister of the intestate*; limited until next of kin should apply for administration. In the Goods of Chollwill, L. R. 1 P. & D. 192. xi. To a *sister of the intestate*; passing over the mother who was willing to renounce. In the Goods of Llanwarne, L. R. 1 P. & D. 306. xii. To a *sister of the intestate*; without taking out personal representation to the father, who also had died intestate. In the Goods of Peck,

2 Sw. & Tr. 506. xiii. To the *father-in-law of the sole next of kin* in Australia. In the Goods of Jones, 1 Sw. & Tr. 13. xiv. To a *mother*; without requiring her to take out administration to the father. In the Goods of Smith, 2 Sw. & Tr. 508. xv. To the *stepmother*; for the use and benefit of the sole next of kin, a lunatic without committee. In the Goods of Burrell, 1 Sw. & Tr. 64. xvi. To a *cousin*; (limited to carry out certain directions contained in a letter). In the Goods of Drinkwater, 2 Sw. & Tr. 611. xvii. To a *cousin*; for the use and benefit of an aged aunt and uncle, the only persons entitled to distribution. In the Goods of Roberts, 1 Sw. & Tr. 64. xviii. To the *guardians of the poor*; limited during the lunacy of the sole next of kin, a pauper lunatic. In the Goods of Findlay, 3 Sw. & Tr. 265. In the Goods of Eccles, 15 P. D. 1. xix. To the *attorney in England of the next of kin abroad*; it being unknown when he would return. In the Goods of Escot, 4 Sw. & Tr. 186. xx. To the *next of kin and to a person entitled in distribution—jointly*; there being special circumstances rendering a joint grant convenient. In the Goods of Grundy, L. R. 1 P. & D. 559. xxi. To a *stranger*; no next of kin or creditor being willing, or able, to take the grant. In the Goods of Bateman, L. R. 2 P. & D. 242. xxii. To a *stranger*; there being doubt as to the legitimacy of the sole next of kin. In the Goods of Hopkins, L. R. 3 P. & D. 235. xxiii. To a *person applying in pursuance of an agreement to divide the estate*; where doubts had arisen as to the legitimacy of the person claiming to be next of kin.

In concluding this subject, it may be expedient to advert to an established rule of the Ecclesiastical Court, *viz.*, that wherever a party has a prior right to administer, the court requires that he should be cited or consent, before it will grant administration to any other person. And the rule will not be relaxed, notwithstanding the party who has the right has no interest in the property in respect of which the grant of administration is sought (*t*). But in cases where the court has a discretion, *viz.*, in cases where the party entitled in priority is so entitled by the practice of <sup>\*the court</sup>, and not by statute, the court will sometimes dispense with the citation or consent of the party having the prior claim (*u*).

Citation or consent of party having a prior right requisite before administration granted to another.

In the Goods of Minshull, 14 P. D. 151. xxiv. To the *partner of one of the executors of the will* who was mentioned by name in the will and was therein requested to act for such executor if he were absent at the time of the testator's death. In the Goods of Taylor [1892], P. 90. Generally the court will not grant administration under this section to a person entitled to a grant in another character, *e. g.*, as a creditor: In the Goods of Fairweather, 2 Sw. & Tr. 588. Nor to the nominee of the person entitled to the grant. *Teague v. Wharton*, L. R. 2 P. & D. 360. In the Goods of Hale, L. R. 3 P. & D. 207. But in *Farrell v. Brownbill*, 3 Sw. & Tr. 467, the court granted administration under this section, with the consent of all parties interested, to their nominee, who took no interest in the property himself. See also In the Goods of Clayton, 11 P. D. 76. But see In the Goods of Richardson, L. R. 2 P. & D. 244, in which it was held that the consent of all persons interested is not sufficient ground for departing from the general rules as to grants. The section is wholly inapplicable where there is no absence of persons entitled to administration and no insolvency: It would then be a mere arbitrary selection on the part of the court: *Haynes v. Matthews*, 1 Sw. & Tr. 460. The court will not exercise the power conferred on it

by the above action by passing over a person entitled to a grant of administration in favor of a creditor when the fact of the insolvency of the intestate is disputed: *Hawke v. Wedderburne*, L. R. 1 P. & D. 594: unless there is no next of kin competent to take administration: In the Goods of Farrands, 1 P. D. 439.

(*t*) In the Goods of Barker, 1 Curt. 592. In the Goods of Currey, 5 Notes of Cas. 54. When the next of kin is of unsound mind, the practice is that his next of kin must also be cited, in order that they may take administration for his use and benefit if they think proper: *Windeatt v. Sharland*, L. R. 2 P. & D. 217.

(*u*) In the Goods of Rogerson, 2 Curt. 656. In the Goods of Southmead, 3 Curt. 28. In the Goods of Widger, 3 Curt. 55. In the Goods of Burchmore, L. R. 3 P. & D. 139. In the Goods of Gardiner, 9 P. D. 66. In the Goods of Webb, 13 P. D. 71. The court granted administration to the sister of a bachelor intestate, upon a proxy of renunciation from the mother (a married woman) without her husband joining in it, she living separate from her husband, and all right to the estate and effects of the deceased having been conveyed to her under a deed of separation: In the Goods of Hardinge, 2 Curt. 640.

† The appointment of administrators is regulated in most of the United States by statute. The most circumstantial and complete are those of New York and Maryland. The *New York* statute (R. S. 8th ed., pt. ii. ch. vi. tit. 2) is as follows, after stating preferences of person :

“§ 28. When there shall be several persons of the same degree of kindred to the intestate entitled to administration, they shall be preferred in the following order ; First, males to females ; second, relatives of the whole blood to those of the half blood ; third, unmarried women to such as are married ; and when there are several persons equally entitled to administration, the surrogate may, in his discretion, grant letters to one or more of such persons.

“§ 29. A husband, as such, if otherwise competent according to law, shall be solely entitled to administration on the estate of his wife, and shall give bond as other persons, but shall be liable as administrator for the debts of his wife only to the extent of the assets received by him. If he shall not take out letters of administration on her estate, he shall be presumed to have assets in his hands sufficient to satisfy her debts, and shall be liable therefor ; and if he shall die leaving any assets of his wife unadministered, they shall pass to his executors or administrators as part of his personal estate, but shall be liable for her debts to her creditors in preference to the creditors of the husband.

“§ 33. If any person who would otherwise be entitled to letters of administration as next of kin, or to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons.

“§ 34. Administration may be granted

to one or more competent persons, although not entitled to the same, with the consent of the person entitled, to be joined with such person ; which consent shall be in writing, and be filed in the office of the surrogate.”

The *Maryland Code* (1888, Art. 93) provides :

“§ 18. If the intestate leave a widow and a child, or children, administration at the discretion of the court shall be granted either to the widow or child or one of the children.

“§ 19. If there be a widow and no child, the widow shall be preferred, and next to the widow or children, a grandchild shall be preferred.

“§ 20. If there be neither widow nor child nor grandchild, the father shall be preferred.

“§ 21. If there be neither widow nor child nor grandchild nor father, brothers and sisters shall be preferred, and next to brothers and sisters the mother shall be preferred.

“§ 22. If there be neither widow nor child nor grandchild nor father nor brother nor sister nor mother, the next of kin shall be preferred.

“§ 23. Males shall be preferred to females in equal degree of kin.

“§ 24. Relations of the whole blood shall be preferred to those of the half blood in equal degree, and relations of the half blood shall be preferred to relations of the whole blood in a remote degree.

“§ 25. Relations descending shall be preferred to relations ascending in the collateral line ; that is to say (for example), a nephew shall be preferred to an uncle.

“§ 26. None shall be preferred in the ascending line beyond a father or mother, or in the descending line below a grandchild.

“§ 27. A *feme sole* shall be preferred to a married woman in equal degree.

“§ 28. Where a female is entitled, ad-

ministration may be granted to her and her husband, provided he be capable.

“§ 29. Relations on the side of the father shall be preferred to relations on the side of the mother in equal degree.

“§ 30. If there be no relations, administration shall be granted to the largest creditor applying for the same.

“§ 31. If there shall be neither husband nor wife nor child nor grandchild nor father nor brother nor sister nor mother, or if these be incapable, or decline, or refuse to appear on proper summons or notice, or if other relations and creditors shall neglect to apply, administration may be granted at the discretion of the court.”

*Missouri* (1889 R. S. § 7) offers the model of a concise statute in these words: “Letters of administration shall be granted: First, to the husband or wife, and secondly to those who are entitled to distribution of the estate, or one or more of them, as the court or judge or clerk in vacation shall believe will best manage and preserve the estate.”

Administration is granted, first, to husband or widow, in *Alabama* (1886 Code, § 2014), *Arkansas* (1884 Dig. Stats. § 7), *California* (Code, C. P. § 1365, or his or her nominee), *Colorado* (1891 An. Stats. § 4696), *Connecticut* (1888 G. S. § 565), *Dakota* (1887, C. L. § 5705, or his or her nominee), *Delaware* (1874 R. C. c. 89, § 9, by implication), *Florida* (1892 R. S. § 1859), *Georgia* (1882 Code, § 2494), *Idaho* (1887 R. S. § 5351), *Illinois* (1891 R. S. c. 3, § 18), *Indiana* (1888 R. S. § 2227), *Iowa* (1888 R. C. § 2354), *Kansas* (1889 G. S. § 2796), *Kentucky* (1887 G. S. c. 39, § 3), *Maine* (1883 R. S. c. 64, § 17), *Maryland* (1888 P. G. L. Art. 93, § 18), *Massachusetts* (1882 P. S. c. 130, § 1), *Michigan* (1882 An. Stats. § 5849), *Minnesota* (1891 G. S. § 5683), *Mississippi* (1892 An. Code,

§ 1850), *Missouri* (1889 R. S. § 7), *Montana* (1887 C. S. p. 288, § 55), *Nebraska* (1893 C. S. c. 23, § 178), *Nevada* (1885 G. S. 2719), *New Hampshire* (1891 P. S. c. 188, § 2), *New Jersey* (1876 Rev. p. 758, § 28), *New York* (1889 R. S. 8th ed. p. 2552, § 27), *North Carolina* (1883 Code, § 1376), *Ohio* (1890 R. S. § 6005), *Oregon* (1892 An. Laws, § 1095), *Pennsylvania* (1883 Purd. Dig. p. 512, § 29), *Rhode Island* (1882 P. S. c. 184, § 4), *South Carolina* (1882 G. S. § 1893), *Tennessee* (1884 Code, § 3047), *Texas* (1888 R. S. Art. 1861), *Vermont* (1880 R. L. § 2064), *Virginia* (1887 Code, § 2639), *Washington* (1891 Code, C. P. § 900), *West Virginia* (1891 Code, c. 85, § 4), *Wisconsin* (1889 An. Stats. § 3807), *Wyoming* (1887 R. S. § 1987).

Second, to next of kin entitled to share in distribution, in *Alabama*, *Arkansas*, *Colorado*, *Connecticut*, *Delaware* (first), *Florida*, *Georgia*, *Illinois*, *Indiana*, *Iowa*, *Kansas*, *Kentucky*, *Maine*, *Massachusetts*, *Michigan*, *Minnesota*, *Mississippi*, *Missouri*, *Nebraska*, *New Hampshire*, *New Jersey*, *North Carolina*, *Ohio*, *Oregon*, *Pennsylvania*, *Rhode Island*, *Tennessee*, *Texas*, *Vermont*, *Virginia*, *West Virginia*, *Wisconsin*, *Wyoming* (same citations as before).

Third, to a creditor, in *Alabama*, *Arkansas*, *Colorado*, *Delaware* (second), *Florida*, *Georgia*, *Illinois*, *Indiana*, *Iowa*, *Kansas*, *Kentucky*, *Massachusetts*, *Michigan*, *Minnesota*, *Mississippi*, *Nebraska*, *New Hampshire*, *North Carolina*, *Ohio*, *Oregon*, *Pennsylvania*, *Tennessee*, *Texas*, *Vermont*, *Virginia*, *West Virginia*, *Wisconsin*, *Wyoming*.

Fourth, to such other person as the court may appoint, in *Alabama*, *Arkansas*, *Colorado*, *Connecticut* (third), *Delaware* (third), *Florida*, *Illinois*, *Indiana*, *Iowa*, *Kansas*, *Kentucky*, *Maine* (third), *Massachusetts*, *Michigan*, *Minnesota*, *Mississippi*, *Missouri* (third), *Nebraska*, *New Hampshire*, *New Jersey* (third), *North Carolina*, *Ohio*, *Oregon*, *Penn-*

sylvania, Rhode Island (third), Texas, Vermont, Virginia, West Virginia, Wisconsin.

In other states the order is : Second, to children, in California, Dakota, Idaho, Maryland, Montana, Nevada, New York, South Carolina, Washington.

Third, to father or mother, in California, Dakota, Idaho, Maryland (father fourth, mother seventh), Montana, Nevada, New York (father third, mother fourth), South Carolina, Washington.

Fourth, to brothers, in California, Dakota, Idaho, Maryland, Montana, Nevada, New York, South Carolina, Washington.

Fifth, to sisters, in California, Dakota, Idaho, Maryland, Montana, Nevada, New York, South Carolina, Washington.

Sixth, to grandchildren, in California, Dakota, Idaho, Maryland, (third), Montana, Nevada, New York, Washington.

Seventh, to next of kin entitled to share in distribution, in California, Dakota, Idaho, Maryland, Montana, Nevada, New York, South Carolina (fifth), Washington.

Eighth, to the public administrator, in California, Idaho, Montana, Nevada, New York, in the city of New York.

If no relatives or creditors, public administrator must be appointed. *Colorado* (1891 An. Stats. § 4711), *Illinois* (1891 R. S. c. 3, § 18), *Maine* (1883 R. S. c. 64, § 25), *Massachusetts* (1882 P. S. c. 130, § 1), in preference to creditors.

Ninth, to creditors, in California, Dakota (eighth), Idaho, Maryland, Montana, Nevada, New York, South Carolina (sixth), Washington.

Tenth, to any person legally competent, in California, Dakota (ninth), Idaho, Maryland, Montana, Nevada, New York, Washington.

The county treasurer has preference next after creditors in all counties in New York except New York County.

*New York* (1889 R. S. 8th ed. p. 2552, § 27).

A surviving partner can in no case be appointed. *California* (Code C. P. § 1365), *Dakota* (1887 C. L. § 5705), *Idaho* (1887 R. S. § 5351), *Montana* (1887 C. S. p. 289, § 55), *Nevada* (1885 G. S. § 2719).

Males are preferred to females. *Alabama* (1886 Code, § 2017), *California* (Code C. P. § 1366), *Dakota* (1887 C. L. § 5706), *Idaho* (1887 R. S. § 5352), *Indiana* (1888 R. S. § 2229), *Maryland* (1888 P. G. L. Art. 93, § 23), *Montana* (1887 C. S. p. 290, § 56), *Nevada* (1885 G. S. § 2720), *New York* (1889 R. S. 8th ed. p. 2552, § 28).

Relatives of the whole blood are preferred to those of the half blood. *California* (Code C. P. § 1366), *Alabama* (1886 Code, § 2017), *Dakota* (1887 C. L. § 5706), *Idaho* (1887 R. S. § 5352), *Indiana* (1888 R. S. § 2229), *Maryland* (1888 P. G. L. Art. 93, § 24), *Montana* (1887 C. S. p. 290, § 56), *Nevada* (1885 G. S. § 2720), *New York* (1889 R. S. 8th ed. p. 2552, § 28).

When several persons are equally entitled, the court may appoint one or more of them. *Alabama* (1886 Code, § 2017), *California* (Code C. P. § 1367), *Dakota* (1887 C. L. § 5707), *Idaho* (1887 R. S. § 5353), *Indiana* (1888 R. S. § 2229), *Montana* (1887 C. S. § 57), *Nevada* (1885, § 2721), *New York* (1889 R. S. 8th ed. p. 2552, § 28), *Texas* (1888 R. S. Art. 1862).

Creditor claiming letters, the court may grant letters to any other person legally competent. *California* (Code C. P. § 1367), *Dakota* (1887 C. L. § 5707), *Idaho* (1887 R. S. § 5353), *Montana* (1887 C. S. p. 290, § 57).

Person entitled being a minor, his guardian or any other person entitled may be appointed at discretion. *California* (Code C. P. § 1368), *Dakota* (1887 C. L. § 5708), *Idaho* (1887 R. S. § 5354), *Montana* (1887 C. S. p. 290, § 58),



*Nevada* (1885 G. S. § 2724), *New York* (1889 R. S. 8th ed. p. 2553, § 33).

No person may be appointed who is under twenty-one. *Arkansas* (1884 Dig. Stats. § 6), *California* (Code C. P. § 1369), *Dakota* (1887 C. L. § 5709), *Delaware* (1874 R. C. c. 89, § 11), *Florida* (1892 R. S. § 1858), *Idaho* (1887 R. S. § 5355), *Indiana* (1888 R. S. §§ 2222, 2230), *Maine* (1883 R. S. c. 64, § 17), *Mississippi* (1892 An. Code, § 1851), *Missouri* (1889 R. S. § 6), *Montana* (1887 C. S. p. 290, § 59), *Nevada* (1885 G. S. § 2722), *New Hampshire* (1891 P. S. c. 188, § 3), *New York* (1889 R. S. 8th ed. p. 2553, § 32), *North Carolina* (1883 Code, § 1377), *Rhode Island* (1882 P. S. c. 184, §§ 4, 5), *Texas* (1888 R. S. Art. 1357), *Wyoming* (1887 R. S. § 1986). In *Maryland* the age is fixed at eighteen years (1888 P. G. L. Art. 93 §§ 17, 52).

A non-resident is not competent, in *California* (Code C. P. § 1369), *Dakota* (1887 C. L. § 5709), *Georgia* (1882 Code, § 2492), *Idaho* (1887 R. S. § 5355), *Kansas* (1889 G. S. § 2812), *Maryland* (1888 P. G. L. Art. 93, §§ 17, 52) (of U. S.), *Missouri* (1889 R. S. § 10), *Montana* (1887 C. S. p. 290, § 55), *New Hampshire* (1891 P. S. c. 188, § 4), *New York* (1889 8th ed. p. 2553, § 32) (of U. S.), *North Carolina* (1883 Code, § 1377), *Rhode Island* (1882 P. S. c. 184, § 6).

One convicted of an infamous crime is not competent, in *California* (Code C. P. § 1369), *Dakota* (1887 C. L. § 5709), *Delaware* (1874 R. C. c. 89, § 11), *Idaho* (1887 R. S. § 5355), *Indiana* (1888 R. S. §§ 2222, 2230), *Maryland* (1888 P. G. L. Art. 93, §§ 17, 52), *Mississippi* (1892 An. Code, § 1851), *Montana* (1887 C. S. p. 290, § 59), *Nevada* (1885 G. S. § 2722), *New York* (1889 R. S. 8th ed. p. 2553, § 32), *North Carolina* (1883 Code, § 1377).

No person is competent to serve as administrator, who is adjudged by the court incompetent by reason of drunken-

ness, improvidence, or want of understanding or integrity, in *California* (Code C. P. § 1369), *Dakota* (1887 C. L. § 5709), *Idaho* (1887 R. S. § 5355), *Indiana* (1888 R. S. §§ 2222, 2230), *Montana* (1887 C. S. p. 290, § 59), *Nevada* (1885 G. S. § 2722), *New York* (1889 8th ed. p. 2553, § 32), *North Carolina* (1883 Code, § 1377).

No person may be appointed who is of unsound mind, in *Arkansas* (1884 Dig. Stats. § 6), *Delaware* (1874 R. C. c. 89, § 11), *Georgia* (1882 Code, § 2494), *Maryland* (1888 P. G. L. Art. 93, §§ 17, 52), *Mississippi* (1892 An. Code, § 1851), *Texas* (1888 R. S. Art. 1857), *Wyoming* (1887 R. S. § 1986).

A married woman cannot be appointed administratrix, in *Arkansas* (1884 Dig. Stats. § 6), *Indiana* (1888 R. S. §§ 2229, 2230), *Wyoming* (1887 R. S. § 1986); and the marriage of an administratrix extinguishes her authority, in *California* (Code C. P. § 1370), *Dakota* (1887 C. L. § 5710), *Idaho* (1887 R. S. § 5356), *Missouri* (1889 R. S. § 6), *Nevada* (1885 G. S. § 2723), *New York* (1889 R. S. 8th ed. p. 2553, § 32); unless with written consent of her husband, Id.

When a married woman is entitled, her husband may be appointed in her right, in *Alabama* (1886 Code, § 2017), *Georgia* (1882 Code, § 2494), *Maryland* (1888 P. G. L. Art. 93, § 28).

A married woman may be appointed, or her husband in her right, in *Delaware* (1874 R. C. c. 89, § 9).

A married woman may be appointed without assent of husband, in *Montana* (1887 C. S. p. 290, § 60).

Relations descending are preferred to those ascending, in *Maryland* (1888 P. G. L. Art. 93, § 25) (none preferred in ascending line beyond father or mother, or in descending line beyond grandchild (Id. § 26)), a *feme sole* to a married woman (Id. § 27), and relations on the side of the father to those of the mother (Id. § 29).

No judge of probate or clerk of any probate court shall be appointed in his own county, in *Missouri* (1889 R. S. § 6).

*Public administrator.* In *California* provision is made by Code C. P. as follows :

§ 1726. Every public administrator duly elected, commissioned and qualified, must take charge of the estates of persons dying within his county, as follows : 1. Of the estate of decedents for which no administrators are appointed, and which in consequence thereof are being wasted, uncared for, or lost ; 2. Of the estates of decedents who have no known heirs ; 3. Of the estates ordered into his hands by the court ; and, 4. Of the estates upon which letters of administration have been issued to him by the court.

§ 1727. Whenever the public administrator takes charge of an estate without letters first issued, he must procure letters as other persons.

§ 1728. Whenever a stranger or person without known heirs dies intestate on the premises of another, he must give immediate notice thereof to the public administrator.

§ 1729. The public administrator must return an inventory of all estates in his possession, and administer and account according to law and the direction of the court.

§ 1730. If letters are granted to any other person on an estate the public administrator has in charge, he must deliver it over to the appointee.

§ 1731. All civil officers must inform the public administrator of all property known to them of a decedent liable to loss, injury, or waste.

§ 1732. The public administrator must institute all suits necessary to recover estate of the decedent.

§ 1733. On complaint of the public administrator the court will order the examination of any party charged with concealing or embezzling the estate.

§ 1734. Parties will be committed for refusing to attend.

§ 1735. The court may at any time order the public administrator to account for and deliver the estate to the heirs or executors or administrators regularly appointed.

§ 1736. Every six months the public administrator must make to the court and publish a return of the condition of the estates in his hands.

§ 1737. The public administrator shall deposit the moneys of the estates with the county treasurer, upon account of the estates subject to the order of the executor or administrator and judge, upon fee of one per cent. to the treasurer, to be invested upon order of the court, and to be paid over to the state treasurer if they escheat to the state.

§ 1738. The public administrator must not be interested for or on account of estates in his hands.

§ 1739. Public administrators must settle and adjust their accounts every month with the county clerk and pay balances to the treasurer.

§ 1740. If money remains in the hands of the public administrator upon settlement, the court must order it paid or a suit instituted therefor by the district attorney.

§ 1741. The fees of all officers chargeable to estates in the hands of public administrators must be paid out of the assets thereof so soon as the same come into his hands.

§ 1742. Public administrators may administer oaths in regard to the administration of the estates in their hands.

§ 1743. When no direction is given for the guidance of a public administrator, the provisions of law governing other executors and administrators govern.

The following states have the same statute : *Idaho* (1887 R. S. §§ 5680-95),

*Montana* (1887 C. S. p. 356, §§ 333-350),  
*Nevada* (1885 G. S. §§ 2221-34).

Similar statutes exist in other states as follows: *Colorado* (1891 An. Stats. §§ 4711-16), *Illinois* (1891 R. S. c. 3, §§ 44-50), *Maine* (1883 R. S. c. 64, §§ 25-31), *Massachusetts* (1882 P. S. c. 131), *Mississippi* (1892 An. Code, §§ 1858-59), *Missouri* (1889 R. S. §§ 296-305), *New York* (1889 R. S. 8th ed. p. 2570, §§ 1-76).

*General principles of selection.* The right to administration is based upon the ground of interest in the estate either as legatee, next of kin, or creditor. *Estate of Ellmaker*, 4 Watts 34; *Leverett v. Dismukes*, 10 Ga. 98; *Johnson v. Johnson*, 15 R. I. 109; *Cramer v. Sharp*, 4 Dick. (N. J.) 558. It should not be granted to one whose interests are adverse to those of the estate. *Estate of Heron*, 6 Phila. 87; *Moody v. Moody*, 29 Ga. 519; *Bieber's Appeal*, 11 Pa. St. 157; *Owings v. Bates*, 9 Gill 463. But a conflict of interest may not deprive the next of kin or the residuary legatee of his priority of right to the administration. *Randle v. Carter*, 62 Ala. 95. But the devisee of a devisee has not such an interest in the original estate as will constitute a valid claim to the administration as against the next of kin. *Jones v. Whitehead*, 66 Ga. 290. And where the majority of the distributees request the appointment of a certain person, one distributee cannot defeat such appointment on the ground that he is not next of kin, nor a creditor, nor interested in the estate. *Halliday v. Du Bose*, 59 Ga. 268. In general, administration will be granted to that one in the class entitled to administration whose appointment will best conserve the interests of the estate. *Moore v. Moore*, 1 Dev. 352; *Atkins v. McCormick*, 4 Jones 274; *Shomo's Appeal*, 57 Pa. St. 356; *Cramer v. Sharp*, 4 Dick. (N. J.) 558; *Estate of Linder*, 16

*Phila.* 397; *Bowie v. Bowie*, 73 Md. 232; *Wilkey's Appeal*, 108 Pa. St. 567. And consideration will be given to the recommendation of those having the greatest interests in the estate. *McClellan's Appeal*, 16 Pa. St. 110; *McBeth v. Hunt*, 2 Strobbh. 335; *Cramer v. Sharp*, 4 Dick. (N. J.) 558. The discretion given to the register as to granting letters of administration is limited to a selection from those who are competent and ask for the administration, selecting from each class entitled to administer in its order. *McClellan's Appeal*, 16 Pa. St. 110. And a person who is not entitled cannot be joined in appointment with one who is entitled without the consent of all who are entitled. *Peters v. Public Administrator*, 1 Bradf. 200. But an appointment in disregard of the statutory requirement as to choice of persons is not void, but only voidable. *Den v. Lecony*, Coxe 111. But in *Breen v. Pangborn*, 51 Mich. 29, such an appointment was said to be void as against the surviving husband. In Pennsylvania and some other states, males are preferred to females. *McClellan's Appeal*, *ubi supra*. As to disqualifying circumstances and character, see p. \*389 n., *ubi infra*. But the register cannot pass over a claimant for letters who stands in the first class, unless satisfactory evidence of unfitness be produced, *Estate of Guldin*, \*81 Pa. St. 362; but where the register has made a choice, his discretion is gone, and he has no power to revoke except for cause. *Thomas' Appeal*, 57 Pa. St. 356.

*Surviving husband.* At common law and by force of statutes in most of the United States the right to be appointed administrator of the wife's estate belongs to the husband exclusively of all other persons, *Woerner on Admn.* § 235; *Croswell on Exrs.* § 120; *Schouler on Exrs.* § 98; *Goodrich v. Treat*, 3 Cal. 408; *Whitaker v. Whitaker*, 6 Johns.

112; Judge of Probate *v.* Chamberlain, 3 N. H. 129; Matter of Harvey, 3 Redf. 214; Hubbard *v.* Barends, 38 Md. 175; Kearney *v.* Missionary Society, 10 Abb. N. C. 274; Shumway *v.* Cooper, 16 Barb. 556; New England Mutual Life Insurance Co. *v.* Woodworth, 111 U. S. 138; Weaver *v.* Chace, 5 R. I. 356; Gilman *v.* McArdle, 12 Abb. N. C. 414; Donnington *v.* Mitchell, 1 Gr. Eq. 243; Coogler *v.* Rogers, 25 Fla. 853; Clark *v.* Clark, 6 Watts & S. 85; Willis *v.* Jones, 42 Md. 422; although he is not a resident within the state, Weaver *v.* Chace, 5 R. I. 356; and although the statute calls for the appointment of next of kin. Fairbanks *v.* Hill, 3 Lea 732. And the husband may assign such right to another. Patterson *v.* High, 8 Ired. Eq. 52; *California* (Code Civ. Pro. § 1365). This was formerly not so in Alabama, as the husband there was not entitled to administration on his wife's estate to the exclusion of her children or one appointed at their request. Randall *v.* Shrader, 17 Ala. 333 (see Code, § 2350). So, in Colorado. Goodrich *v.* Treat, 3 Col. 408. The act of 1845, in Florida, by which the husband of a woman who dies without children, and whose death occurs in Florida, is entitled to administration, and also to all her property, both real and personal, applies to a person dying under twenty-one. Coogler *v.* Rogers, *ubi supra*. This right of the husband may be relinquished with his claim on the property of the wife by antenuptial agreement, whereby the property passes at her death to others. Woerner on Admn. § 235; Crosswell on Exrs. § 128; Schouler on Exrs. § 98; Ward *v.* Thompson, 6 Gill & J. 349. The husband's right to administer is lost with his right to the property of the wife. Fowler *v.* Kell, 14 Sm. & M. 68; *e. g.*, in favor of her next of kin where the property is held in trust for them after her death. Bray *v.* Dudgeon, 6 Munf. 132. But if such agreement re-

serves a separate use to the wife for her life, and a right (which she does not exercise) to dispose of it by her will, the administration will go to the husband. Hart *v.* Soward, 12 B. Mon. 391. And the right will not be lost by his want of interest as next of kin, Townsend *v.* Radcliffe, 44 Ill. 446; nor by reason of his cruel treatment and desertion of the wife in her lifetime, Altemus' Case, 1 Ashm. 49; nor of his leaving home with the knowledge of his wife under an unproved charge of adultery against him. Coover's Appeal, 52 Pa. St. 427. If his marriage is void or voidable, it seems that his right to administer should be affected by that fact in the same manner as his wife's right is affected by the same circumstances. As to this, see *infra*. If the husband survives the wife and dies after having administered, the estate of the wife in his hands goes to his personal representatives. Hendren *v.* Colgin, 4 Munf. 231. But it is otherwise, if he has not taken out letters. Matter of O'Neil, 2 Redf. 544. And if the wife survives the husband, her estate goes to her own next of kin. Kearney *v.* Missionary Society, 10 Abb. N. C. 278.

But the appointment of an administrator upon the estate of a *feme covert* is acquiesced in, if her husband, in a litigation with the administrator, did not raise the question of the appointment, where such question would have disposed of the action. Bassett *v.* Shepardson, 57 Mich. 428. And it has been held, that in a suit brought against the husband by his wife's administrator he cannot question the validity of the letters to the plaintiff. Clark *v.* Clark, 6 Watts & S. 85. Any person, however, procuring the appointment of administration on the estate of a married woman becomes, in general, a trustee for the surviving husband. Weeks *v.* Jewett, 45 N. H. 540.

*Surviving widow.* She is entitled to

administer on the estate of her deceased husband before the next of kin. McClellan's Appeal, 16 Pa. St. 110; Radford v. Radford, 5 Dana 156. But her right is sometimes said not to be absolute, but conditional. Estate of O'Brien, 63 Iowa 622; Rawlins v. Rawlins, 18 Fla. 345. And she may be set aside for good cause, Thornton v. Winston, 4 Leigh 152; Stearns v. Fiske, 18 Pick. 24; such as (in Kentucky) non-residence. Radford v. Radford, 5 Dana 156. Her poverty is not, however, a sufficient cause to deprive her of her right to administration, Bowerson's Appeal, 100 Pa. St. 434; nor the fact that she is illiterate and over seventy years of age. Wilkey's Appeal, 108 Pa. St. 567. These causes are more particularly considered under the discussion of administrator's competency in p.\*389 n. *ubi infra*. In Kentucky, the court has power to associate with the widow a stranger, and this may be done in the face of a protest from the next of kin. Shropshire v. Withers, 5 J. J. Marsh. 210. And granting the request that another be associated in the administration is not an abuse of the discretion of the court. Jordan v. Ball, 44 Miss. 194. And in Mississippi, the right to administer is limited to husband, wife, and distributees, Byrd v. Gibson, 1 How. (Miss.) 568; as to others, the appointment is discretionary with the court, Jordan v. Ball, 44 Miss. 194; and the widow is preferred to the son, Muirhead v. Muirhead, 6 Sm. & M. 451; while in Pennsylvania and Massachusetts the English rule, under 21 Hen. VIII. c. 5, s. 3, seems to prevail, and the court therefore has the discretion to appoint either next of kin or widow, or both. McClellan's Appeal, 16 Pa. St. 110; Williams' Appeal, 7 Id. 259; Cobb v. Newcomb, 19 Pick. 339.

The widow may renounce, as may also the next of kin; but to be effectual such renunciation should be recorded in

the Probate Court. Arnold v. Sabine, 1 Cush. 525. And in Alabama, if the widow or next of kin do not claim the right within forty days from the death, it is adjudged that they have renounced. Curtis v. Williams, 33 Ala. 570; Curtis v. Burt, 34 Ala. 729; Forrester v. Forrester, 37 Ala. 398. And in Georgia, a widow who is disqualified may name the administrator. Headman v. Rose, 63 Ga. 458. But in other states the right to administer is a personal one, and cannot be delegated, Georgetown College v. Browne, 34 Md. 450; and her renunciation gives her no right to nominate another person to the exclusion of the next of kin. Cobb v. Newcomb, 19 Pick. 337; McBeth v. Hunt, 2 Strobb 335. Only the widow of a lawful marriage is entitled to administration. Woerner on Admn. § 237; Schouler on Exrs. § 99; Byrnes v. Dibble, 5 Redf. 383. Living separate from her husband without a decree of divorce does not deprive her of the right. Nusz v. Grove, 27 Md. 391. Her abandonment of her husband will, however, disqualify her. Odiorne's Appeal, 54 Pa. St. 175. And a wife divorced *a vinculo* is not entitled to administration (or to a distributive share in her husband's personal estate), whether the decree was granted because of her own misconduct or that of her husband. Matter of Ensign, 103 N. Y. 284; Dobson v. Butler, 17 Mo. 88; Estate of Tyock, 135 Pa. St. 522. If, however, on appeal a decree of divorce *a vinculo* is annulled even after the husband's death, it will restore her right to administration. Boyd's Appeal, 38 Pa. St. 246. On the other hand, the fact that her marriage with the deceased was voidable will not deprive her of the right to become his administratrix. This is true where the marriage was within prohibited degrees, *e. g.* an uncle and niece. Barker's Appeal, 44 Pa. St. 309. And even where a former hus-

band was living, who had been absent more than five years before her marriage with the decedent, and was supposed and presumed to be dead. *White v. Lowe*, 1 Redf. 376.

*Next of kin.* Subject to the preference of husband or wife, and to any different statutory provision, the right to letters of administration belongs to the next of kin. *Cramer v. Sharp*, 4 Dick. (N. J.) 558; *Sayre v. Sayre*, 3 Id. 267; *Rinehart v. Rinehart*, 12 C. E. Gr. 475; *Hayes v. Hayes*, 75 Ind. 395. And they are reckoned at the time of the appointment, and not of the intestate's death, *Griffith v. Coleman*, 61 Md. 250; years of litigation having intervened in this case. If there are next of kin, no other appointment can be made without their consent or renunciation. *Munsey v. Webster*, 24 N. H. 126. In many of the United States the time is fixed for preferred applications by next of kin, after which time they have been held to lose their preference. *Cunningham v. Thomas*, 59 Ala. 158. In other states, where no time is fixed by statute, the next of kin have a reasonable time to apply for administration; in Ohio an application made within eighteen days is made within a reasonable time. *Todhunter v. Stewart*, 39 O. St. 181. The principle of preference of next of kin is based upon their interest in the preservation and final distribution of the estate. Administration of an estate should be committed to those who are the ultimate beneficiaries. *Donahay v. Hall*, 18 Stew. (N. J.) 720; *Cramer v. Sharp*, 4 Dick. (N. J.) 558; *Johnson v. Johnson*, 15 R. I. 109; *Bradley v. Bradley*, 3 Redf. 512; *Thornton v. Winston*, 4 Leigh 152; *Langan v. Bowman*, 12 Sm. & M. 715; *Hayes v. Hayes*, 75 Ind. 395. And in Georgia, it has been declared that the statute contemplates not merely relatives, but relatives entitled to distribution. *Murdock*

*v. Hunt*, 68 Ga. 164. The appointment is not, however, confined to those who have the immediate present right to a distributive share, *Butler v. Perrott*, 1 Dem. 9; but all kindred are included who would be entitled to a share if there were no nearer kin. *Anderson v. Potts*, 5 Cal. 63. The statutory order of preference of next of kin is to be followed, irrespective of their present interest in the distribution of the estate or their want of it. *Lathrop v. Smith*, 24 N. Y. 418. And if a stranger is appointed on the renunciation of the older children only, he will be removed on the petition of younger children for appointment. *Williams' Appeal*, 7 Pa. St. 529.

The court is not, however, bound to select the nominee of the next of kin. *Estate of Cresse*, 1 Stew. (N. J.) 236. But see Georgia Code, § 2494. And in California, an adopted son may nominate the administrator. *Estate of Keenan*, Myrick Prob. 186. And an unmarried minor nominated by the grandmother will be preferred to a creditor. *Estate of Wyche*, Id. 85.

Interest is to be considered before personal relations or affection. Thus, next of kin are preferred to an adopted child having no right to the estate. *Estate of McCully*, 13 Phila. 296. In New York, letters may be given to sisters of the half blood, *Kirchies v. Scherg*, 3 Redf. 277; the whole blood being preferred by the statute (2 R. S. 74, § 28).

Among next of kin of equal degree the court may in general select one or more in its discretion. *Taylor v. Delancy*, 2 Caine's Cas. 192; *Coope v. Lowerre*, 1 Barb. Ch. 45. And this is sometimes expressly provided by statute. North Carolina Code, § 1876; *Garrison v. Cox*, 95 N. C. 353. An applicant for letters of administration may be appointed without citing other persons of equal degree. *Peters v.*

Public Administrator, 1 Bradf. 200. And after appointing the older of two sisters the court may, on the petition of the younger and against the protest of the first appointee, associate the younger sister with the older (although he could not create two separate co-ordinate administrations). *Brubaker's Appeal*, 98 Pa. St. 23. The elder has no right to be preferred to the younger. *Shomo's Appeal*, 57 Pa. St. 356. In some states, among those of equal degree, males are preferred to females, *Cook v. Carr*, 19 Md. 1; or the largest of several distributees is preferred. *Langan v. Bowman*, 12 Sm. & M. 715. But where, under the statute awarding damages for killing a child, such damages are equally distributable between the father and mother, a mother has an equal interest in the administration, and letters may be issued to her. *Rajnowsky v. Detroit &c. Railroad Co.*, 74 Mich. 20. Non-resident minors have no preference to adult females related in the same degree and residing in the state. *Wickwire v. Chapman*, 15 Barb. 302. And an adult married daughter will be preferred to the guardian of a minor child. *Cottle v. Vanderheyden*, 56 Barb. 622. In New York an unmarried woman has a preference over a married woman of equal degree of kindred, *Matter of Coursen*, 89 N. Y. 401; S. C. 2 Civ. Pro. 411, revg. 25 Hun 579; the provision of the New York Revised Statutes not being repealed by the act of 1867 (c. 782).

*Creditors.* If the petition for the letters of administration contains an allegation that the petitioner is a creditor of the decedent, this is a sufficient jurisdictional allegation. *Johnson v. Johnson*, 66 Mich. 525. But the heir-at-law may deprive a creditor of his statutory right to administration by tendering to him the amount of his claim. *Culley v. Mohlenbrock*, 36 Ill. Ap. 84. Admin-

istration may be granted to a creditor in Massachusetts (Gen. Stats. c. 130, § 1) after the next of kin have declined or neglected to apply for thirty days. *Arnold v. Sabin*, 1 Cush. 525. And in general their right is subject to the preference given to the next of kin, *Carthey v. Webb*, 2 Murph. 268; *Haxall v. Lee*, 2 Leigh 267; *Farmer v. Husse*, 80 Ga. 614; but prior to that of the public administrator. *Rosenthal v. Prussing*, 108 Ill. 128. But in New Jersey, although no application has been made by the widow for more than fifty days, another appointment made without notice to her is invalid. *Gans v. Dabergott*, 13 Stew. (N. J.) 189. And in Virginia, a creditor who had been appointed five years after the death of the intestate in default of other application, must give way to a subsequent application on the part of the next of kin. *Haxall v. Lee*, 2 Leigh 267. In Texas and in Virginia, a creditor as such has no special claim, but the administration may go, after the next of kin are passed over, to any fit person. *Cain v. Haas*, 18 Tex. 616; *McCandlish v. Hopkins*, 6 Call. 208. A creditor barred by the Statute of Limitations is not entitled to administration. *Succession of Sarrazin*, 34 La. An. 1168. And where a demand against the estate of a deceased non-resident is barred by the laws of his domicile at the time of his death, it is barred everywhere. Therefore where a person failed to have his claim allowed in the domiciliary jurisdiction, and came into another state and obtained administration there as a creditor, and it is apparent, at the trial of his claim, that the claim is barred by the statute, and therefore that he is not a creditor, the court should disallow his claim and revoke his letters of administration. *Wernse v. Hall*, 101 Ill. 423. So, debts assigned to A. after the death of the intestate do not constitute him a creditor and entitle him to administer as such.

*Pearce v. Castrix*, 8 Jones 71. But one who has paid the funeral expenses and thereby become sole creditor is entitled to letters. *Lentz v. Pilert*, 60 Md. 296. On the removal of an administrator the creditors may nominate an administrator *de bonis non*, and on their failure the court may appoint any fit person. *Long v. Easley*, 13 Ala. 239.

Where two creditors apply for letters, it is proper for the judge of probate to grant letters to the larger notwithstanding that the appointment of the smaller is requested by the widow and other creditors. *Ex parte Ostendorff*, 17 S. C. 22. But he should not be appointed in preference to a creditor of small amount who is the nominee of about ninety-five per cent. of the whole body of creditors. *Freeman v. Worrell*, 42 Ga. 401. And one claiming as trustee, and not in his individual capacity, to be the largest creditor of an intestate's estate is not such a creditor as the Maryland Code prefers. *Glem v. Reid*, 74 Md. 238. On the other hand, in Louisiana, the first applicant among creditors is preferred without regard to the amount of his claim. *Succession of Beraud*, 21 La. An. 666.

*Appointment of strangers.* The right of the next of kin to administration is a personal right. They have, in general, no right of nomination or selection. Where the next of kin have waived their claims to administration, the Probate Court may lawfully in its discretion appoint a stranger. *Matter of Cresse*, 1 Stew. (N. J.) 236; *Will of Kirkpatrick*, 7 C. E. Gr. 463; *Ex parte Ostendorff*, 17 S. C. 22. Those entitled not being willing to take out letters, the probate judge may appoint such other person as may apply. *Ex parte Crafts*, 28 S. C. 281. In Nebraska, the county judge may commit the administration to "such other person" as he may think proper. *Atkinson v. Hasty*, 21 Neb. 663, and see *Glem v. Reid*, 74

Md. 238. In North Carolina, the next of kin have a right within six months after decedent's death, either to administer themselves, or to designate some one else to administer. *Williams v. Neville*, 108 N. C. 559. In Pennsylvania, within the class entitled to administration, the selection of the administrator is in the discretion of the register of wills, and his decision is absolute, unless personal incompetency or other disqualification in the person chosen is shown. *Levan's Appeal*, 112 Pa. St. 294. And in Indiana, such appointment is within the discretion of the Circuit Court. *Wallis v. Cooper*, 123 Ind. 40. And in Louisiana, the discretion of the district judge in appointing an administrator is not lightly to be interfered with. *Succession of Romero*, 42 La. An. 894. And where there is a contest for administration between two beneficiaries, the appointment is within the discretion of the probate judge. *Succession of Chalier*, 39 La. An. 308. And in such case the discretion of the Probate Court to make such appointment is very liberal; and the record of the appointment need not show the superior qualifications of the appointee. *Davis v. Swearingen*, 56 Ala. 31. And there is no appeal from such discretionary appointment, *Davis v. Swearingen*, 56 Ala. 537; after due notice to, and default of, those who were entitled to the appointment. *Dalrymple v. Gamble*, 66 Md. 298; *Ex parte White*, 16 S. E. Rep. 286 (S. C.). But see *Estate of Pacheco*, 23 Cal. 476.

*Public administrator.* In many of the United States provision is made for the administration of estates of decedents, by an officer known as the public administrator. *Woerner on Admn.* §§ 180, 240. Such officer is elected by the people in California, Missouri, Nevada, and in New York City, and is appointed by the governor of the state in Colorado, Illinois, Maine,



and Massachusetts. In others the appointment is made by a court having probate jurisdiction. This is so in Kentucky, Mississippi, Tennessee, and Wisconsin. In Alabama, he is appointed for the county of Mobile only. In North Carolina, he is appointed by the clerk of the Supreme Court. And in Georgia, the clerk of the Superior Court may act as such public administrator. In New York (except in the counties of New York and Kings) the county treasurer is *ex officio* public administrator. In Arkansas and Virginia, sheriffs are *ex officio* public administrators. And in Tunstall v. Withers, 86 Va. 892, it was held that as the statute makes no provision for transferring an estate committed to the sheriff for administration, to his successor in office, he must proceed with the administration till completed, whether his official term has ended or not, and for an abuse of the trust his sureties as well as himself will be liable. But in Florida, the sheriff does not *ex officio* become administrator. Wilson v. Dibble, 16 Fla. 782. In New York, a creditor cannot sue out a citation to show cause why administration should not be granted to the public administrator. Matter of Batchelor, 64 How. Pr. 350. In Missouri, the public administrator may, in the first instance, act on his own judgment in taking charge of an estate, but his determination is not conclusive of his authority to do so. Final determination of that question lies with the Probate Court. McCabe v. Lewis, 76 Mo. 296. At any time before the public administrator takes charge, the Probate Court may appoint an administrator, who cannot be removed solely on account of the superior rights of the public administrator. Tittman v. Edwards, 27 Mo. Ap. 492; Succession of Salvy, 44 La. An. 433. Under the Missouri statute the public administrator has authority to

take charge of only such property of the intestate as was in his county at the time of the death. McCabe v. Lewis, 76 Mo. 296. And where he unlawfully takes charge of an estate, he cannot maintain an action to recover assets of the estate. Id. His authority to take charge of an estate cannot, however, be questioned in a collateral proceeding. Dunn v. German American Bank (Mo.), 18 S. W. Rep. 1139. And although he be named as executor, he is nevertheless chargeable as public administrator. State v. Purdy, 67 Mo. 89. The right of the public administrator to administration applies only to cases of intestacy. Estate of Nunan, Myrick's Prob. 238. If the decedent leave a will, the court has discretion, Id.; and it seems that the court will prefer the public administrator to a Chinaman where the will names no executor. Estate of Yun, Id. 181.

The appointment of the public administrator is not authorized when there are heirs within the jurisdiction, Succession of Smith, 40 La. An. 105; but when the testamentary executor is under accusation as the murderer of the testator, the public administrator should take charge of the estate. Succession of Townsend, 36 Id. 535. Letters may be issued to the public administrator, notwithstanding the known desire of the decedent that another should administer upon his estate, Estate of Morgan, 53 Cal. 243; and although the other is supported by the recommendation of the next of kin who are themselves incompetent, Id. And as against the nominee of a married daughter of the intestate, the public administrator has the better right to the administration. Estate of Kelly, 57 Cal. 81. So, in Missouri, Becraft v. Lewis, 41 Mo. Ap. 546. The public administrator has a right to administer *cum testamento annexo* in preference to the nominee of a foreign executor who has

renounced the administration, *Matter of Garber*, 74 Cal. 338; or to the attorney in fact of an alien legatee. *Matter of Blank*, 2 Redf. 443. So, he is entitled to a general preference over the attorney of a foreign administrator, *Matter of Hanover*, 3 Redf. 91; or over a trust company authorized by statute to administer on estates of deceased persons, *Estate of Goddard*, 94 N. Y. 544; *Goddard v. Abbott*, 30 Hun 401; or the nominee of a non-resident son of the deceased, *Estate of Beech*, 63 Cal. 458; or over a creditor, *Estate of McKinnon*, 64 Cal. 226; or a creditor who is also the nominee of the non-resident next of kin, *Estate of Hyde*, Id. 228. But in Illinois, the rights of a resident creditor are preferred to those of the public administrator. *Rosenthal v. Prussing*, 108 Ill. 128. In the city of New York, the public administrator has the preference after the next of kin over creditors and all other persons; and in other counties next after creditors. Redf. Surr. Prac. 317. And in California, the nominee of the widow (who is a non-resident) is entitled to letters in preference to the public administrator. *Estate of Cotter*, Myrick's Prob. 179; *Estate of Robie*, Id. 226; *Estate of Cotter*, 54 Cal. 215. And the temporary absence of the wife or the heirs gives the public administrator no rights. *Succession of Longuefosse*, 34 La. An. 583; see *Succession of Dietrick*, 32 La. An. 127. The application of the public administrator as a creditor of the deceased does not estop him from afterward applying as public administrator. *Estate of McKinnon*, 64 Cal. 226. The right to appointment of any person of the blood of the intestate, not disqualified by statute, is

superior to that of the public administrator. *Butler v. Perrott*, 1 Dem. 9. And the appointment of administrator without due notice as prescribed by statute is void. *Matter of Page*, 107 N. Y. 266.

The power and authority of the public administrator are, in general, the same as of any general administrator. *State v. Rottaken*, 34 Ark. 144. He may be required by the Probate Court, like a private administrator, to pay over on his discharge to his successor any moneys of the estate that may remain in his hands. *State v. King*, 76 Mo. 510. In California, his power is derived from his appointment and letters, and not *virtute officii*, and is conditioned on his taking oath, and in default of his so doing after the expiration of his term of office, his successor may be appointed administrator. *Matter of Hamilton*, 34 Cal. 465. In Mississippi, however, the order of appointment is sufficient without letters actually issued, and new bond and oath are not required for each separate estate. *Weir v. Monahan*, 67 Miss. 434. In Tennessee, his letters may be revoked at any time within six months after the intestate's death in favor of the next of kin. *Varnell v. Loagne*, 9 Lea 158. In Georgia, he may resign the public office without resigning the particular estate for which he has been appointed administrator, *Gibson v. Carreker*, 82 Ga. 46; and he is superseded in New York by due grant of letters, within six months after his appointment, to any private applicant, *Peters v. Public Administrator*, 1 Bradf. 200. For more particular statement of the New York law, see Redf. Surr. Prac. 307, *et seq.*

## SECTION II.

*Who are incapable of being administrators.†*

A widow, or next of kin, who would otherwise be entitled, may be incapable of the office of administrator on account of some legal disqualification.

Widow or next of kin may be incapable of office of administrator.

It will be shown in a subsequent part of this treatise, to whom, upon such an event, the administration is to be committed (x).

The incapacities of an administrator not only comprise those persons who have already been mentioned as disqualified for the office of executor (y) but extend to outlawry (z), and bankruptcy (a), or other lawful disability. But it is no incapacity to be an administrator that the next of kin is an alien (b).

Incapacities of administrator.

If the next of kin be a minor,† administration must be granted to another person during his minority; which species of administration will hereafter be considered separately (c).

Infancy.

But on one occasion, administration, limited to the receipts of dividends in the English Funds, was granted by Sir John \*Nicholl to a minor residuary legatee, the wife of a minor, both subjects of and resident in Portugal, on a certificate being produced that, by the law of Portugal, she was entitled (d).

However, in a subsequent case, Sir C. Cresswell refused to grant administration to a minor, though by the law of the country where the deceased was domiciled the minor was entitled to the grant, and that learned judge appeared to be of opinion, that the court ought not to follow the practice of the court of domicil, where it was in contradiction to the English law, according to which the minor could not take upon himself the liabilities which the law casts upon an administrator—for instance, he could not execute a bond (e).

Coverture was no incapacity,† even before the Married Women's Property Act, 1882, for the office of administratrix.

Therefore, if a *feme covert* be next of kin to the intestate, administration shall be granted to her (f). But

Feme covert: before Married Women's Property Act, 1882:

† See American note at end of this Section.

(x) See *post*, Pt. I. Bk. V. Ch. III. § VI.

(y) See *ante*, pp. \*186-188.

(z) 1 Roll. Abr. 908. Bac. Abr. Exors. (G.) Toller, 93.

(a) *Hills v. Mills*, 1 Salk. 36. Com. Dig. Admor. (B.) 6.

(b) Com. Dig. Admor. (B.) 6. Upon this subject, see *ante*, p. \*184.

(c) *Post*, Pt. I. Bk. V. Ch. III. § III.

(d) In the Goods of the Countess of Da Cunha, 1 Hagg. 237.

(e) In the Goods of the Duchess of Orleans, 1 Sw. & Tr. 253.

(f) Com. Dig. Admor. (B.) 6. *Ibid.* Admor. (D.)

she could not, before the Married Women's Property Act, take administration without the consent of her husband (*g*), inasmuch, among other reasons, as he was required to enter into the administration bond, which she was incapable of doing. Yet if it could be shown that the husband was abroad, or otherwise incompetent, a stranger might join in the security in his stead (*h*). In either case the administration was committed to her alone, and not to her jointly with her husband: otherwise, if he should survive her, he would be administrator, contrary to the meaning of the act (*i*).

Since the commencement of the Married Women's Property Act, 1882, a married woman may take administration without the consent of her husband, and in all respects act in the \*matter concerning the intestate's estate as if she were a *feme sole*.

since the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75.

(*g*) See *Bubbers v. Harby*, 3 Curt. 50.

(*h*) *Toller*, 91.

(*i*) *Anon. Style*, 74. *Toller*, 91. If it were committed to them jointly during the coverture it might perhaps be

good, because, if committed to the wife alone, the husband for such period may act in the administration with or without her assent: *Aleyn*, 36.

† It is safe to assume that what will disqualify one from acting as executor will equally defeat the right to administer, but not all persons competent as executors are likewise competent as administrators. *Woerner on Admn.* § 241. As to competency of executors, see p. 260 *et seq.*, n., *supra*. As to statutory disqualifications for administration, see *Am. note p. \*387 supra*. The disqualification to be considered is that which exists at the time of the appointment, not at the time of deceased's death. *Griffith v. Coleman*, 61 Md. 250. It seems that even an alien enemy may act as administrator, if within the state, if duly appointed and authorized. *Carthey v. Webb*, 2 Murph. 268. If the next of kin is *non compos mentis*, his guardian should be appointed. *Mowry v. Latham*, 23 Atl. Rep. 13. As to mental incapacity for administration, see p. 276, n., *supra*.

An infant can neither be an administrator himself nor select one to be appointed to the office. *Rea v. Engle-*

*sing*, 56 Miss. 463. "On account of the incompetency of infants to bind themselves by bond or to render themselves liable to account for property which may come to their hands during minority, they cannot lawfully be appointed to fill the office of administrator. Wherever the right to administration devolves upon an infant, the proper course is to grant administration to his guardian or to some other person *durante minore ætate*." *Carow v. Mowatt*, 2 Edw. Ch. 57, 60; *Labranche v. Trepagnier*, 4 La. An. 558; *Collins v. Spears*, 1 Miss. 310; *Pitcher v. Armat*, 6 Miss. 288. *A fortiori* a married woman under age should not be appointed administratrix, although a female minor is in other respects emancipated by marriage. *Briscoe v. Tarkington*, 5 La. An. 692. So, the guardian of an infant residuary legatee should receive the administration *cum testamento annexo*. *Matter of Lasak*, 3 N. Y. 356.

*Coverture* does not disqualify in most

of the United States. *Binnerman v. Weaver*, 8 Md. 517; *Estate of Gyger*, 65 Pa. St. 311; *Estate of Guldin*, \*81 Pa. St. 362; and see notes, pp. 272, 273, *supra*. In some states, as in New York and Massachusetts, this is expressly provided by statute. In some states if her husband is joined in the appointment, she may be appointed administratrix, *English v. McNair*, 34 Ala. 40; or executrix, *Stewart's Appeal*, 56 Me. 302. And where the husband must assent in order that letters should issue to his wife, his assent is sufficiently manifested by his joining her in the administration bond. *Estate of Gyger*, 65 Pa. St. 311. In Texas, the husband must join as well as consent. *Nickelson v. Ingram*, 24 Tex. 630. On the marriage of an administratrix her husband becomes joined in the administration in Massachusetts. *Barbee v. Bush*, 7 Mass. 510. And in Georgia, where coverture is a disqualification, the husband takes the appointment which the wife would have. *Leverett v. Dismuke*, 10 Ga. 98. So, letters *pendente lite*, on caveat to a will, go to the husband of a sole legatee of the sole legatee. *Long v. Huggins*, 72 Ga. 776.

Letters of administration may be granted to a non-resident in most of the United States. *Matter of Williams*, 44 Hun 67; *Libbey v. Mason*, 112 N. Y. 525; *Ehlen v. Ehlen*, 64 Md. 360; *Weaver v. Chase*, 5 R. I. 356; *Jones v. Jones*, 12 Rich. 623; *Ex parte Barker*, 2 Leigh 719; *Chicago &c. Railroad Co. v. Gould*, 64 Iowa 343. But in Wisconsin, this is declared to be against the policy of the statute, although a resident may be appointed on application of one of the non-resident next of kin. *Estate of Sargent*, 62 Wis. 130. And in some other states non-residence is a disqualification. *Matter of Stevenson*, 72 Cal. 164; *Estate of Beech*, 63 Cal. 458; *Williamson v. Furbush*,

31 Ark. 539; *Frick's Appeal*, 114 Pa. St. 29.

The office of administrator is one of trust and confidence, and ought not to be committed to an heir who has an interest in opposition to the other heirs of the estate. *Bieber's Appeal*, 11 Pa. St. 157; see *Estate of Ellmaker*, 4 Watts 34; *Moody v. Moody*, 29 Ga. 519; *Estate of Heron*, 6 Phila. 87; *Owings v. Bates*, 9 Gill 463; *Drew's Appeal*, 58 N. H. 319; *State v. Bidlingmaier*, 26 Mo. 483; *State v. Reinhardt*, 31 Mo. 95; *Pickering v. Pendexter*, 46 N. H. 89: in this case a disinterested non-resident was preferred to an interested resident of equal degree. So, bitter animosity between the next of kin renders them not "suitable" in New Hampshire. *Drew's Appeal*, 58 N. H. 319. A surviving partner should not be appointed administrator of the deceased partner's estate, *Heward v. Slagle*, 52 Ill. 336; *Cornell v. Gallagher*, 16 Cal. 367; *Matter of Garter*, 74 Cal. 338; *Estate of Brown*, 11 Phila. 127; see *Davis v. Milligan*, 88 Ala. 523. In Indiana, the same person may be appointed administrator of two or more estates, although there be conflicting interests. *Wright v. Wright*, 72 Ind. 149. But such appointment is not favored. *State v. Bidlingmaier*, 26 Mo. 483. So, even the widow will not be appointed, where she is subject to the undue influence of a large debtor of the deceased, who is charged with fraudulent combination with the deceased against his creditors. *Stearns v. Fiske*, 18 Pick. 24. On the other hand, the fact that a husband claims the whole estate of his deceased wife does not show a want of integrity, and does not disqualify as such. *Estate of Carmody*, 88 Cal. 616.

The son of the judge making the appointment is not disqualified, *Plowman v. Henderson*, 59 Ala. 559; *Koger v. Franklin*, 79 Ala. 505; nor a father-in-

law, *Hine v. Hussy*, 45 Ala. 496; although such appointment is voidable, *Koger v. Franklin*, 79 Ala. 505. And in Massachusetts, the appointment of the brother of the judge's wife was held to be void, her father being the principal creditor. *Hall v. Thayer*, 105 Mass. 219.

*Ignorance.* One who cannot write nor read writing, and has no experience in business, is incompetent in North Carolina *Stephenson v. Stephenson*, 4 Jones 472. But in Maryland, it has been held that a widow's inability to read or write does not disqualify her from being appointed administratrix. *Nusz v. Grove*, 27 Md. 391. So, where the widow was illiterate and over seventy years of age, but of good average business capacity. *Wilkey's Appeal*, 108 Pa. St. 567; or illiterate and without any separate property. *Bowerson's Appeal*, 100 Pa. St. 434. See too, *Gregg v. Wilson*, 24 Ind. 227. In the New York statute "want of understanding" is a disqualification. This, it has been held, must amount to a lack of intelligence, and not simply a want of business knowledge. *Goods of Shilton*, Tuck. 73.

In Pennsylvania, one who is *insolvent* is disqualified from being appointed administrator, *Levan's Appeal*, 112 Pa. St. 294; *Cornpropst's Appeal*, 33 Id. 537; but a poor person is not necessarily insolvent. *Levan's Appeal*, 112 Pa. St. 294. And see notes, pp. 274, 275, *supra*.

So, *improvidence*, as a statutory disqualification, means a want of foresight in the management of property which would render the estate unsafe

in his hands. *Coope v. Lowerre*, 1 Barb. Ch. 45. It means such habits as render a man unfit. And an executor might be removed on this ground for illiteracy coupled with small pecuniary means and misconduct and mismanagement in administering trust estates. *Emerson v. Bowers*, 14 N. Y. 449. To be rejected on this ground, a man must be shown to be so destitute of care and foresight in the management of the property that the estate would be unsafe in his hands. *Matter of Cutting*, 5 Dem. 456.

So, the statute in New York disqualifying a person *convicted of an infamous crime* refers only to persons convicted within the State of New York. *Estate of O'Brien*, 67 How. Pr. 503; S. C. 3 Dem. 156. And a conviction for larceny in a foreign jurisdiction is no evidence that the person convicted is "incompetent by reason of improvidence." *Estate of O'Brien*, *ubi supra*.

*Vice and immorality.* Letters testamentary cannot be withheld from one, who is otherwise entitled, for anything short of a legal disqualification—and not, *e. g.*, for general want of honesty. *Smith's Appeal*, 61 Conn. 420. So, administration cannot be refused to the next of kin for moral turpitude, *Coope v. Lowerre*, 1 Barb. Ch. 45; or for drinking habits not amounting to the statutory disqualification of habitual drunkenness. *Goods of Kechele*, 1 Tuck. 52. But being a professional gambler is presumptive evidence of incompetency. *McMahon v. Harrison*, 6 N. Y. 443. And see as to immoral habits, *Estate of Plaisance*, *Myrick's Prob.* 117.

## SECTION III.

*Of the mode of granting letters of administration, and the practice relating thereto and form thereof.*†

In pursuance of the authority conferred by the Court of Probate Act, 1857, sect. 30 (*k*), a great many rules, orders, and instructions as to grants of letters of administration were made in the year 1862, for the regulation of the practice and of the fees of the court, in respect both of contentious and non-contentious business, and the guidance both of the principal and district registrars. They run to so great a length that it would be impracticable to insert them in a treatise such as this.

Practice as to grants of letters of administration.

It is, therefore, thought better merely to refer the reader for them to the books of practice (*l*). But inasmuch as these “orders, rules, and instructions” are in fact in a great measure founded on the old practice of the Prerogative Court, it is thought advisable to retain all the statements contained in this and the preceding and some of the following sections of the former editions of this work as to the then established practice of that court.

Administration is generally granted by writing under seal. It may also be committed by entry in the registry, without letters *sub sigillo*: but it cannot be granted by parol (*m*).

By what instrument or form.

By rule 45, P. R. (non-contentious business), “In every case where probate or administration is for the first time applied for after the lapse of three years from the death of \*the deceased, the reason of the delay is to be certified to the registrars, and should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit.” In the case of a recent death, if a party swear that he is one of the next of kin, the grant will issue without inquiry as to the knowledge of the other next of kin (*n*), but where there are other next of kin equally entitled thereto the registrars may require

Time of granting letters.

† See American note at end of this Section.

(*k*) See *ante*, p. \*269.

(*l*) Tristram and Coote's Practice, 10th ed., Browne on Probate. Some further rules, relating principally to pleas to declarations propounding wills, were made and issued (to take effect on

and after 11 Jan. 1866), and from time to time further rules have been added which will be found set forth in the above books of practice.

(*m*) Anon. Show. 408, 409. Godolph. Pt. 2, c. 30, s. 5. Toller, 119.

(*n*) In the Goods of Darling, 3 Hagg. 565.

proof by affidavit that notice of the application has been given to them (*nn*).

The practice by rule 44, P. R. (non-contentious) is, that letters of administration shall not issue until after the expiration of fourteen days from the death of the intestate : unless for special cause (as that the goods would otherwise perish, or the like) the judge or two of the registrars shall think fit to order them sooner (*o*).

Where a party entitled to the grant of administration has renounced, such renunciation may be retracted before the administration has passed the seal (*p*).

Retracting renun-  
ciation.

Intestates Wid-  
ows and Chil-  
dren Act, 1873,  
Stat. 36 & 37 Vict.  
c. 52 :

In the case of intestacies where the property of the person dying intestate is of small amount, facility for taking out letters of administration to his estate and effects is given by the Intestates Widows and Children Act, 1873 (36 & 37 Vict. c. 52).

This act provides that where the whole estate and effects of an intestate shall not exceed in value the sum of one hundred pounds, his widow, or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the county court within the district of which the intestate had his fixed place of abode at the time of his death, and the said registrar shall fill up the usual \*papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate and transmit them by post to the said registrar of the county court to be by him delivered to the party so applying for the same, without the payment of any fee for the same save as is provided by this act. (Sect. 1.)

[The schedule to the act gives a scale of fees payable according to the value of the estate to be administered. 5s. on £20 or under, and the sum, in addition, of 1s. for every £10 or fraction of £10 beyond £20.]

(*nn*) Rule 28, P. R. *ante*, p. \*362,  
note (*o*).

(*o*) 1 Ought. 323, tit. 219, s. 1, note (*a*).

(*p*) *West v. Willby*, 3 Phillim. 379.  
See *M'Donnell v. Prendergast*, 3 Hagg.

212. *Ante*, p. \*233.

[\*391]



The registrar of the county court may require such proof as he may think sufficient to establish the identity and relationship of the applicant. (Sect. 2.) s. 2: .

If the registrar of the county court has reason to believe that the whole estate and effects, of which the intestate died possessed, exceeds in value one hundred pounds, he shall refuse to proceed with the application, until he is satisfied as to the real value thereof. (Sect. 3.) s. 3:

The registrars of county courts may exercise for the purposes of the act the powers of commissioners of the Court of Probate. (Sect 4.) s. 4: .

Power to frame rules, orders, &c., for carrying the act into operation. (Sect. 5.) s. 5:

Nothing in the act is to affect any duty payable on letters of administration. (Sect. 6.) s. 6:

The provisions of the act apply to Ireland. (Sect. 7.) s. 7.

By the Amendment Act passed in the year 1875 (38 & 39 Vict. c. 27), the provisions of the preceding act were extended to children of poor intestate widows, and it was provided that the amending act shall be read and construed along with and as part of the preceding act. Amendment Act,  
38 & 39 Vict. c. 27.

† *General principles.* Proceedings in probate courts are of a summary character. Woerner on Admn. § 149; Flinn v. Shackelford, 42 Ala. 202; Brook v. Chappell, 34 Wis. 405; Comstock v. Smith, 26 Mich. 306. This does not, however, imply disorderly or mixed procedure. This is often strictly regulated by statute; and irrespective of statutes the court will generally confine itself to the matter formally presented. The only questions decided by the court on an application for letters of administration are whether there is property, whether the court has jurisdiction, and whether the party applying is competent. Estate of Haskell, Myrick's Prob. 204. The court has no power on an application for letters of administration to adjudicate upon or settle any question of title to real estate. Thrall v. Thrall, 60 Wis. 503. The right of property cannot be liti-

gated in a proceeding for the appointment of an administrator. Matter of Nugent, 77 Mich. 500. So, the Probate Court has no jurisdiction to determine the right of another claimant to the administration, where the question is only as to compelling the first administrator to give a new bond. Nelson v. Boynton, 54 Ala. 368. Probate courts frequently act on the principles and with the procedure of courts of equity. Dundas' Appeal, 73 Pa. St. 474; Williamson's Appeal, 94 Pa. St. 231; Millard v. Harris, 119 Ill. 185; Donovan's Appeal, 41 Conn. 551; Hyland v. Baxter, 98 N. Y. 610; Stockton's Appeal, 64 Pa. St. 58; although they have no original chancery powers. West v. Thornburgh, 6 Blackf. 542; Sharp v. Sharp, 76 Ala. 312. And the appointment of an administrator and the questions involved in such a contest are not common law proceedings or subject.

as such to a writ of error. *Wooley v. Crane*, 86 Mich. 360.

*When to be taken.* The custodian of a will is required in some states to deliver it to the Probate Court or to the executor within thirty days after testator's death. *Arizona* (1887 R. S. § 968), *California* (Code C. P. § 1298), *Dakota* (1887 C. L. § 5659), *Idaho* (1887 R. S. § 5296), *Michigan* (1882 An. Stats. § 5797), *Montana* (1887 R. S. p. 277, § 8), *Rhode Island* (1882 P. S. c. 183, § 2), *Washington* (1891 G. S. § 854), *Wisconsin* (1889 An. Stats. § 3785). In *New Jersey*, if he neglects for forty days to prove the will, an administrator *cum testamento annexo* should be appointed (1877 Rev. p. 758, § 28). Letters are granted "upon the death of a testator" in *Alabama* (1886 Code, § 1975), and "forthwith" in *Maryland* (1888 P. G. L. Art. 93, § 14). In *California*, the will may be proved any time after testator's death (Code C. P. § 1299); but no will can be proved until ten days after testator's death in *New Jersey* (1877 Rev. p. 755, § 16); and administration must not be granted until fifteen days after the death of the intestate in *Alabama* (1886 Code, § 2019); *Curtis v. Williams*, 33 Ala. 570. If there be a husband or widow surviving, no other person should be appointed until the expiration of forty days after the death of the intestate is known, unless the husband or widow, prior to that time, relinquishes the right. *Curtis v. Williams*, 33 Ala. 570. The failure of the widow to apply for letters of administration on the estate of her deceased husband within forty days after his death becomes known is an implied waiver of her right to the administration. *Curtis v. Burt*, 34 Ala. 729. After thirty days any creditor of the intestate may apply for administration in *Michigan*. *Wilkinson v. Conaty*, 65 Mich. 614. In *West Virginia*, it seems that no distributee is entitled, as against husband or wife,

until the lapse of thirty days, and then any distributee, or a creditor, or a stranger, may be appointed at the discretion of the court. *Bridgman v. Bridgman*, 3 W. Va. 212.

In some states there is a limit of time within which the letters must be applied for. No letters can be granted after twenty-one years from the death of the deceased, except upon cause shown, in *Pennsylvania* (1883 Purd. Dig. p. 510, § 17); after twenty years in *Massachusetts* (1882 P. S. c. 130, § 3), *Wales v. Willard* 2. Mass. 120; *Kentucky* (1883 G. S. c. 39 Art. 2, § 2), *Maine* (1883 R. S. c. 64, § 1), and generally in *Tennessee* (1884 Code, § 3061); after ten years in *Connecticut* (1887 G. S. § 568); after five years in *Iowa* (1886 R. C. § 2367); after four years in *Texas* (1888 R. S. Arts. 1827-28), *Lloyd v. Mason*, 38 Tex. 212. And an administration on the estate of one who had died ten years before the administration was applied for, was held presumably void in *Texas*, even as to third parties, where the petition upon which such administration was granted alleged no fact to show any necessity for the delay. *Paul v. Willis*, 69 Tex. 261. But in *Massachusetts*, an administration *de bonis non* may be granted after the expiration of twenty years from the death of the former administrator. *Bancroft v. Andrews*, 6 Cush. 493. So, in *Connecticut*, the ten year statute does not apply to the appointment of an administrator *cum testamento annexo*. *Lawrence's Appeal*, 49 Conn. 411. So, in *Tennessee*, administration may be granted thirty years after the death of the intestate "to any person entitled to distribution who was an infant or married woman when the deceased died." *Townsend v. Townsend*, 4 Coldw. 70; Code, § 3061, *ubi supra*. In *Michigan*, acquiescence for fourteen years by adult children, in attempted disposition of the estate by the father, during which no

attempt is made to distribute it, will bar administration in the absence of creditors. *Beardslee v. Reeves*, 76 Mich. 661. And under the Iowa Code after five years no administration will be granted, and the next of kin become the owners of the personal property of the decedent, it being presumed that the debts have been paid. *Murphy v. Murphy*, 80 Iowa 740. Administration procured fourteen years after the death, and twelve years after an application in another county, which was never perfected, no reason being given for the delay, is void, *Duncan v. Veal*, 49 Tex. 603; or voidable. *Harris v. Shafer*, (Tex.) 21 S. W. Rep. 110.

*Form of application.* A written application is not essential to the jurisdiction of a probate court. *Robbins v. Taft*, 12 R. I. 67. But it is required by the New York Code of Civil Procedure (§ 2644); *Batchelor v. Batchelor*, 1 Dem. 209; *Fowler v. Walter*, 1 Dem. 240. In New York, the petition must pray that all persons having a prior right, and who have not renounced, show cause why administration should not issue to the petitioner. *Matter of Batchelor*, 64 How. Pr. 350; S. C. 1 Dem. 209. The Code requires the petition to set forth the jurisdictional facts (Code C. P. § 2660). So in California. *Beckett v. Selover*, 7 Cal. 215; *Townsend v. Gordon*, 19 Cal. 189. And in some states the appointment is void if such averments are not made. *Shipman v. Butterfield*, 47 Mich. 487; *Moore v. Moore* (Neb.), 50 N. W. Rep. 443. But the appointment cannot be collaterally attacked because the petition fails to allege the death of the intestate, where the jurisdiction of the court does not depend upon the formality of the petition. *Manning v. Leighton*, 26 Atl. Rep. 258 (Vt.). And false representations by an applicant as to the place of intestate's death are not necessarily fatal to the jurisdiction, on

an application to set aside the grant of administration. *Langmade v. Hamilton* (Ga.), 15 S. E. Rep. 535. In California, an applicant for administration is estopped by a former application with another applicant, but upon removal of the first administrator for mismanagement, the estopped applicant may be appointed. *Estate of Pico*, 56 Cal. 413.

*Notice.* Probate practice and procedure to settle an estate are proceedings *in rem*, and judgments thereon relate to property and bind parties without personal notice. Such notice is only necessary when required by positive laws. *Kearney v. Kearney*, 72 Cal. 591. In a contest as to the right of administration there are strictly no plaintiffs or defendants, all applicants are actors. *Atkins v. McCormick*, 4 Jones 274. When the administrator is next of kin, no notice is required prior to granting administration. *Decker v. Decker*, 74 Me. 465. But the applicant must give notice to all who are equally entitled to administer. *Sayre v. Sayre*, 3 Dick. (N. J.) 267; *Gans v. Dabergott*, 13 Stew. (N. J.) 184; *Matter of Courson*, 89 N. Y. 401. So, of an application for letters of administration *cum testamento annexo*. *Batchelor v. Batchelor*, 1 Dem. 209. One contesting an application for letters of administration may be required by the applicant to state his interest in the estate. *Newton v. Newton*, 61 Tex. 511. And one who has no interest has no right to be heard or resist the granting of letters. *Augusta &c. Railroad Co. v. Peacock*, 56 Ga. 146. On the other hand, in California, a prior right to the appointment may be set up at any time (Code C. P. § 1883). *Estate of Wooten*, 56 Cal. 332.

*Renunciation.* Under the North Carolina Code, § 1378, when any person applies for administration, he must produce and file the written renunciation of all persons having a prior right.

*Williams v. Neville*, 108 N. C. 559. So, *New York* (Code C. P. § 2664). It must appear of record that they refused. *Stebbins v. Lathrop*, 4 Pick. 33. In other states a verbal refusal is sufficient. *Pollard v. Mohler*, 55 Md. 284; although the Code provides that it may be renounced in writing. In some states a renunciation may be retracted. *McClellan's Appeal*, 16 Pa. St. 110; at any time before letters issued to another. *Casey v. Gardiner*, 4 Bradf. 13. But this is not so in California, *Estate of Kirtlan*, 16 Cal. 162; *Carpenter v. Jones*, 44 Id. 625, where the renunciation was a letter requesting the appointment of another person and the writer mistook its legal effect. And a renunciation of the right to administration *de bonis non* filed in the Orphans' Court is final and binding upon the one making it, and cannot subsequently be retracted. *Stockdale v. Conway*, 14 Md. 99. But if the renunciation was obtained by misrepresentation, and letters *de bonis non* issued to another on the strength of it, both renunciation and letters may be revoked. *Thomas v. Knighton*, 23 Md. 327. The public administrator's renunciation of his preference over creditors may be retracted as a matter of right like that of a private party. *Casey v. Gardiner*, *ubi supra*.

*Proofs.* The New York statute (Code C. P. § 2661) provides that before any letters of administration shall be granted "the fact of such person's dying intestate shall be proved to the satisfaction of the surrogate, who shall examine the person applying for such letters on oath touching the time, place, and manner of the death," &c. It seems, however, that this statute is merely directory, and that a failure to conform to its provisions is not a fatal objection to the validity of the letters issued. *Bulkley v. Redmond*, 2 Bradf. 281.

The death of the decedent may be proved by circumstantial or hearsay evidence, *Woerner on Admn.* § 207; *Ringhouse v. Keever*, 49 Ill. 470; *Primm v. Stewart*, 7 Tex. 178; even by general reputation among acquaintances, in the case of one who left no kindred. *Ringhouse v. Keever*, *ubi supra*.

At common law, and in many states by express statute, the presumption of death arises after an absence from home of more than seven years without news of the absentee's being alive within that time. *Redf. Surr. Pr.* 289; *Best on Ev.* § 409; *Stephen on Ev. c. 14, Art. 99*; *Greenleaf on Ev.* § 41; *Wharton on Ev.* § 1274; *Abb. Trial Ev.* § 72; *Esterly's Appeal*, 109 Pa. St. 222; *Hoyt v. Newbold*, 46 Vr. 219; *Matter of Nolting*, 43 Hun 456. And the presumption may be disproved. *Stevens v. McNamara*, 36 Me. 176. And the presumption is that he died at the end of the seven years, in the absence of further evidence. *Eagle v. Emmet*, 4 Bradf. 117. In this case the history of the presumption is given by Mr. Surrogate Bradford. An earlier date of death may be found as a fact, upon additional evidence of circumstances or probabilities. *Davie v. Briggs*, 97 U. S. 628. But the burden of proof is on the party maintaining it. *Evans v. Stewart*, 81 Va. 724. But where the statute creates a presumption on proof of such absence from the failure to prove that the absentee had left the state, it does not exclude evidence of death where the party did not leave the state. *Bank of Louisville v. School Trustees*, 83 Ky. 219. As to the effect of letters on the estate of a living person granted under such presumption—and also as to order of appointment and effect of letters generally—see Am. note, p. \*486, *ubi infra*.

## \*SECTION IV.

*Of administration to the effects of intestate seamen, marines, and soldiers; and therewith of personalty payable without representation obtained.*

By stat. 28 & 29 Vict. c. 111 [Navy and Marines (Property of Deceased) Act, 1865], it is provided : Sects. 3 and 4, that on the death of any person being or having been an officer, seaman, or marine (*q*), or any person being or having been employed in any of her Majesty's dockyards or other naval establishment, or in any of the civil departments of the navy, or entitled to an allowance from the Compassionate Fund, or of any widow entitled to a pension on the establishment of the navy, the amount due by the Admiralty (thereinafter called the residue) shall be disposed of according to the provisions of the act. Sect. 5, that where the residue exceeds 100*l*. the Admiralty shall pay it to the representative of the deceased. Sect. 6, that where the residue does not exceed 100*l*. representation to the deceased shall not be necessary, but the Admiralty may, if they think fit, require representation to be taken out, and in that case, or if representation is taken out otherwise, shall pay the residue to the representative. Sect. 7, that in the case of a seaman or marine, the Admiralty shall not be bound to pay the residue to his representative if representation has been obtained by a creditor as such, or by any person without complying with the regulations made by Order in Council (Dec. 28, 1865), but shall dispose of the residue under the act as if representation had not been obtained.

\*Sect. 8 provides that : "When the residue does not exceed 100*l*., and representation is not taken out, then; subject to the other provisions of this Act, the Admiralty shall, as soon as may be, dispose of the residue as follows :—(1) They shall, if they think fit, pay the residue to any per-

(*q*) By sect. 2, "officer" means a commissioned, warrant, or subordinate officer, or assistant engineer in her Majesty's naval or marine force : "seaman" or "marine" means a petty officer or seaman, non-commissioned officer of marines, or marine, or any other person

forming part, in any capacity, of the complement of any of her Majesty's naval or marine force (not being an officer within the meaning of this act) or a petty officer or man, of the Royal Naval Reserve or Naval Coast Volunteers.

28 & 29 Vict. c. 111.

Mode of obtaining administration to effects of deceased seamen, &c.

Ss. 3, 4.  
To whom act applies.

S. 5.  
Where residue over 100*l*.

S. 6.  
No representation necessary for sums under 100*l*.

S. 7.  
Where representation obtained by creditor.

S. 8.  
Disposal of residue under 100*l*. where representation not taken out.

son showing herself or himself to their satisfaction to be entitled to take out representation to the deceased (otherwise than as a creditor), to the end that the residue may be applied by the person to whom it is so paid in a due course of administration ; and the same shall be so applied accordingly (for which application the Admiralty may require such security as they think fit) : (2) Or else the Admiralty shall, if they think fit, pay to the persons (if any) beneficially interested in the residue their respective shares thereof : (3) And in cases where the foregoing provisions of the present section do not apply, and the amount of the residue appears to the Admiralty insufficient to cover the expense of representation, the Admiralty shall dispose of the residue in manner prescribed by Order in Council."

Sect. 9 provides that in the case of a seaman or marine the Admiralty shall not make payment to a nominee of the representative or of a person entitled to obtain representation unless in special circumstances it seems to them safe and proper.

S. 9. Generally no payment to be made to nominee of representative.  
S. 10. No disposal of residue to be made for three months.  
Sect. 10 provides that the Admiralty shall not dispose of the residue for three months from the receipt of notice of the death except by payment to the representative of the deceased, unless in special circumstances it seems to them safe and proper.

Sect. 11 provides that : "In the case of a seaman or marine where representation is not taken out, the Admiralty shall before disposing of the residue or any part thereof satisfy out of the residue (as far as the same will extend) any debt of the deceased of which they have notice, subject to the following conditions : 1st, That the debt accrued due within three years before the death : 2nd, That payment of it is claimed within two years after the death : 3rd, That the claimant proves the debt to the satisfaction of the Admiralty : 4th, That six \*months have elapsed from the receipt by the Admiralty of notice of the death, and no person has shown herself or himself to the satisfaction of the Admiralty to be entitled to take out representation to the deceased." And further that a creditor shall be only entitled to obtain payment out of such residue by lodging a claim with the Admiralty and proceeding thereon under the act.

S. 11. Payment of debts by Admiralty.  
Sect. 13 extends the provisions of the act to unsold effects and money in charge of the Admiralty. Sect. 15 exempts residues under 100% administered under the act without representation from probate duty, and from stamp duty.

on the administration bond where the Admiralty requires such bond.

By 47 & 48 Vict. c. 44, s. 2, it is provided that all references in this act to a pension or naval pension, or to money payable by the Admiralty, shall include a naval pension and a Greenwich Hospital pension, gratuity, and allowance within the meaning of the Greenwich Hospital Acts, 1865 to 1883, and any sum due on account of such.

47 & 48 Vict. c. 44.  
Extension of  
meaning of cer-  
tain words.

The Order in Council of Dec. 28, 1865, provides, by Sects. XVIII., XIX., XX., XXI., XXII., for the proceedings to be taken in the case of a seaman or marine dying intestate leaving naval assets to which any person makes claim as widow or next of kin. They are similar to the proceedings in the case of the death of a seaman or marine leaving a will required by Sects. XIII., XIV., XV., XVI., XVII., of the Order in Council, which have been already referred to at greater length (*r*).

Order in Council  
of Dec. 28, 1865.  
Proceedings to be  
taken on death of  
seaman intestate.

Sects. XXIV., XXV., XXVI., and XXVII., provide for procedure in the case of officers or any person described in Sect. 4 of 28 & 29 Vict. c. 111, dying and leaving naval assets not exceeding 100*l*. where representation is not required or intended to be taken out in England.

Procedure in case  
of officers, &c.,  
where representa-  
tion not taken out  
in England.

In the case of merchant seamen it is provided by 17 & 18 Vict. c. 104, s. 199 (Merchant Shipping Act, 1854), that wages and property of seamen or apprentices not exceeding \*in value 50*l*., subject to the provisions thereafter contained and to such deductions as the Board of Trade think proper to allow, may be paid over by them to the persons therein mentioned, without representation being obtained. And by Sect. 201 provision is made for payment by the Board of Trade of just claims by creditors.

17 & 18 Vict. c.  
104, s. 199.  
Where represen-  
tation to mer-  
chant seamen not  
necessary.

S. 201.  
Payment of debts.

By stat. 19 & 20 Vict. c. 41, s. 5 (An Act to make further Provision for the Establishment of Savings Banks for Seamen), it is provided that moneys due from the Board of Trade to the estate of any deceased depositor in any savings bank established under the act shall be paid and applied to the same persons and in the same manner and subject to the same conditions as provided by the Merchants' Shipping Act, 1854.

19 & 20 Vict. c. 41,  
s. 5.

Deposits in sav-  
ings banks for  
seamen.

By stat. 11 Geo. IV. & 1 Wm. IV. c. 41, s. 5, as amended by 26 & 27 Vict. c. 57, s. 3, the commissioners of the Chelsea Hospital with respect to pension or prize money, may

11 G. IV. & 1 W.  
IV. c. 41, s. 5.

(*r*) See *ante*, pp. \*336, \*337.

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authorize the agent for pensions, or other proper officer charged with the payment thereof, to pay to any person or persons who shall prove him, her, or themselves, to the satisfaction of such commissioners, to be the next of kin or legal representative, or otherwise legally entitled to any pension, or prize money, due to any deceased officer, non-commissioned officer, &c., such pension, &c., provided the same does not exceed 50%, although no administration or probate shall have been obtained.

2 & 3 W. IV. c. 53, s. 19.

Prize money of deceased soldiers.

27 & 28 Vict. c. 36, s. 3.

Commissioners of Chelsea Hospital may authorize the payment of shares not exceeding 50% without representation.

By stat. 2 & 3 Wm. IV. c. 53, s. 19, provisions are made as to the payment of prize money to the representatives of deceased soldiers.

By 27 & 28 Vict. c. 36, s. 3, which is in lieu of Sect. 25 of 2 & 3 Wm. IV. c. 53, it is provided that the commissioners of Chelsea Hospital may in any case, if they think fit, authorize their treasurer or secretary to pay the share of prize money (s) not exceeding 50% belonging to any deceased officer, \*soldier, or other person, to or among any person or persons showing themselves

entitled to the satisfaction of the commissioners thereto or to shares thereof without representation being obtained.

By 2 & 3 Wm. IV. c. 53, s. 26, it is enacted, that, in all cases of claim for prize money made by the next of kin of foreigners, who shall have been in the pay of his Majesty as non-commissioned officers or soldiers, and who shall have died intestate, it shall be lawful, when such next of kin shall reside out of his Majesty's dominions, for the treasurer or deputy treasurer of the said hospital for the time being to pay such claims to such next of kin, or any person or persons duly authorized by such next of kin to receive the same, without the production of letters of administration; and, in all cases where such foreign non-commissioned officers or soldiers shall have made wills, it shall be lawful for the treasurer or deputy treasurer, in like manner, to pay and satisfy such claims to the person or persons who, by inspection of the original will, or an authenticated copy thereof, shall appear to be entitled thereto, or to such person or persons as he, or she, or they shall duly authorize to receive the same, without requiring the probate.

(s) "Prize money" by sect. 2, includes bounty money, grant, or other allowance of money in the nature of prize or

grant in the hands of the commissioners for distribution.



By s. 28, a creditor taking out administration, is entitled only to the payment of the sum due to him at the time. 2 & 3 W. IV. c. 53, s. 28.

By stat. 26 & 27 Vict. c. 57, s. 15, and 47 & 48 Vict. c. 55, s. 4, special provisions are made for payment of the residue of the estate of officers and soldiers where it does not exceed 100%. without any representation being taken out to them. And by s. 16 of the former act provisions are made for the disposal of the residue after the expiration of three months in the case of an officer and one month in the case of a soldier, where such residue does not exceed 100%. and representation is not taken out.

These provisions of the legislature for the payment of small sums to persons interested in the estates of deceased sailors and soldiers, without representation obtained, have been extended by other statutes to cases of persons interested \*in certain other small estates. Thus by 3 & 4 Vict. c. 110, s. 11, it is provided that in the case of the intestacy of a debenture holder depositor or other claimant entitled to receive any sum not exceeding 50%. out of the funds of a loan society, entitled to the benefit of the act, the same may be paid as provided without representation obtained. So by 37 & 38 Vict. c. 42, s. 29, in the case of building societies under the act, it is provided that a sum not exceeding 50%. due to any member or depositor who dies intestate may be paid as provided without representation obtained. And similarly in the case of building societies still governed by 6 & 7 Wm. IV. c. 32 (see Sect. 7 of 37 & 38 Vict. c. 42), sums not exceeding 20%. may be paid over. So in the case of depositors in trustee or post office savings banks, it is provided by the regulations made in accordance with 50 & 51 Vict. c. 40, s. 3 (which supersedes previous similar provisions), for the nomination by depositors not under sixteen years of age of any person to whom any sum, not exceeding in the aggregate 100%, payable to such depositor at his decease, may be paid at such decease, and in the absence of nomination for the payment without representation obtained to the persons and in the manner specified by the regulations. Similar provisions for nomination or payment of sums not exceeding 100%. without representation obtained have been made in the case of members of friendly societies by 38 & 39 Vict. c. 60, s. 15 ; in the case of members of registered trade

Other cases where representation not necessary.

3 & 4 Vict. c. 110, s. 11.

Members of loan society.

37 & 38 Vict. c. 42, s. 29.

Members of building societies.

6 & 7 W. IV. c. 32.

Depositors in savings banks.

50 & 51 Vict. c. 40, s. 3.

38 & 39 Vict. c. 60, s. 15.

Members of friendly societies.

39 & 40 Vict. c. 22, s. 10.

Members of trade unions.

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39 & 40 Vict. c. 45,  
s. 11.

Members of in-  
dustrial and prov-  
ident societies.

unions by 39 & 40 Vict. c. 22, s. 10 ; and in the case of members of industrial and provident societies by 39 & 40 Vict. c. 45, s. 11, as extended in all three cases by 46 & 47 Vict. c. 7, s. 3

And lastly it is provided by 50 & 51 Vict. c. 67, s. 8, that sums not exceeding 100*l.* due from a public department in respect of any civil pay, superannuation or other allowance, annuity, or gratuity to any deceased person may, if the prescribed public department so direct, but subject to any regulations made by the Treasury, pay over the same as there directed without representation obtained.

50 & 51 Vict. c.  
67, s. 8.  
Civil servants.

\*It may here be noted that by 46 & 47 Vict. c. 47, s. 8 (Provident Nominations and Small Intestacies Act, 1883), it is provided : " If a member of any society who is entitled to make a nomination under this Act or the Acts hereby amended (*i. e.* to say members of Friendly, Industrial and Provident Societies, Trade Unions, and Savings Banks) is illegitimate, and has died intestate, and without having made any such nomination subsisting at his death, the directors may pay the sum which such member might have nominated to or among the person or persons who, in the opinion of the majority of them, would have been entitled thereto if such member had been legitimate, or, if there are no such persons, then the deposits shall be dealt with as the Commissioners of the Treasury may direct.

As to payment in  
certain cases of  
sums belonging to  
illegitimate per-  
sons deceased.

It has not been thought necessary in this work to set out the above enactment at any greater length ; for further information the reader should consult the acts cited, and Tristram & Coote's Probate Practice, Part I. Chap. IV.

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## \*CHAPTER THE THIRD.

## OF SPECIAL AND LIMITED ADMINISTRATIONS.

## SECTION I.

*Of administrations cum testamento annexo.†*

Hitherto the subject has been confined to cases of complete intestacy. But it often happens, that the deceased, although he makes a will, appoints no executor, or else the appointment fails : in either of which events, he is said to die *quasi intestatus* (a). The appointment of executor fails, 1. Where the person appointed refuses to act. 2. Where the person appointed dies before the testator, or before he has proved the will ; or where, from any of the causes specified in a former part of this work, he is incapable of acting. 3. Where the executor dies intestate, after having proved the will, but before he has administered all the personal estate of the deceased. In all these cases, as well as where no executor is appointed, the court must grant an administration, which is called administration with the will annexed (b) ; and in the last instance it is also called administration *de bonis non* (c). The office of an administrator differs little from that of an executor (d) : and it is plain that the will to which it is annexed must be similarly proved, as though probate were taken of it by an executor (e).

Instances of *quasi* intestacy.

Administration with the will annexed : administration *de bonis non*.

† See American note at end of this Section.

(a) 2 Inst. 397.

(b) See *ante*, Pt. I. Bk. III. Ch. IV. p. \*504, *et seq.*, and notes. But the court will not grant administration with the will annexed to the residuary legatee with the consent of the executor. It can only do so on the renunciation of probate by the executor, or, after citation has been served on him, upon his non-appearance within the prescribed time : *Garrard v. Garrard*, L. R. 2 P. & D. 238.

(c) Com. Dig. Administrator (B. 1) Administration *de bonis non* must also be granted, whenever an administrator dies before he has administered all the effects. See *post*, sect. 2, p. \*411, *et seq.*

(d) 2 Black. Comm. 535.

(e) Such administration must also be granted, if one of two executors proves the will and dies, and the other renounces : See *ante*, p. \*206, \*233. Com. Dig. Administrator (B. 1) : So if a man name the executor of B. to be his executor, and die in the lifetime of B. ;

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\*It is obvious that many of the cases above contemplated are not within the statute of administration, 21 Hen. VIII. c. 5 (*f*), which provides only for intestacy, and the refusal of the appointed executor : Consequently in such instances the court is left to the exercise of its discretion in the choice of an administrator, according to its own practice : and no person has such a legal right to preference as can be enforced by application to the common law courts (*g*).

The rule of practice in the Ecclesiastical Court, in a case where the grant of administration is not within the statute, was to consider which of the claimants has the greatest interest in the effects of the deceased, and decree the administration accordingly, if there are no peculiar circumstances (*h*). Hence, in all cases where no executor is appointed, or the appointed executor fails to represent the \*testator, the residuary legatee, if there be one, is preferred to the next of kin, and entitled to administration *cum testamento annexo* (*i*). And so strong has been the effort of the courts that the right of administration should follow the right of property, that although in the case of

for until B.'s death, he is in effect intestate : *Graysbrook v. Fox*, 1 Plowd. 279, 281 : Or if a man name an executor to have authority after a year from his death ; for during the year he is without an executor : 1 Plowd. 279, 281. And it seems that in all cases where a man makes his testament and executors, and there is a mesne time in which the executors cannot or will not execute the office, the Ordinary ought in the meantime to grant administration : *Graysbrook v. Fox*, 1 Plowd. 279.

(*f*) See *ante*, p. \*346.

(*g*) *Rex v. Bettesworth*, 2 Stra. 956. In the Goods of *Ewing*, 6 P. D. 19.

(*h*) *Wetdrill v. Wright*, 2 Phillim. 243, 248. In fact, in all cases, whether within the statute or not (with the exception, according to the old practice, of the single instance of administration to a wife's effects, whose husband has died after her, but before her estate is administered, see *ante*, p. \*349), the right of administration follows the

right to the property : In the Goods of *Gill*, 1 Hagg. 341. In a contest for administration, with the will annexed, the court preferred the sister of the testator to the widow as it appeared that the sister as a legatee had the larger interest in the property to be distributed : In the Goods of *Homan*, 9 P. D. 61. See *ante*, p. \*350, as to the grant being made to the persons having an interest under the will of a married woman in preference to her husband. See also In the Goods of *Martindale*, 1 Sw. & Tr. 8. In the Goods of *Pine*, L. R. 1 P. & D. 388.

(*i*) The residuary legatee, it is said, is the testator's choice ; he is the next person in his election to the executor : *Atkinson v. Barnard*, 2 Phillim. 318. If there are several entitled to the residue, administration may be granted to any of them : *Taylor v. Shore*, T. Jones, 162. Com. Dig. Administrator (B. 6). See *Dampier v. Colson*, 2 Phillim. 54.

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the appointed executor's renunciation, the letter of the statute expressly directs the Ordinary to grant administration to the next of kin, yet the spirit of the act has been held, both by common lawyers and civilians, to exclude the next of kin where there is a residuary legatee; on the ground that in such case the next of kin have no interest (*k*). "The reason," said the court, in *Thomas v. Butler* (*l*), "that the statute 21 Hen. VIII. required that administration should be granted to the next of kin, was, upon the presumption that the intestate intended to prefer him: But now the presumption is here taken away, the *residuum* being disposed of to another: and to what purpose should the next of kin have it, when no benefit can accrue to him by it? and it is reasonable that he should have the management of the estate who is to have what remains of it after the debts and legacies are paid."

So the residuary legatee, even when there is no present prospect of any residue, is entitled to administration in preference as well as to the next of kin (*m*), as also to legatees and annuitants (*n*). So he is entitled though only residuary legatee in trust (*o*). even where there is no residue, or where he is only trustee:

\*However, the next of kin has a *prima facie* right, and therefore, where a party claims as, or derivately from, a residuary legatee, the burden of proof lies on such party (*p*). but next of kin have a *prima facie* right. Hence, where the husband appointed his wife executrix and residuary legatee, and he and his wife were drowned in the same ship, the court granted administration to the next of kin of her husband, on the ground that the next of kin of the wife had not proved her survivorship (*q*).

(*k*) *Taylor v. Diplock*, 2 Phillim. 276, 277. In the Goods of Gill, 1 Hagg. 341, 342. See also *ante*, p. \*374.

(*l*) 1 Ventr. 219.

(*m*) *Thomas v. Butler*, 1 Ventr. 219. Treat. on Eq. B. 4, p. 2, c. 1, s. 6; for, being once out of the statute upon the construction of the will, there is nothing *ex post facto* can bring him within it: 1 Ventr. 219.

(*n*) *Atkinson v. Barnard*, 2 Phillim. 316.

(*o*) *Hutchinson v. Lambert*, 3 Add. 27. See, however, *contra*, as to mere trustees, *Coussmaker v. Chamberlayne*, 2 Cas. temp. Lee, 243. *Boddicott v.*

*Dalzeel*, *ibid.* 294. *Fawkener v. Jordan*, *ibid.* 327. *Post*, p. \*403 (*x*); but in no case will the court decree administration to *substituted* trustees as such without the consent of *all* parties beneficially interested in the trust properties until the trust properties are actually vested in such substituted trustees. *Cresswell v. Cresswell*, 2 Add. 342.

(*p*) The next of kin, as to personalty, stands in the same position as the heir-at-law as to realty: *Underwood v. Wing*, 4 De G. M. & G. 633.

(*q*) *Taylor v. Diplock*, 2 Phillim. 261. In the Goods of Selwyn, 3 Hagg. 748. *Underwood v. Wing*, 4 De G. M. & G.

Where the residuary legatee survives the testator, and has a *beneficial* interest, his representative has the same right to administration *cum testamento annexo*, as the residuary legatee himself, and is therefore entitled to administration in preference to the next of kin (*r*), or to legatees (*s*). Thus, if an executor be also residuary legatee, and die before probate, or intestate, before he has fully administered the estate, administration *cum testamento annexo* shall be granted to his personal representative, and not to the next of kin of the first testator (*t*). Hence, also, though generally speaking, if a \*feme covert executrix dies intestate, her husband cannot take out administration *de bonis non* to the first testator, yet if she be also residuary legatee, he may do so (*u*). But it should seem that where the residuary legatee is a mere trustee, it is the general rule of practice, upon his death to grant the administration, not to his representative, but to such person or persons as have the beneficial interest in the residuary estate (*x*).

Although it was the practice of the Spiritual Court, grounded on the principle above stated, to grant administration to the residuary legatee, yet, as he had no legal right to it under the statute, the court was not *bound* (as in the case of the sole next of kin of a complete intestate) to grant it to him. Thus, where the testator appointed two executors by his will, and left the residue of his estate to his son, the executors renounced, and the son moved for a *mandamus* to obtain administration *cum testamento annexo*: But the court refused to grant the writ, on the ground that none of the statutes mentioned the residuary legatee;

633. *S. C. Wing v. Angrave*, 8 H. of L. 183. In the Goods of Carmichael, 32 L. J., P. & M. 70. In the Goods of Wheeler, 31 L. J., P. & M. 40. See *post*, Pt. III. Bk. III. Ch. II. § V., where the question of survivorship among persons whose death is occasioned by the same cause is more fully considered.

(*r*) *Wetdrill v. Wright*, 2 Phillim. 243. See also *Thomas v. Baker*, 1 Cas. temp. Lee, 341.

(*s*) In re Thirlwall, 6 Notes of Cas. 44.

(*t*) *Ysted v. Stanley*, Dyer, 372 *a*, *ex relatione* Doctor Drury (judge of the Prerogative Court). Went. Off. Ex. 32, 14th edition. Godolph. Pt. 1, c. 20,

*s. 2*. Where the testator made his wife residuary legatee for life, and substituted his daughter after her death, and the widow proved the will, and then both she and her daughter died; it was held that the personal representative of the daughter had a right to administration *cum testamento annexo*, in preference to the representative of the mother: *Wetdrill v. Wright*, 2 Phillim. 243.

(*u*) *Richardson v. Seise*, 12 Mod. 306. *Rous v. Noble*, 2 Vern. 249.

(*x*) *Hutchinson v. Lambert*, 3 Add. 27. *Coussmaker v. Chamberlayne*, 2 Cas. temp. Lee, 243.

and Lord Hardwicke adverted to a case in chancery, before Lord Macclesfield, between Wheeler and the Archbishop of Canterbury, where it was held that this sort of administration is not within the statute (y).

If the residuary legatee declines, it is usual to grant administration *cum testamento annexo* to the next of kin: But it is clear, that when he has no interest he may be excluded, and the administration granted to a person who has an interest \*in the effects, *e. g.* a creditor (z). In *Furlonger v. Cox. (a)*, the deceased left a widow and a son; the widow was sole executrix and universal legatee: She renounced probate, and the son contended for the administration against a creditor (b); the court held that the son was excluded, the estate being insolvent, and gave the administration to the creditor (c).

If the residuary legatee declines, administration usually granted to next of kin:

If the executor fails to take probate, and there is no residuary legatee, the next of kin are entitled to administration *cum testamento annexo* (d). If the next of kin decline it, such administration may be granted to a legatee (e)

but he may be excluded if he has no interest.

If there is no residuary legatee, the next of kin is entitled: if the next of kin decline, it may be

(y) *Rex v. Bettesworth*, 2 Stra. 956. In the goods of Ewing, 6 P. D. 19, 25. But where the same person is both next of kin and residuary legatee, neither law nor practice will warrant a refusal to grant administration *cum testamento annexo* to such person, when the executors renounce: *Linthwaite v. Galloway*, 2 Cas. temp. Lee, 414.

(z) *West v. Willby*, 3 Phillim. 381. See *Mayhew v. Newstead*, 1 Curt. 593, in which case the executor and residuary legatee having assigned his interest to trustees for the benefit of his creditors, administration with the will annexed was granted to two of the trustees, he having been first cited.

(a) Prerog. Jan. 1811: cited by Sir John Nicholl, in 3 Phillim. 381.

(b) But, unless in cases where the next of kin has no interest in the property, a creditor cannot be allowed to contest the right to administration. *Ante*, p. \*386, n. (t). And a residuary legatee, who has renounced, may retract his renunciation and claim the ad-

ministration in preference to a creditor, though the estate is alleged to be deeply insolvent: In the Goods of Waters, 2 Robert. 142.

(c) Lord Mansfield, in the Archbishop of Canterbury *v. House*, Cowp. 140, said, that "no next of kin ever struggled for the administration of an insolvent estate with an honest view."

(d) *Kooystra v. Buyskes*, 3 Phillim. 531. Administration with a will annexed, in which there was no executor nor residuary legatee, was decreed to two aunts of the deceased, legatees in the will, and daughters of the next of kin, a grandmother, she being nearly ninety years of age, and incapable: In *re Hinckley*, 1 Hagg. 477.

(e) If there be a legatee for life and a legatee substituted, the practice is to prefer the former. But the court will depart from its practice, when, were it to be followed, a question of construction of the will would, in effect, be determined, and will make such a grant

granted to a legatee or creditor, upon notice.

or to a creditor (*f*); but notice must be given of the application of the legatee or creditor to the next of kin (*g*).

\*In all these cases, where a party has a prior title to a grant, he must be cited before administration is committed to any other person (*h*). Therefore the executor, if there be one, must be cited before a grant to a residuary legatee (*i*), a residuary legatee before a grant to a specific legatee, and so on, through all the gradations of priority. So if there is a testamentary disposition without an executor, it has been laid down that the party, in whose favor the disposition is made, must cite the next of kin, before he can have administration *cum testamento annexo* (*k*).

The court may grant administration, with the will annexed, to one of two universal legatees, a decree with intimation having issued in the name of the other, who is since dead (*l*). So administration, with the will annexed, in which there was no executor, may be granted to one of two legatees, a decree with intimation having issued in their joint names against a residuary legatee (*m*).

When the executor resides out of the jurisdiction,† adminis- as will leave the question open : *Brown v. Nicholls*, 2 Robert. 399.

(*f*) *Kooystra v. Buyskes*, 3 Phillim. 531. *Snape v. Webb*, 2 Cas. temp. Lee, 411.

(*g*) 3 Phillim. 531. Com. Dig. Administrator (B. 6). See also *Woolley v. Green*, 3 Phillim. 314.

(*h*) In the Goods of *Barker*, 1 Curt. 592. *Ante*, p. \*386, note (*g*).

(*i*) If there be two executors, and one alone has proved the will, power being reserved to the other, both the executors must be cited : In the Goods of *Leach*, Dea. & Sw. 294. See *Le Briton v. Le Quesne*, 2 Cas. temp. Lee, 261, as to the citation of an executor who has already proved the will in a court out of the jurisdiction, in a case where administration is required by the residuary legatee, in order to recover a debt within the jurisdiction.

(*k*) 3 Bac. Abr. 41, tit. Executors (E. 8.). Accordingly in a case where an application was made for

a grant of administration with the will annexed to the sole legatee, on an affidavit, that the testator died possessed of no other property than that specifically described in the will, *Sir Cresswell Cresswell* held, that the next of kin ought to have been cited, but appears to have given the applicant his option of taking administration limited to the property disposed of by the will : In the Goods of *Watson*, 1 Sw. & Tr. 110. But on a subsequent occasion when this case was cited, the learned judge said that it was an exceptional case, and that the general rule was against such a grant, which should not be made unless some very strong reason be given : In the Goods of *Watts*, 1 Sw. & Tr. 538.

(*l*) *Law v. Campbell*, 1 Hagg. 55.

(*m*) *Pickering v. Pickering*, 1 Hagg. 480. See *ante*, p. \*378.

† See American note at end of this Section.



\*tration *cum testamento annexo* may be granted to another person under a letter of attorney from the executor for his use and benefit (*n*). It should seem that a will thus proved by the attorney of the executor is the same thing as if actually proved by himself. And, consequently, the chain of representation is not broken by his death, if he has himself appointed an executor (*o*). Again, the letter of attorney is revocable; and when the executor revokes it and desires probate, the court is bound to grant it to him (*p*).

Administration to attorney to executor:

its effect:

it is revocable.

On one occasion, administration, with the will annexed, had been granted for the use and benefit of the executor, then at sea, to his attorney: The executor having returned to England, and being desirous of probate, and the administration with the will annexed having been brought in by the attorney (with the usual affidavit, "that no action at law, or suit in equity, had been brought by or against him as administrator,") had been sworn as executor: And he prayed that the administration should be declared to have *ceased and expired*, and that probate should be granted to him: The application, in respect to the letters of administration, was objected to in the registry, on the ground that in some similar cases the administration had been expressly revoked: In support of the motion, it was urged that the administration, having been rightly granted, ought not to be revoked: A revocation which was unnecessary might possibly be injurious; for it might render some of the administrator's acts void: and would certainly be inconvenient, for the probate would be considered at the Stamp Office as an original, and consequently probate duty required to be paid as for an original grant, and the duty, already paid on the administration, could only be recovered upon a special application to the commissioners, supported by affidavit: whereas, if the administration were declared to have *ceased and expired*, the probate \*would pass at the Stamp Office upon a free stamp: The court (Sir John Nicholl) declared the administration *cum testamento annexo* to have *ceased and expired*; and directed that, in future, grants, *durante absentia*, to attorneys, should be limited "for the use and benefit of resident at , and until the executor (or the party entitled to the

Consequence of the return of the executor.

(*n*) See *ante*, p. \*376. In the Goods of Barker [1891] P. 251.

(*o*) In the Goods of Bayard, 1 Robert.

768. In the Goods of Murguia, 9 P. D. 236.

(*p*) *Pipon v. Wallis*, 1 Cas. temp. Lee, 402.

administration) should duly apply for, and obtain, probate or administration" (q).

On the death of the executor the letters of administration cease to be of any force; and therefore the administrator cannot make a good title, if he sells leasehold property of the deceased, unless he can warrant to the purchaser that the executor is alive (r).

It may here be observed, that a person who is entitled to probate as executor cannot be allowed to take out administration *cum testamento annexo* (notwithstanding the inconvenient effect which the taking probate may in some cases have, by reason of continuing the chain of representation to some other party whose executor the testator happens to be). For if a person be entitled to a grant in a superior character, the court will not make that grant to him in an inferior character (s). Accord-

ingly, by rule 50, P. R. 1862 (non-contentious), "No person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character" (t).

(q) In the Goods of Cassidy, 4 Hagg. 360. Webb v. Kirby, 7 De G., M. & G. 381. As to the effect of the death of the executor, see Suwerkrop v. Day, 8 A. & E. 624.

(r) Webb v. Kirby, 7 De G., M. & G. 376, reversing the decision of the V.-C., 3 Sm. & G. 333.

(s) In the Goods of Bullock, 1 Robert. 273. In the Goods of Richardson, 1 Sw.

& Tr. 515. In the Goods of Morrison, 2 Sw. & Tr. 129.

(t) As to the construction of this rule, see in the Goods of Loftus, 3 Sw. & Tr. 307, which decides that it is competent for the court to treat the rule as intended for the general guidance of the business in the registry, and capable of modification by the court, if sufficient reason can be shown for departure from it.

† If the persons named in the will as executors are unfit or disqualified or refuse to act, letters of administration with the will annexed may be granted to the persons entitled in case of intestacy. *Alabama* (1886 Code, §§ 2006, 2011), *Arkansas* (1884 Dig. Stats. §§ 10, 11, 12), *Colorado* (1891 An. Stats. §§ 4682, 4717), *Connecticut* (1888 G. S. § 549), *Dakota* (1887 C. L. § 5695), *Delaware* (1874 R. C. c. 89, § 5), *Georgia* (1882 Code, §§ 2440, 2491), *Idaho* (1887 R. S. § 5341), *Illinois* (1891 R. S. c. 3,

§ 1), *Indiana* (1888 R. S. § 2226), *Iowa* (1888 R. C. §§ 2347, 2348), *Kansas* (1889 G. S. § 2791), *Kentucky* (1887 G. S. c. 39, §§ 11, 12), *Maine* (1883 R. S. c. 64, § 20), *Maryland* (1888 P. G. L. Art. 93, §§ 43, 52), *Massachusetts* (1882 P. S. c. 130, § 6), *Michigan* (1882 An. Stats. § 5838), *Minnesota* (1891 G. S. §§ 5666-67), *Mississippi* (1892 An. Code, § 1833), *Missouri* (1889 R. S. § 11), *Montana* (1887 C. S. p. 287, §§ 45, 105), *Nebraska* (1893 C. S. c. 23, § 167), *Nevada* (1885 G. S. § 2766), *New York*

(Code C. P. § 2643), *Ohio* (1890 R. S. § 6000), *Pennsylvania* (1883 Purd. Dig. p. 509, § 14), *Rhode Island* (1882 P. S. c. 179, § 4), *South Carolina* (1882 G. S. § 1881), *Tennessee* (1884 Code, § 3078), *Texas* (1888 R. S. Art. 1868), *Vermont* (1880 R. L. §§ 2064, 2069), *Virginia* (1887 Code, § 2637), *Washington* (1891 G. S. § 891), *West Virginia* (1891 Code, c. 85, § 2), *Wisconsin* (1889 An. Stats. § 3796).

If the sole executor or all the executors or administrators die, resign, or are removed, the Probate Court must grant letters of administration with the will annexed, or of the goods unadministered, to the person entitled as in case of intestacy. *Alabama* (1886 Code, § 2064), *Arkansas* (1884 Dig. Stats. § 41), *California* (Code C. P. § 1350), *Colorado* (1891 An. Stats. § 4720), *Connecticut* (1888 G. S. § 569), *Dakota* (1887 C. L. § 5698), *Delaware* (1874 R. C. c. 89, § 10), *Georgia* (1882 Code, §§ 2490, 2491), *Illinois* (1891 R. S. c. 3, §§ 38, 37), *Indiana* (1888 R. S. § 2240), *Kansas* (1889 G. S. §§ 2807-08), *Kentucky* (1887 G. S. c. 39, § 16), *Maine* (1883 R. S. c. 64, §§ 21, 23), *Maryland* (1888 P. G. L. Art. 93, § 71), *Massachusetts* (1882 P. S. c. 180, § 9), *Mississippi* (1892 An. Code, § 1856), *Missouri* (1889 R. S. §§ 46, 40), *Montana* (1887 C. S. p. 288, § 48), *Nebraska* (1893 C. S. c. 23, §§ 175, 186), *New Jersey* (1876 Rev. p. 396, § 2, p. 758, § 29), *New York* (Code C. P. § 2693), *Ohio* (1890 R. S. § 6018), *Oregon* (1892 An. Laws, § 1098), *Rhode Island* (1882 P. S. c. 179, §§ 24, 27), *South Carolina* (1882 G. S. §§ 1896, 1904), *Texas* (1888 R. S. Art. 1871), *Vermont* (1880 R. L. § 2072), *Virginia* (1887 Code, §§ 2643, 2645), *Washington* (1891 G. S. § 940), *West Virginia* (1891 Code, c. 85, §§ 8-10), *Wisconsin* (1889 An. Stats. § 3800).

*Letters and Procedure.* Letters *cum testamento annexo* are inseparably connected with the will, and their authority

ceases when the will is set aside. *Smith v. Stockbridge*, 39 Md. 640; *Kilton v. Anderson* (R. I.), 25 Atl. Rep. 907. They can only be granted by the probate court of the county in which the will was proved and letters testamentary granted, *Estate of Eysler*, 5 Watts 132; *People v. White*, 11 Ill. 341; in *Pennsylvania*, since 1832, by the register. *Estate of Langton*, 16 Phila. 267. If it appears that there are no assets, or the presumption arises from lapse of time that there are no assets unaccounted for which can be identified and reached by the administrator, and there is no claim in respect to them which can be enforced, letters of administration with the will annexed need not be granted as a matter of right. *Van Giessen v. Bridgeford*, 83 N. Y. 348, 356; *Roome v. Philip*, 27 N. Y. 357; *Dominick v. Michael*, 4 Sandf. 37; *Fowler v. Walter*, 1 Dem. 240. Where the executor fails to qualify, the court should appoint an administrator. *Leavitt v. Leavitt*, 65 N. H. 102. The appointment of an administrator with the will annexed, while there is an executor under no disability, who has not renounced the appointment, is voidable upon the application of the executor made in due time. *Baldwin v. Buford*, 4 Yerger 16; *Thompson v. Meek*, 7 Leigh 419; *Creath v. Brent*, 3 Dana 129. The renunciation of the executor should appear of record. *Springs v. Irwin*, 6 Ired. 27. But the court having exercised its discretion and appointed an administrator *cum testamento annexo*, such appointment cannot be collaterally attacked. *Mobberly v. Johnson*, 78 Ky. 273. In *New York* and generally, the appointment is made in a distinct proceeding (*e. g.* not in the accounting of the executor of the deceased executor). *Popham v. Spencer*, 4 Redf. 399. And all parties having a prior right to the appointment should be cited. *Batchelor*

*v. Batchelor*, 1 Dem. 209. And the petition, like that for administration, should pray for the appointment of the petitioner. *Fowler v. Walter*, 1 Dem. 240; *Matter of Batchelor*, 64 How. Pr. 350. But it is not generally necessary that the order of appointment should state the facts giving jurisdiction, if they are sufficient to sustain the appointment. *Peebles v. Watts*, 9 Dana 102; *Thompson v. Meek*, 7 Leigh 419; *Smith v. Wingo*, 1 Rice 287; *Suttle v. Turner*, 8 Jones 403; *Griffith v. Wright*, 18 Ga. 173.

An administrator *cum testamento annexo* is, in general, required to give bond like an administrator in chief. *Ex parte Brown*, 2 Bradf. 22; N. Y. Code C. P. § 2645. Bonds similar to those provided in other cases, with such variations as the case may require, must be given by administrators with the will annexed, and other special administrators. *Alabama* (1886 Code, § 2024), *Arkansas* (1884 Dig. Stats. § 20), *Colorado* (1891 An. Stats. § 4690), *Florida* (1892 R. S. § 1884), *Illinois* (1891 R. S. c. 3, §§ 8, 23), *Indiana* (1888 R. S. § 2242), *Kansas* (1889 G. S. § 2787), *Maine* (1883 R. S. c. 63, § 24), *Massachusetts* (1882 P. S. c. 130, § 8), *Michigan* (1882 An. Stats. §§ 5840, 5868), *Minnesota* (1891 G. S. § 5674), *Mississippi* (1892 An. Code, § 1834), *Missouri* (1889 R. S. § 19), *Nebraska* (1893 C. S. c. 23, § 169), *Nevada* (1885 G. S. § 2766), *New Jersey* (1876 Rev. p. 761, §§ 44, 45), *New York* (Code C. P. §§ 2645, 2693), *North Carolina* (1883 Code, § 1388), *Ohio* (1890 R. S. § 6002), *Oregon* (1892 An. Laws, § 1091).

Special administrators must give bonds in such sum as the judge may direct in *California* (Code C. P. § 1414), *Colorado* (1891 An. Stats. § 4705), *Dakota* (1887 C. L. § 5747), *Idaho* (1887 R. S. § 5393), *Massachusetts* (1882 P. S. c. 130, § 11), *Michigan* (1882 An. Stats. § 5854), *Wisconsin* (1889 An. Stats. § 3812).

Administrators *cum testamento annexo* shall give bond with two sureties in double the value of the estate in *South Carolina* (1882 G. S. § 1883).

So, as to administrator *de bonis non* (Id. § 1897). So as to temporary administrator in *Georgia* (1882 Code, § 2488). So, as to special administrator in *Kansas* (1889 G. S. § 2800).

An administrator with the will annexed must give bond to account for the proceeds of real estate sold in *Pennsylvania* (1883 Purd. Dig. p. 512, § 28). And if a special administrator, under bond as such, is appointed administrator *cum testamento annexo*, he will continue to be liable in the former capacity, until he gives bond in the latter capacity. *Matter of Fisher*, 15 Wis. 567. But the regularity of the appointment of an administrator *cum testamento annexo* like that of a general administrator cannot be questioned in a collateral proceeding. *Curtis v. Williams*, 3 Dem. 63.

*Who is entitled.* The person most beneficially interested under the will should have the administration. *Long v. Huggins*, 72 Ga. 776. When there are two or more persons equally entitled to receive letters of administration *cum testamento annexo*, the surrogate will appoint the person who, other things being equal, has the largest interest under the will, *Estate of Morgan*, 2 How. Pr. N. S. 194; or administration may be granted, upon the consent of the person entitled, jointly to him and another (who is not entitled). *Quintard v. Morgan*, 4 Dem. 168; *Estate of Morgan*, 8 Civ. Pro. 77. But in *California*, it is said that the court prefers to appoint as administrator *cum testamento annexo* a public officer rather than a private person. *Estate of Murphy*, *Myrick's Prob.* 185. And as between the public administrator, and the nominee of a foreign executor who has

renounced his right to letters testamentary, in California, and who is not a surviving husband or wife of the decedent, the public administrator has the prior right. *Estate of Garber*, 74 Cal. 338. So, in New York, between the public administrator and the nominee of a foreign legatee. *Matter of Blank*, 2 Redf. 443. In the appointment of an administrator *cum testamento annexo*, a residuary legatee is generally preferred to next of kin, *Woerner on Admn.* § 245; *Schouler on Exrs.* § 124; *Croswell on Exrs.* § 148; *Bradley v. Bradley*, 3 Redf. 512; and even (where the residuary legatee was also the next of kin) to the widow. *Govane v. Govane*, 39 Md. 640. Although, in Maryland, the statute now prescribes a different order: first the widow, then the residuary legatee, then the next of kin. Code, Art. 93, § 34. But where there is no widow and no residuary legatee, the next of kin is entitled. *Georgetown College v. Brown*, 34 Md. 450; *Dalrymple v. Gamble*, 66 Id. 298. In New Jersey, when the executor dies before the testator, a residuary legatee is entitled to administration in preference to legatees, next of kin, and creditors, and the ordinary and surrogate have no discretion as to this appointment when the residuary legatee is willing and able to accept. *Will of Kirkpatrick*, 7 C. E. Gr. 463. And where the residuary legatee is a corporation aggregate, the administration will be granted to one of their number named by them for that purpose. *Id.* If the residuary legatee is an infant, his guardian will be appointed. *Matter of Lasak*, 3 N. Y. 356. And if a married woman, her husband will be appointed. *Long v. Huggins*, 72 Ga. 776.

But the widow and next of kin are excluded from the right of administration *cum testamento annexo* only when the testator disposes of his whole estate, *Estate of Ell-*

maker, 4 Watts 34, 38; or when adversely interested, *Id.* The next of kin have a *prima facie* right. *Williams' Appeal*, 7 Pa. St. 259. The next of kin, in the order named in the statute, or his appointee, is entitled in preference to any creditor. *Little v. Berry*, 94 N. C. 433. And a claimant under a contract made with the executors is not a creditor within the provisions of the New York Code (Civ. Pro. § 2643), authorizing letters of administration with the will annexed to a creditor. *Fowler v. Walter*, 1 Dem. 240. The executor himself may be appointed administrator *cum testamento annexo*, where he is disqualified for the executorship (*e. g.*, as a witness to the will), *Murphy v. Murphy*, 24 Mo. 526; or on his refusal for other cause. *Briscoe v. Wickliffe*, 6 Dana 157. And in case of a non-resident executor, it is customary to appoint his resident attorney. *St. Jurgo v. Dunscomb*, 2 Bradf. 105.

*His authority and powers.* It is the right and the duty of an administrator *cum testamento annexo* to administer the entire personal estate of the decedent, *Sullivan v. Fosdick*, 10 Hun 173; *Landers v. Stone*, 45 Ired. 404; *Venable v. Mitchell*, 29 Ga. 566; although it was formerly held in Georgia that he could not dispose of property, as to which testator died intestate. *Ashburn v. Ashburn*, 16 Ga. 213; *Harper v. Smith*, 9 Id. 461. Where he is appointed on the removal of an executor, it is the duty of the executor so removed to immediately deliver to him all the assets of the estate. *Aldridge v. McClelland*, 7 Stew. (N. J.) 237. And the court admitting a will to probate may order that the assets of the estate in the possession of persons in another state (who are before the court as proponent and witness of another will of the testator) be handed over by them to the administrator. *Matter of Dietz*, 14 Stew. (N. J.) 284. All the duties of an execu-

tor, pertaining to his office as such, devolve on the administrator with the will annexed. Woerner on Admn. §§ 178, 245; *Blake v. Dexter*, 12 Cush. 559, 569; *Buttrick v. King*, 7 Met. 20; *Jackson v. Jeffries*, 1 A. K. Marsh. 88; *King v. Talbert*, 36 Miss. 367. And where a trust is annexed to the office, it should be executed by him. *Knight v. Loomis*, 30 Me. 209; *Gibbons v. Riley*, 7 Gill 81; *Blake v. Dexter*, 12 Cush. 559; *Hall v. Cushing*, 9 Pick. 395; *Dorr v. Wainwright*, 13 Id. 328; *King v. Talbert*, 36 Miss. 367; *Lott v. Meacham*, 4 Fla. 144. Thus, where the will directs that the real estate be sold and the proceeds added to the personal estate and divided in a certain manner, and appoints no executor, it is the duty of the administrator *cum testamento annexo* to execute the directions of the will, either personally, or by application to a court of equity for the appointment of a trustee to make the sale. *Wenner v. Thornton*, 98 Ill. 156. And where powers are given to the trustee essential to the management of the trust, they will pass with the trust itself to his successor in the office of trustee. *Burdick v. Goddard*, 11 R. I. 516.

A trust may, however, be given to an executor, *e. g.*, in the management and direction of the real property, which, with the powers connected with it and incidental to it, is distinct from the executorship, and will not pass with that office to the administrator *cum testamento annexo*, *Ingle v. Jones*, 9 Wall 486; *Dunning v. Ocean National Bank*, 61 N. Y. 497; *Belcher v. Branch*, 11 R. I. 226; *Ross v. Barclay*, 18 Pa. St. 179; *Brush v. Young*, 4 Dutch. 237; *Knight v. Loomis*, 30 Me. 204; *Simpson v. Cook*, 24 Minn. 180; *Warfield v. Brand*, 13 Bush 77; the statute carrying the office and powers of the executor, and not of the testamentary trustee, *Ross v. Barclay*, *ubi supra*; and if exercised inadvertently or otherwise by him, it

will not come within the scope of his accounts or liabilities as administrator. *Belcher v. Branch*, *ubi supra*.

The devolution of the duties and powers of an executor upon the administrator *de bonis non cum testamento annexo* is regulated by statute in most of the United States. These statutes are stated more particularly at the end of this note, and must be considered in connection with the cases relating to the same subject matter, although they express, in part at least, only principles of law already established independently of the statute. Thus, in *Blakemore v. Kimmons*, 8 Baxt. 470, the will was probated before the passage of the act.

The powers of the administrator *cum testamento annexo* are, in general, the same as those of an executor, *Kidwell v. Brummagin*, 32 Cal. 436; *Jackson v. Jeffries*, 1 A. K. Marsh. 88; whether they are derived from the statute or the common law. *Tuers v. Brunges*, 56 How. Pr. 282. But his appointment does not carry with it the discretionary powers conferred alone upon the executor named in the will. *Frisby v. Withers*, 61 Tex. 134; *Fish v. Coster*, 28 Hun 64; *Pratt v. Stewart*, 49 Conn. 339. Powers connected with the individual named as executor and not with his office do not devolve upon his successor unless clearly so intended by the testator. Woerner on Admn. §§ 178, 340; *Croswell on Exrs.* § 475; *Lanning v. Sisters of St. Francis*, 8 Stew. (N. J.) 392; *Lucas v. Price*, 4 Ala. 679; *Matter of Bierbaum*, 40 Hun 504; *Estate of Pugh*, 17 Phila. 509. So, where the power was to sell and divide the real estate as "to my executors may seem best," *Naundorf v. Schurman*, 14 Stew. (N. J.) 14; or to sell and divide under direction of the will, *Conklin v. Egerton*, 21 Wend. 430; or to invest, manage, sell, and convey in their discretion, *Stoutenburgh v. Moore*, 10 Id. 63; or to divide the property

into shares and hold certain shares in trust with power of sale and investment. *Kortright v. Storminger*, 49 Hun 249. So, in general, a discretionary power of sale. *Cooke v. Platt*, 98 N. Y. 35. But such power goes to the successor, if there is express provision in the will for its execution by him. *Fish v. Coster*, 28 Hun 64; *Royce v. Adams*, 57 Hun 415. So, where the power was given to the executors, "or those administering my estate," although the trust and the power involved were distinct from the ordinary administration of the estate. *Matter of Baker*, 26 Hun 626. But where the will gave a special trust and power of sale to the executor A., and provided for its exercise by B. on A.'s death or refusal, it was held that A.'s resignation, and its acceptance and the appointment of B. as trustee by a court having no such jurisdiction or authority, did not divest A. of the trust or prevent its subsequent exercise by him. *Veazie v. McGugin*, 40 O. St. 365.

A power of sale in a will may generally be executed by the administrator *cum testamento annexo*, *Howell v. Sebring*, 1 McCart. 84; *Bennett v. Hester*, 2 Ired. Eq. 330; *Kidwell v. Brummagin*, 32 Cal. 436; *Peebles v. Watts*, 9 Dana 102; *Lantz v. Boyer*, 81 Pa. St. 325; *Roger v. Meixel*, 19 Id. 240; *Olwine's Appeal*, 4 Watts & S. 492; *Hassinger's Appeal*, 11 Pa. St. 454; *Robinson v. Ostendorff* (S. C.), 16 S. E. Rep. 371; *Farwell v. Jacobs*, 4 Mass. 634; *Elstner v. Fife*, 32 O. St. 358; *Green v. Davidson*, 4 Baxt. 488; *Davis v. Hoover*, 112 Ind. 423; *Blake-more v. Kimmons*, 8 Baxt. 470; especially where it is given for the purpose of paying legacies or debts, *Woerner on Admn.* § 339; such purposes pertaining to ordinary administration of the estate, *Pratt v. Stewart*, 49 Conn. 339. And a general power of sale is *prima facie* for the payment of debts, and may

be exercised by the administrator *cum testamento annexo*. *Evans v. Chew*, 71 Pa. St. 47. So, a direction for sale, amounting to a conversion of the property to pay debts and legacies, goes to the administrator. *Cooke v. Platt*, 51 N. Y. Super. Ct. 55. So, *a fortiori* where there is a direction to sell without discretion of any kind, the power goes to the administrator. *Woerner on Admn.* § 339; *Mott v. Ackerman*, 92 N. Y. 539; *Bingham v. Jones*, 25 Hun 6. The New Jersey statute makes no distinction between *direction* and power to sell, *Corlies v. Little*, 2 Gr. 373 (executed by surviving executor); and direction to sell, if the executors think the land will bring its value, is not such a discretion as will make the authority a personal one, *Weimar v. Fath*, 14 Vr. 1 (exercised by remaining executor after removal of the other). And this is true of a direction to sell "for such price as in his judgment shall be right." *Joralemon v. Van Riper*, 17 Stew. (N. J.) 299. So, a power with discretion as to time and method of sale is considered merely incidental to the executor's office and goes to his successor. *Drummond v. Jones*, 17 Stew. (N. J.) 53; *Giberson v. Giberson*, 16 Id. 116. But see, *contra*, *Mitchell v. Spence*, 62 Ala. 450, where the executor was directed to sell and divide the proceeds among certain devisees. Under the Alabama statute a power of sale in a will probated in South Carolina, given to the executor for division among certain devisees, has been held to go to an administrator *cum testamento annexo* in Alabama, and to take away from the Alabama Probate Court the power to order a sale of the property. *Brock v. Frank*, 51 Ala. 85. In Iowa, there being no statute to that effect, the administrator *cum testamento annexo* does not take a power of sale given to the executor unless the intention is clearly expressed

in the will. *Hodgin v. Toler*, 70 Iowa 21. So, in Illinois. *Nicoll v. Scott*, 99 Ill. 529. He may sell, however, under order of the court, especially where the will expressly directed a sale. *Lees v. Wetmore*, 58 Iowa 170. Where there is any doubt, however, a court of equity will not require specific performance by a purchaser at the administrator's sale. *Paret v. Keneally*, 30 Hun 15; *Cooke v. Platt*, 51 N. Y. Super. Ct. 55. But see *Hicks v. Peterson*, 30 N. Y. St. Rep. 155. The authority of an administrator *cum testamento annexo* to complete a sale made under a power in the will of course ceases with his office upon his resignation. *Elstner v. Fife*, 32 O. St. 358.

When lands are devised to executors to be sold, or a power of sale is given them, an administrator *de bonis non* with the will annexed has the same power. *Alabama* (1886 Code, § 1864), *Colorado* (1891 An. Stats. § 4749), *Connecticut* (1888 G. S. § 554), *Delaware* (1874 R. C. c. 158, § 17), *Georgia* (1882

Code, § 2767), *Indiana* (1888 R. S. § 2365), *Kansas* (1889 G. S. § 2920), *Maryland* (1888 P. G. L. Art. 93, § 81), *Minnesota* (1891 G. S. § 5674), *Missouri* (1889 R. S. § 136), *North Carolina* (1883 Code, § 1493), *Ohio* (1890 R. S. § 5980), *Virginia* (1887 Code, § 2663), *West Virginia* (1891 Code, c. 86, § 1). Administrators *cum testamento annexo* have the same authority over the estate as the executors named in the will. *California* (Code C. P. § 1356), *Dakota* (1887 C. L. § 5701), *Georgia* (1882 Code, § 2440), *Idaho* (1887 R. S. § 5347), *Kentucky* (1887 G. S. c. 39, § 13), *Michigan* (1882 An. Stats. § 5861), *Minnesota* (1891 G. S. §§ 5668, 5674), *Montana* (1887 C. S. p. 288, § 51), *Nebraska* (1893 C. S. c. 23, §§ 173, 190), *Nevada* (1885 G. S. § 2766), *New Jersey* (1876 Rev. p. 398, § 11), *Pennsylvania* (1883 Purd. Dig. p. 520, § 71), *Rhode Island* (1882 P. S. c. 184, § 34), *Tennessee* (1884 Code, § 3081), *Vermont* (1880 R. L. § 2073), *Washington* (1891 G. S. § 1893), *Wisconsin* (1889 An. Stats. § 3799).



## \*SECTION II.

*Of administration de bonis non.*†

This subject may be treated with reference, 1st, to the death of an executor : 2ndly, to the death of an administrator.

1. With respect to the consequences of the death of an executor. If a sole executor happens to die, without having proved the will, the executorship, as there has before been occasion to observe (*u*), is not transmissible to his executor, but is wholly determined, and administration *cum testamento annexo* must be committed to the person entitled, according to the rules pointed out in the preceding section.

1. Consequences of the death of an executor :

When the administration is granted under such circumstances, although the executor may have administered in part by disposing of the testator's effects, &c., yet the administration shall not be *de bonis non administratis*, but an immediate administration : because, although the acts done by the executor are good (*x*), the administering is an act *in pais*, of which the Court of Probate cannot take notice (*y*).

If one of several executors dies before, or after, probate, no interest is transmissible to his own executor, but the whole representation survives to his companion (*z*). Where such surviving executor, or where a sole executor, dies after probate, having made a will, appointing his own executor, the entire representation of the original testator will be transmitted to him (*a*). But where such surviving executor, or sole executor, dies after probate, intestate, then no interest is transmissible to his own administrator (*b*) : but administration of another sort becomes necessary, which is called ad\*ministration *de bonis non*, that is, of the goods of the original testator left unadministered by the former executor (*c*).

where sole or surviving executor dies after probate intestate, there must be administration *de bonis non* :

So if the original testator dies abroad, or in the colonies, and his executor proves the will there, and then dies, having appointed his own executor, who proves the latter will

so where the executor appoints his own executor

† See American note at end of this Section.

(*u*) *Ante*, pp. \*205, \*257.

(*x*) See *ante*, p. \*250.

(*y*) *Wankford v. Wankford*, 1 Salk. 308, by Holt, C. J.

(*z*) *Ante*, p. \*206.

(*a*) *Ante*, pp. \*204, \*206. The rule is the same, though the original probate was limited : In the *Goods of Beer*, 2 Robert. 349.

(*b*) *Ante*, p. \*304.

(*c*) *Ante*, p. \*205. *Tingrey v. Brown*, 1 Bos. & Pull. 310.

in the Probate Court here, it has been held, that the executor of the if the original executor does not represent the first testator : But will was not proved in this country : that in order to constitute such a personal representative here, administration *de bonis non* must be obtained in the Probate Court in this country (d).

In a case where the estate of a testatrix had been administered where estate administered except as to one legacy : except as to one legacy, the court granted administration with will annexed *de bonis non* to the legatee without requiring the representative of the executor, or residuary legatees to be cited (e). And upon an application for a grant of administration *de bonis non*, where it appeared that the residuary legatee, resident abroad, had had notice by letter, and that he had no beneficial interest, there being actually no residue, the grant was made to a specific legatee, without requiring the residuary legatee to be cited or to renounce (f).

Again, before the Court of Probate Act (1857), 20 & 21 Vict. c. 77, so where one of several executors proves, and the rest renounces, and he who has proved dies : if there were several executors, and one alone proved the will, and the rest renounced, upon the death of him who had proved, no interest was transmissible to his executor ; but the representation survived to the co-executors, who might retract their former renunciation, and assume the executorship (g) ; but if they persisted in refusing to act, the sort of administration just mentioned became necessary.

But now by the 79th section of that statute, “where any person Stat. 20 & 21 Vict. c. 77, s. 79. after the commencement of this Act renounces probate of the Will of which he is appointed executor or one \*of the executors, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor” (h).

This administrator *de bonis non* will, when appointed, be the only Who is entitled to administration *de bonis non cum testamento annexo*. representative of the party originally deceased. Such administration will evidently be committed *cum testamento annexo*, and will be granted to the person entitled according to the general principles already developed in cases of administration *cum testamento annexo*. In many instances, it

(d) *Twyford v. Trail*, 7 Sim. 92. In the Goods of Gaynor, L. R. 1. P. & D. 723.

(e) In the Goods of King, 8. P. D. 162.

(f) In the Goods of Wilde, 13 P. D. 1.

(g) *Arnold v. Blencowe*, 1 Cox, 426. Ante, pp. \*206, \*233.

(h) See ante, pp. \*233, \*234.

is obvious, he will be a different person from the representative of the deceased executor ; but if the executor were also beneficially residuary legatee, his representative will likewise be entitled to the administration *de bonis non* to the original testator (*i*).

Where administration *durante minoritate* was in the first instance granted to the mother of an infant, a part residuary legatee, on the renunciation of the executor : The infant died : By his death the administration ceased, and the mother became entitled, as widow, to the lapsed residue jointly with another infant : Under these circumstances, administration *de bonis non*, with the will annexed, was decreed to her (*k*).

It has been said, upon the authority of *Limmer v. Every*, as reported by Croke (*l*), that where an executor dies, having appointed an executor, who is a minor, and the administrator *durante minoritate* is appointed, he has no authority to intermeddle with the effects of the original testator, but an administration *de bonis non* must be granted (*m*). However, as the case is reported by Leonard (*n*), the point decided was \*merely that such an administrator should sue as administrator of the first testator : And in a later case (*o*), it was held, on an application for a prohibition, that although an administrator of an executor is not an administrator to the first testator, yet an administrator *durante minore ætate* is *in loco executoris*, and may be sued as the executor of an executor may (*p*).

Administration *de bonis non* not necessary when there is an administration *durante minoritate* of an executor of an executor.

2ndly. With respect to the consequences of the death of an administrator, or of one entitled to administration,† It has already been shown, that if a party who, as next of kin to the intestate at the time of his death, was entitled to administration, dies before letters of administration are obtained, his representative is entitled to the grant in preference to one who has no beneficial interest in the effects, although he may have become next of kin at the time the grant is required (*q*).

2. Consequences of the death of an administrator, or of one entitled to administration :

Where administration has been granted to two and one dies, the

(*i*) See *ante*, p \*402.

(*k*) *Akers v. Dupuy*, 1 Hagg. 473.

(*l*) *Cro. Eliz.* 211.

(*m*) 3 Bac. Abr. 13, Exors. (B. 1).  
Toller, 118.

(*n*) 4 Leon. 58, *nomine* *Limmer v. Evorie*.

(*o*) *Anon.* 1 Freem. 288.

(*p*) See also *Norton v. Molyneux*, Hob. 246 ; and Mr. Smirke's note, in his edition of *Freeman*, p. 288.

† See American note at end of this Section.

(*q*) *Ante*, pp. \*374, \*375.

survivor will be sole administrator (*r*), for it is not like a letter of attorney to two, where by the death of one, the authority ceases, but it is an office analogous to that of executor, which survives (*s*). Upon the death of such surviving administrator, or of a sole administrator, in order to effect a representation of the first intestate, the court, whether the administrator died testate or intestate, must appoint an administrator *de bonis non*; for an administrator is merely the officer of the court, prescribed to it by Act of Parliament, in whom the deceased has reposed no trust; and therefore on the death of the administrator, no authority can be transmitted by him to his executor or administrator, but it results to the court to appoint another officer (*t*).

of one of several administrators:  
of a surviving or sole administrator.  
Who is entitled to administration *de bonis non* on the death of the original administrator:

It remains to be considered who, upon the death of the administrator, is entitled to be appointed administrator *de bonis non* to the original intestate.

The ecclesiastical judges have on several occasions laid down, that in all that regards the obligation of the statutes of administration on the court, in the grant of administration, no distinction exists between an original and a *de bonis non* administration (*u*). And in *Kindleside v. Cleaver*, the common law judges delegates expressed the same opinion (*x*). Accordingly, upon the death of an original administrator, a person who was next of kin at the time of the death of the intestate, has been regarded as entitled, under the statute of Hen. VIII., to the *de bonis non* grant, in preference to the representative of the original administrator, or to the representative of any other next of kin at the time of the death; and hence, in the case where a husband takes out administration to his wife, and dies, the spiritual courts for a long time considered themselves bound by the statute (in contravention of convenience, and of the general principle that the right of administration shall follow the right of property), to commit administration *de bonis non* of the wife, if required, to the next of kin of the wife at the time of her death, as having an absolute statutable right; although the beneficial interest in her

(*r*) *Hudson v. Hudson*, Cas. temp. Talb. 127, decided by Lord Talbot, after hearing civilians. *Eyre v. Lady Shaftsbury*, 2 P. Wms. 121. Com. Dig. Administrator (B. 7). *Jacomb v. Harwood*, 2 Ves. Sen. 268.

(*s*) *Adam v. Buckland*, 2 Vern. 514. 3 Bac. Abr. 56, tit. Executors (G).

(*t*) 2 Black. Comm. 506.

(*u*) Dr. Bettesworth, in *Kindleside v. Cleaver*, 1 Hagg. 345. Dr. Hay, in *Walton v. Jacobson*, 1 Hagg. 346.

(*x*) See 2 Hagg. Appendix, 170.

effects be in the representative of the husband (y). But the practice has been altered in this respect: And the rule now established, on the principle that the grant ought to follow the interest, is, that \*the administration will be granted to the representatives of the husband, unless it can be shown that the next of kin of the wife are entitled to the beneficial interest (z). Rule now established.

Again, it has been held that the statutes only regard *the next of kin at the time of the death* of the intestate, and not the next of kin at the time a second grant is wanted; and therefore when the next of kin, who were so at the time of the deceased, are dead, the court has power, independent of the statute to grant administration *de bonis non*, at its discretion according to their own rules (a). In the guidance of which discretion, the established principle is (as in the case of administration *cum testamento annexo*), that if there are no peculiar circumstances, the administration shall be committed to him who has the greatest interest in the effects of the original intestate (b). Thus, in *Savage v. Blythe* (c), the intestate died, leaving a brother and several nephews and nieces: Administration was granted to the brother, and at the end of the year he distributed, taking the securities of the deceased upon himself: he afterward died, leaving the securities due to the original deceased outstanding; and having made a will, and appointed an executor: a decree was taken out against the nephews to show cause why administration *de bonis non* should not be granted to the executor of the brother administrator: The nephews appeared, and prayed administration as next of kin under the statute: But Sir Wm. Wynne held that the statutable right was confined to the next of kin at the time of the death, and granted the administration *de bonis non* to the executor of the deceased administrator, on the ground that the interest was clearly in him. In the subsequent case of *Almes v. Almes* (d), the same judge again granted similar administration, under nearly the same circumstances, upon the same grounds;

(y) *Kindleside v. Cleaver*, 1 Hagg. 345. See *ante*, pp. \*350, \*351. Yet instances may be found, where, notwithstanding the statute, the court have denied administration to the next of kin, on the ground of his having no interest. See *Young v. Pierce*, 1 Freem. 496. *Ante*, p. \*374.

(z) *Fielder v. Hanger*, 3 Hagg. 769.

In the *Goods of Pountney*, 4 Hagg. 290. *Ante*, p. \*351.

(a) *Cardale v. Harvey*, 1 Cas. temp. Lee, 179.

(b) But the court is not *obliged* to grant to the largest interest: 1 Cas. temp. Lee, 177.

(c) 2 Hagg. Appendix, 150.

(d) *Ibid.* 155.

and \*mentioned the case of *Lovegrove v. Lewis (e)*, decided by Sir George Hay, and affirmed by the delegates, where the administration was granted to the executor of the original administrator, to the exclusion of those who were next of kin at the time of the grant (*f*). So in the instance of administration *de bonis non* to the effects of the wife, after the death of the husband administrator, if the persons who, at the time of her death, were her next of kin are dead, it has always been held that the court may exercise its discretion (*g*).

The proposition, however, that if all who were next of kin at the time of the death of the intestate are dead, then the representative of such next of kin, being entitled to the beneficial interest, is also entitled to administration *de bonis non*, must, it appears, be understood with this limitation, *viz.*, that a person originally in distribution is preferred to the representative of the next of kin (*h*).

It has already been observed, that upon the death of a creditor administrator, a party who was next of kin at the time of the death of the intestate may come in and claim administration *de bonis non* (*i*). And though all the next of kin at the time of the death are dead, it should seem that no grant of administration *de bonis non*, however limited in its object, can be obtained after the termination of the creditor administration, without citing those who are next of kin at the time the grant is required. Thus, in *Skeffington v. White (k)*, the intestate died in 1790, leaving two sisters entitled in distribution: They renounced, and administration \*was decreed in 1791, to a creditor, who administered the estate till 1806, when he died: the sisters did not come in and take administration *de bonis non*; and from that time no further representation was taken out till 1827, when an administration *de bonis non* was granted, *without citing the then next of kin* (the son of one of the sisters, who were both dead), limited to assign a certain leasehold property of the deceased, not severed in his lifetime, but mortgaged during the original creditor administration: In March, 1828, Sir

(e) S. C. 2 Hagg. Appendix, 152, n. (a).

(f) See also *In the Goods of Middleton*, 2 Hagg. 60.

(g) By Sir John Nicholl, *In the Goods of Gill*, 1 Hagg. 344.

(h) See the Appendix to 2 Hagg. p. 157. But this rule, in the discretion of the court, may be varied by granting

[\*414]

[\*415]

the administration to the next of kin: *In the Goods of Carr*, L. R. 1 P. & D. 291. According to the general practice, a party having a direct interest is preferred to those entitled in a representative character: *In the Goods of Middleton*, 2 Hagg. 61.

(i) *Ante*, p. \*382, note (i).

(k) 1 Hagg. 699.

Lumley Skeffington, the then next of kin in whom all the beneficial interest in the deceased's estate was vested, obtained a decree to show cause why the latter administration should not be revoked, on the ground of his not having been cited when the limited grant was made, and on a suggestion that such grant had been surreptitiously obtained, and that there was a surplus belonging to the deceased's estate: Sir John Nicholl thought the citation under the circumstances was not necessary, but that Sir Lumley was barred by time, by events, and by his own laches; and that there was no ground for revoking the grant: However, on appeal to the delegates, the court pronounced for the appellant, directed a monition to issue to call in the limited administration, and condemned the respondent in costs (*l*).

(*l*) 2 Hagg. 626.

† *Appointment, when made.* Administration *de bonis non* may be granted twenty years after the death of the former administrator, *Bancroft v. Andrews*, 6 Cush. 493; or the issue of the original letters, *Matter of Holmes*, 33 Me. 577. The appointment should be made by the court that granted the original letters. *Ex parte Lyons*, 2 Leigh 761. Informality in the appointment does not render it void, *Bailey v. Scott*, 13 Wis. 692; *Ragland v. King*, 37 Ala. 80; *Russell v. Erwin*, 41 Ala. 292; *e. g.*, general letters may be intended and construed as letters *d. b. n.* after the death of the original administrator, *Moseley v. Mastin*, 37 Ala. 216. He need not be designated in his appointment as *d. b. n.* *Steen v. Bennett*, 24 Vt. 303.

There cannot be, in one estate, both an executor or administrator with the will annexed and an administrator. *Landers v. Stone*, 45 Ind. 404, 409. An administrator *d. b. n.* cannot be appointed where there is a will proved and an executor qualified, *Creath v. Brent*, 3 Dana 129; or where one of several joint executors or administrators survives, *Woerner on Admn.* § 179; *State v. Green*, 65 Mo. 528; *Lewis v. Brooks*, 6 Yerg. 167. His appointment before the death, removal, or resignation of the executor or original administra-

tor is void. *Woerner on Admn.* § 179; *Croswell on Exrs.* § 216; *Munroe v. People*, 102 Ill. 406; *Petigru v. Ferguson*, 6 Rich. Eq. 378; *Mathews v. Douthitt*, 27 Ala. 273; *Grande v. Chaves*, 15 Tex. 550; *Estate of Hamilton*, 34 Cal. 464; *Creath v. Brent*, 3 Dana 129; *Allen v. Kellam*, 69 Ala. 442. A sale of land by such administrator *d. b. n.* is void, and his deed executed in pursuance of such sale will convey no legal title. *Allen v. Kellam*, *ubi supra*. And an administrator *d. b. n.* whose appointment is void is not even administrator *de facto*. *Hooper v. Scarborough*, 57 Ala. 510. Where the order removing a defaulting administrator is void, letters to an administrator *d. b. n.* are void, and confer no authority to receive presentment of claims. *McDowell v. Jones*, 58 Ala. 25. But letters in chief are relinquished without formal revocation by the acceptance of letters *d. b. n.* *Turner v. Wilkins*, 56 Ala. 173. The marriage of an administratrix, in Wisconsin (where a married woman is incompetent) creates a legal vacancy and will support the appointment of a successor. *Oakes v. Buckley*, 49 Wis. 592.

The common law presumption exists in favor of the regularity of such proceeding of the Probate Court, *Steen v.*

Bennett, 24 Vt. 303; where the order merely recites the resignation of the former administrator, *Russell v. Erwin*, 41 Ala. 292; or contains no recitals whatever, *Gray v. Harris*, 43 Miss. 421; *Sims v. Waters*, 65 Ala. 442; *Oakes v. Buckley*, 49 Wis. 592; *Willis v. Ferguson*, 59 Tex. 172. In some states this presumption may be overcome even in a collateral proceeding by positive evidence that the vacancy did not exist, *Allen v. Kellam*, 69 Ala. 442; while in other states the regularity of the appointment cannot be questioned collaterally, *Petigru v. Ferguson*, 6 Rich. Eq. 378; *Macey v. Stark* (Mo.), 21 S. W. Rep. 1088; and see Am. note, p. \*486, *ubi infra*. In a collateral suit brought by an administrator *d. b. n.* in Missouri the petition is fatally defective, if it fails to show due removal of the predecessor, *State v. Green*, 65 Mo. 528; but if it makes the necessary averments, their truth cannot be questioned in that suit, *Scott v. Crews*, 72 Mo. 261.

Where an administrator dies before the completion of the administration, an administrator *d. b. n.* must be appointed. *Merrill v. Merrill*, 92 N. C. 657. And a creditor may be appointed even after distribution of the estate, and after the death of the administrator. *Brattle v. Converse*, 1 Root 174. But an administrator *d. b. n.* should not be appointed, after all debts are presumed to be paid or barred by lapse of time, *Murphy v. Menard*, 14 Tex. 62; especially when the petition fails to show that any debts or legacies remain unpaid, except a legacy to one of the contestants. *San Roman v. Watson*, 54 Tex. 254.

But such administrator may properly be appointed even where the original administrator has reduced all the assets of the estate to money. *Donaldson v. Raborg*, 26 Md. 312; *De Valenzin v. Duffy*, 14 Pet. 282. If nothing remains, however, to be done, the grant of letters *d. b. n.* is nugatory. *Wilcoxon v.*

*Reese*, 63 Md. 542. But the appointment may be made, although the prior administrator has been discharged because he could find no assets. *Langsdale v. Woollen*, 99 Ind. 575. And such appointment is necessary, if there are assets remaining unadministered, and an administrator of the original administrator cannot administer them. *Hendricks v. Snodgrass*, 1 Miss. 86. In Massachusetts, it must appear that there is unadministered estate or uncollected debts exceeding twenty dollars. *Pinney v. McGregory*, 102 Mass. 186, 190. Appointment is proper where there are leaseholds inventoried, but not accounted for or distributed, *Neal v. Charlton*, 52 Md. 495; although the widow claims to have purchased and paid for them. And *prima facie* evidence of unadministered assets is sufficient to support the appointment. *Scott v. Fox*, 14 Md. 388. A suit pending in the name of the removed administrator is unadministered assets. *Hayward v. Place*, 4 Dem. 487.

So, unpaid debts of the estate are sufficient ground for the appointment, *Brattle v. Converse*, 1 Root 174; *Brattle v. Gustin*, 1 Root 425; *State v. Farmer*, 54 Mo. 439; but not debts barred by limitation. *Chandler v. Hudson*, 11 Tex. 32. In Texas, it is enough if the petition alleges that there is unadministered estate. *Williams v. Verne*, 68 Tex. 414.

A legacy is not a debt within the meaning of the Massachusetts statute as ground for the appointment. *Chapin v. Hastings*, 2 Pick. 361. So, the loss of a specific legacy occasioned by the former administrator's default as executor of another estate in paying over property bequeathed to the intestate, whose administrator he was, will not support the appointment of an administrator *d. b. n.* where there were no unadministered assets remaining in the intestate's estate. *American Board's*



Appeal, 27 Conn. 344. In general, an administrator *d. b. n.* is necessary for the payment of unpaid legacies, and the executor's administrator must account with him and he with the legatees. *Boulton v. Scott*, 2 Gr. Ch. 231; *Alexander v. Stewart*, 8 Gill & J. 226; *Scott v. Crews*, 72 Mo. 261.

Administration is not complete without distribution. *Taylor v. Brooks*, 4 Dev. & B. 139. And an administrator *d. b. n.* may be appointed for distribution only, *Scott v. Crews*, 72 Mo. 261; *Carroll v. Connet*, 2 J. J. Marsh. 195; *Alexander v. Stewart*, 8 Gill & J. 226; although there may have been a nominal but incomplete "final settlement" by order for distribution to the heirs (not named), and with no proofs of payment filed, *Oakes v. Buckley*, 49 Wis. 592; or discharging the administrator, but continuing the administration as to matters embraced in exceptions to the report. *Green v. Brown* (Ind. App.), 33 N. E. Rep. 979. But after a substantial though irregular settlement, and in opposition to all parties interested, an administrator *d. b. n.* will not be appointed. *Mercer v. Pike*, 58 N. H. 286. And he cannot be appointed to execute a power of sale in the will where there was no original administration (the executor dying before testator's death), and no administrator was appointed. *Wilcoxon v. Reese*, 63 Md. 542. So, where sale of real property had been made by the administrator and no deed given and the administrator discharged, the Probate Court cannot appoint an administrator *d. b. n.* simply to give the deed, *Grayson v. Widdle*, 63 Mo. 523; and such deed is a nullity, *Long v. Joplin Mining & Co.*, 68 Mo. 422; the purchaser's remedy in both these cases being an equitable one.

*Who entitled.* In general, and when there is no other express statutory provision, the principles governing the

choice of the administrator in chief apply to the appointment of an administrator *d. b. n.* The statutes relating to such appointments are stated in the American note on p. \*387, *supra*. See also *Croswell* on Exrs. §§ 211, 213. The statute requiring letters of administration to be issued to the next of kin in preference to strangers is applicable to administrators *d. b. n.* in New Jersey. *Donahay v. Hall*, 18 Stew. (N. J.) 720. So, on the death of the executor, the residuary legatee is generally preferred for letters *d. b. n.* *Matter of Bradley*, 3 Redf. 512. And on the death of an administrator his executor is preferred to the intestate's next of kin. *Hendren v. Colgin*, 4 Munf. 231. But the appointment of the attorney of a creditor, applying for administration to sell real estate for his debt, is voidable as against the heirs, *Deans v. Wilcoxon*, 25 Fla. 980; but not in a collateral proceeding, *Id.*

*Executor of executor.* When an executor dies, his executor succeeded at common law to the estate of his testator. This has been changed by statute in many states, and the estate devolves upon an administrator *d. b. n.* For American statutes, see p. 293, n., *supra*. So, *Prescott v. Moore*, 64 Me. 422; *Booker v. Armstrong*, 93 Mo. 49. So, as against the executor of a deceased administrator, *Schenck v. Schenck*, 2 Pen. (N. J.) 562; who cannot be held to account and pay distributive shares, *Garret v. Stilwell*, 2 Stockt. 313; or against the administrator of a deceased executor, *Perrin v. Calhoun*, 49 Mich. 342 (Mich. C. L. § 4375); who cannot be sued for unpaid legacies. *Tallon v. Tallon*, 156 Mass. 313. Although at common law the executor of an executor took the original estate, he might renounce as to it, and qualify as to his own testator's estate. *Hart v. Smith*, 20 Fla. 58. He might be required to account for the original estate

that came to his hands. Estate of Ranney, 66 How. Pr. 291. So, if the assets come to the hands of the personal representatives of a deceased administrator, they hold as unadministered assets only in trust to deliver to the administrator *d. b. n.* when appointed. University v. Hughes, 90 N. C. 537. The payment of a bank deposit in the administrator's name to his administrator has been held to be a good defense to the suit of the administrator *d. b. n.*, Sibbs v. Philadelphia Savings Fund Society, 153 Pa. St. 345; but not, if made after notice prohibiting the payment. Stair v. York National Bank, 55 Pa. St. 364.

*Liabilities and powers.* The administrator in chief and the administrator *d. b. n.*, at common law are separate and independent of each other. The administrator *d. b. n.* is bound, however, by the rightful administration of his predecessor. Acts within the scope of such administration, not tainted with fraud, he cannot undo or disown. He is bound not only by the acts of his predecessor, but also by all the admissions and agreements that would affect creditors or distributees. Martin v. Ellerbe, 70 Ala. 320. It is his duty to complete the unfinished administration, and to that end, his authority and duties relate back to the death of the intestate. Brittain v. Dickson, 104 N. C. 547. They are, in the main, those of a general administrator. Shackelford v. Runyan, 7 Humph. 141. His power is derived from the statute, and must be exercised in strict compliance with it. Croxton v. Renner, 103 Ind. 223. He is entitled to be substituted in pending suits for his predecessor, and to continue the action. Burlington &c. Railroad v. Crockett, 17 Neb. 570. Thus, in proceedings begun by an administrator for sale of land, the order to sell may be made to the administrator *d. b. n.* Trumble v. Williams, 18 Neb. 144.

And he may apply to vacate a sale of land made on an irregular *fi. fa.* against the deceased. Dryer v. Graham, 58 Ala. 623. He may sue a third party on a contract made with his predecessor in behalf of the estate. McGuinness v. Whalen, 17 R. I. 619. And if he refuses to bring a necessary collection suit, it may be brought in some states by creditors, making him a party defendant. Wilson v. Pearson, 102 N. C. 290. But he and his sureties will be liable for his neglect to collect notes taken by the deceased administrator, only where the latter had been acting as administrator and made himself and his sureties liable as such. Roper v. Burton, 107 N. C. 526. It has been held that he is so far in privy with his predecessor that he cannot file a bill to set aside, for collusion, a contract between the administrator and a third party, Steele v. Atkinson, 14 S. C. 154; and that he may, on the other hand, have a bill in equity for the recovery from a distributee of moneys improvidently paid him by the administrator and required for debts of the estate. Brice v. Taylor, 51 Ark. 75. He takes his title from the deceased, and not from his predecessor. American Board's Appeal, 27 Conn. 344; Wilson v. Arrick, 112 U. S. 83; United States v. Walker, 109 U. S. 258. He is not bound as a privy by a judgment recovered against the prior administrator. Graves v. Flowers, 51 Ala. 402. But overpayments made by a deceased executor may be recovered from the administrator *d. b. n.* by the executor's representatives, although there were no assets except the proceeds of real property sold by him by order of the court. Munroe v. Holmes, 13 Allen 109. On the other hand, he is not liable for the defaults or maladministration of his predecessor. Estate of Bentley, 16 Phila. 377; Brownlee v. Lockwood, 5 C. E. Gr. 239. As to proceedings against his predecessor and sureties, see *Am. notes*, pp. \*463, \*794 *infra*.

## SECTION III.

*Of limited administrations.*

Besides the administrations already discussed, which extend to the whole personal estate of the deceased, and terminate only with the life of the grantee, it is competent to the court to grant *limited* administrations, which are confined to a particular extent of time, or to a specified subject-matter. It will be the object of the present and three following sections, to consider this species of grant.

\*By Rule 29, P. R., "Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge."

Rule 29, P. R. 1862. Consent or citation of persons entitled to general grant.

By Rule 30, "No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant except under the direction of the Judge."

Rule 30. A person entitled to general grant not to take a limited one.

*Administration durante minore ætate.*

If the person appointed sole executor, or he to whom, in case of intestacy, the right to administration has devolved under the statutes, be within age, a peculiar sort of administration must be granted, which is called an administration *durante minore ætate*. In the former case, it is obviously a species of administration *cum testamento annexo*.

If there are several executors, and one of them is of full age, no administration of this kind ought to be granted; because he who is of full age may execute the will (*m*). But it has been held differently in the case of several next of kin in equal degree, entitled under an intestacy. In Cartright's Case (*n*), the intestate died leaving four grandchildren whereof one was of age, and the other three were minors; and the administration was contested betwixt her that was of age and the mother and guardian of the other three; and this case was argued at Serjeants' Inn, before the two Chief Justices and the Chief Baron, *et al.*, who granted it to the mother, as guardian to the three, *durante minore ætate*; though it was strongly

When necessary:

(*m*) Pigot and Gascoigne's Case, See Colborne v. Wright, 2 Lev. 240. Brownl. 46. *Ante*, p. \*185. There Bac. Abr. Executors (B. 1). are some authorities to the contrary: (*n*) 1 Freem. 258. *Ante*, p. \*362.

urged, that she that was of age being capable, and the others incapable, she ought to be preferred : But, on the other hand, it was laid down, that since the statute 22 & 23 Car. II. c. 10, which entitled them all to a distribution, the interest of the three preponderated, and \*therefore that was to be regarded ; and they compared it to the case of a residuary legatee who shall be preferred before the next of kin (o).

This sort of administration has been frequently held not to be within the statute of 21 Hen. VIII. c. 5. And consequently, it is discretionary in the court to grant it to such person as it shall think fit (p). Thus, in the case of *Rex v. Bettesworth* (q), a *mandamus* was

no *mandamus* lay to grant it to a particular person. moved for, to be directed to the judge of the Prerogative Court, to grant administration to one Smith, during the minority of his two infant grandchildren : The judge had approved of him as a proper person, but insisted on his giving security to distribute the effects in equal proportions among the creditors : The court were of opinion that the judge had a discretionary power in granting administration *durante minore ætate*, and therefore that in this case he might insist upon reasonable or equitable terms, or otherwise refuse administration to the claimant : But they said if a *mandamus* had been moved for, to grant administration generally, they would have granted it (r).

In the exercise of this discretion it was the practice of the Spiritual Court to grant the administration to the guardian whom that court had a right by law to appoint for a personal estate (s). With respect to the appointment of guardian

Practice of the Spiritual Court to grant administration to the guardian :

(o) See *ante*, p. \*401.

(p) *West v. Willby*, 3 Phillim. 379.

(q) 1 Barnard, 370, 425.

(r) The discretionary power of the Spiritual Court is also recognized in the statute 38 Geo. III. c. 87, s. 6. See *post*, p. \*421.

(s) In the Goods of Weir, 2 Sw. & Tr. 451. See also *Brotherton v. Harris*, 2 Cas. temp. Læ, 131 : In this case it was held that the guardian appointed by the Ecclesiastical Court was to be preferred to the guardian appointed by the Court of Chancery. But see note (70) to Co. Lit. 88, b, by Hargrave, in which the right of the Ecclesiastical Court to appoint a guardian for the personal

estate is doubted. In the case of In the Goods of Sartoris, 1 Curt. 910, administration, for the use and benefit of minor children of a Frenchman deceased, was granted to their guardian appointed by the French authorities. It has been held that a testamentary guardian of minor children is entitled to a grant of the administration for their use and benefit preferably to a guardian elected by the children : In the Goods of Morris, 2 Sw. & Tr. 360. The guardian of an infant, sole next of kin of an intestate, whose estate is solvent, is entitled to take administration of his effects, in preference to creditors : *John v. Bradbury*, L. R. 1 P. & D. 245. As.

a \*distinction exists between an infant and a minor. The former is so denominated if under seven years of age, the latter from seven to twenty-one (*t*). The court *ex officio* assigns a guardian to an infant (*u*); the minor himself may nominate his guardian, who is then admitted in that character by the judge (*x*); but if the minor makes an improper choice, the court will control it (*y*). According to the practice of the Prerogative Court, the guardianship was granted to the next of kin of the child, unless sufficient objection to him was shown (*z*).

distinction between infant and minor:

If a wife, be the only next of kin, and a minor, she may elect her husband her guardian, to take the administration for her use and benefit, during her minority; but the grant ceases on her coming of age, when a new administration may be committed to her (*a*).

But there are many instances where the court has granted the administration to persons not guardians of the minor, \*and refused to grant it to the person nominated by them. Thus in *Lovell and Brady v. Cox* (*b*), *Lovell and Brady* were appointed trustees by the deceased, and his heir, *Anne Cox*, was executrix and residuary legatee: She was a minor, and the father claimed the administration *pendente minoritate*: The court held that it had a discretionary power, refused it to him, and gave it to the trustees (*c*). So the administration may be granted to creditors,

the guardian sometimes excluded.

to giving justifying security in such a case, see *ibid*. The general rule, however, is that the creditors as such have no right to call upon the next of kin to give justifying security: *Hughes v. Cookson*, 1 Cas. temp. Lee, 386. *Hickman v. Black*, 2 Cas. temp. Lee, 251.

(*t*) Toller, 100.

(*u*) Sir G. Lee was of opinion, that he could not assign a guardian to an infant *en ventre de sa mère*; *Walker v. Carless*, 2 Cas. temp. Lee, 560.

(*x*) *Rich. v. Chamberlayne*, 1 Cas. temp. Lee, 134.

(*y*) *Fawkener v. Jordan*, 2 Cas. temp. Lee, 330. This is mentioned by Lee, J., in *Rex v. Bettesworth*, Fitzg. 164, Mich. 4 Geo. II., as being then the course of the Spiritual Court.

(*z*) Toller, 100. In the Goods of *Ewing*, 1 Hagg. 381. But the court

may, in its discretion, pass by the next of kin: In the Goods of *Ewing*, 1 Hagg. 381, *post*, \*419, note (*e*). *Quick v. Quick*, 33 L. J., P. & M. 177. In the Goods of *Gardiner*, 9 P. D. 66. In the Goods of *Webb*, 13 P. D. 71. On one occasion a creditor was appointed guardian to minors (the only children of E. P.), who had no known relations, for the purpose of taking out administration to the estate of E. P., who had died intestate and insolvent: In the Goods of *Peck*, 1 Sw. & Tr. 141.

(*a*) Toller, 92.

(*b*) Prerog. cited by Sir John Nicholl in *West v. Willby*, 3 Phillim. 379.

(*c*) See also *Appleby v. Appleby*, 1 Cas. temp. Lee, 135, where administration *cum testamento annexo* was granted to a grandmother during the minority of an executor, she being also testa-

[\*418]

[\*419]

in exclusion of the guardian of the minor, if the estate is insufficient to pay the debts : And in many other cases it has been laid down that the court is not bound by the choice of the minor (*d*). Thus, where a grandfather, to whom, as the next of kin, the administration *durante minoritate* would in the ordinary course have passed, was turned eighty, it was granted to an uncle, he giving full justifying security (*e*).

In *Havers v. Havers* (*f*), Lord Hardwicke, C., said, that administration *durante minore ætate* ought not to have been granted to a person who was very poor, though the guardian and next of kin of the infant.

The old practice above stated has been applied, and in some respects

varied, by the rules, P. R. non-contentious, as follows :—  
Rules P. R. 1862 (non-contentious) as to grants to guardians. By Rule 33, "Grants of administration may be made to guardians of minors and infants for their use and

Rule 33. benefit, and elections by minors of their next of kin or next friend, as the case may be, will be required ; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with."

34. "In cases of infants (*i. e.*, under the age of seven years, \*not having a testamentary guardian, or a guardian appointed by the High Court of Chancery), a guardian must be assigned by order of the Judge, or of one of the Registrars ; the Registrar's order is to be founded on an affidavit, showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship."

Rule 35. 35. "Where there are both minors and infants, the guardians elected by the minors may act for the infants without being specially assigned to them, by order of the Judge or a Registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the Judge or of a Registrar."

Rule 36. 36. "In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal

mentary trustee, in preference to the mother, whom the minor had chosen guardian. See also *Hughes v. Ricards*, 2 Cas. temp. Lee, 543.

(*d*) *West v. Willby*, 3 Phillim. 374.

(*e*) In the Goods of *Ewing*, 1 Hagg. 381.

(*f*) *Barnard. Chanc. Cas.* 23.

estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants."

In a case in the Prerogative Court, the residuary legatee was a minor, married to a husband who was also a minor, both being subjects of, and resident in, Portugal: But it appeared that the husband, by reason of his holding a commission in the army, and being married, by the law of Portugal was considered of full age, and that by her marriage, her disabilities, as a minor, ceased: Under these circumstances, administration with the will annexed, limited to the receipt of certain dividends in the English Funds, was granted to the wife (*g*).

Administration granted to a minor, a foreigner, entitled by the law of his own country.

\*Where an intestate left a widow and infant son, and administration was granted to the widow, who soon after became *non compos*, and the estate was small and unable to bear the expense of a commission of lunacy, and there were debts owing to it, which were in danger of being lost, if there was no person to receive them; Sir George Lee, without revoking the administration granted to the widow, assigned (upon the renunciation and consent of the grandmother) the infant's aunt to be his guardian, and granted administration to her also, for the use and benefit of the widow and infant, during the incapacity of the widow, and the minority of the infant, if the widow should not sooner recover her senses: And the learned judge directed the administration to be drawn up in a special form, reciting the above particulars (*h*).

Administration during the incapacity of a widow, and minority of her son:

It has already been pointed out (*i*) that formerly an infant executor was considered capable of the office, on attaining the age of seventeen: But now by statute 38 Geo. III. c. 87, s. 6 (*k*), after reciting that inconveniences arose from granting probate to infants under the age of twenty-one, it is enacted, "That where an infant is sole executor, administration with the Will annexed shall be granted to the guardian of such infant, or to such other person as the Spiritual Court

When administration *durante minore ætate* shall be determined.

Stat. 38 Geo. III. c. 87, s. 6.

(*g*) In the Goods of the Countess Da Cunha, 1 Hagg. 237. But see *contra*, In the Goods of Orleans, 1 Sw. & Tr. 253, in which Sir C. Cresswell held that the court will not follow the grant of the country of domicile when it

would by so doing be acting in contradiction to the law of this country.

(*h*) 1 Cas. temp. Lee, 625.

(*i*) *Ante*, p. \*185, n. (*q*).

(*k*) Extended to Ireland, by 538 Geo. III. c. 81, ss. 1, 2.

shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the Will shall be granted to him."

And by the seventh section it is enacted, "That the person to whom such administration shall be granted shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin."

Before this act there was a distinction between administration granted during the minority of an infant executor and an infant next of kin : inasmuch as in the latter case the administration has always been held to continue in force till the next of kin attained the age of twenty-one (*l*).

It seems agreed, that if administration be granted during the minority of several infants, it determines upon the coming of age of any one of them. Thus if there be several infant executors, he who first attains the age of twenty-one shall prove the will, and may execute it (*m*).

It was resolved, according to Lord Coke, by the justices of the Common Pleas in Prince's Case (*n*), that if administration be committed during the minority of an executrix, and she take husband of full age, then the administration shall cease. But this has since been doubted, in the case of *Jones v. Lord Strafford* (*o*), where Lord King, C., and Raymond, C. J., strongly inclined against this opinion as reported in Prince's Case, the same not being taken notice of by other contemporary reporters, as 2 And. 132, Cro. Eliz. 718, 719, and 3 Leon. 278, in all which books Prince's Case is reported : Besides which it was extrajudicially expressed, the question in the case being only whether such a special administrator could assign over a term for years which belonged to the testator : and it is remarkable that the author of the Office of Executor, after mentioning the proposition as stated in Prince's Case, proceeds, "Yet I do a little marvel at these opinions, considering that these things are managed in the Spiritual Court, and by that law (the law spiritual) which intermeddles not with the husband in the wife's case ; now by that law, and not our common law, comes in this limit of seventeen years. And I have seen it otherwise reported, in and touching the last point" (*p*).

(*l*) Freke v. Thomas, 1 Lord Raym. 667. 4 Burn, E. L. 384, Phillimore's edition.

(*m*) 4 Burn, E. L. 385, Phillimore's edition.

(*n*) 5 Co. 29, b.

(*o*) 3 P. Wms. 88.

(*p*) Page 392, 14th edition.



If administration be granted during the minority of several \*infants, one of whom dies before he comes of age, this will not determine the administration (*q*). If an administrator *durante minore ætate* recovered judgment, and then his time determined, the executor formerly might have had a *scire facias* upon that judgment. As to the proceedings substituted in lieu of *scire facias* by the Judicature Act, 1875, see *post*, Pt. II., Bk. II., Ch. 4.

Formerly questions seem to have been raised about the power of an administrator *durante minore ætate*, but it seems now settled that the limit to his administration is the minority of the person, but there is no other limit. He is an ordinary administrator, appointed for the very purpose of getting in the estate in the usual way, and the property vests in him (*r*). A power of sale given by a testator to his executors or administrators may be executed by an administrator *durante minore ætate* (*s*). Administration *durante minore ætate*, limit of :  
what acts such administrator may do.

So he may assent to a legacy, if there are assets for the payment of debts (*t*). So he may be sued for the debts due from the deceased : and if he give his bond for any of such debts, he may retain goods to the value (*u*) : and if an action be brought against him, and the administration determine pending the action, he ought to retain assets to satisfy the debt which attached on him by the action (*x*). Likewise he may retain for his own debt (*y*).

It has been said that he cannot do anything to the prejudice of the infant ; and therefore he cannot sell the goods of the deceased any farther than they are necessary for payment of debts, nor can he otherwise sell a term for years during the minority of the infant (*z*).

\*In the case of an action brought by an administrator *durante minore ætate*, he must have averred in the declaration that the infant was still under age (*i. e.*, in all cases since In an action by an administrator *durante*, &c., it

(*q*) Anon. Brownl. 47. Jones *v.* Strafford, 3 P. Wms. 89, overruling the opinion in Brudnel's Case, 5 Co. 9, *a*.

(*r*) See Re Cope, 16 C. D. 49.

(*s*) Monsell *v.* Armstrong, L. R. 14 Eq. 423.

(*t*) Bac. Abr. Exors. (B. 1), 2 Prince's Case, 5 Co. 29, *a*. Anon. 1 Freem. 288.

(*u*) Briers *v.* Goddard, Hob. 250. Com. Dig. Admon. (F.).

(*z*) Sparkes *v.* Crofts, Comberb. 465, by Lord Holt.

(*y*) Roskelly *v.* Godolphin, T. Raym. 483. Com. Dig. Admon. (F.).

(*z*) Bac. Abr. tit. Exor. (B. 1), 2. But see Re Cope, 16 C. D. 49, 52, as to the distinction between administrator *durante minore ætate* granted *ad opus et commodum* of the infant and such administration granted generally. See Sir Moyle Finch's Case, 6 Co. 67 *b*, and Touchstone, p. 490.

must have been averred that the infant is within age.

the stat. 38 Geo. III. c. 87, s. 6, that he was within the age of twenty-one years (*a*); because it is a matter within his conuzance, and which entitled him to the action (*b*). However, the defendant must have taken advantage of this omission by way of plea or demurrer, and could not object to it after he had joined issue with the plaintiff on another point, which admits the continuance of his authority (*c*).

But if an action were brought *against* such an administrator, the plaintiff in his declaration was not obliged to aver *Secus*, in an action *against* him. that the infant was still under age; for this is a matter more properly within the conuzance of the defendant, and, if his power be determined, he ought to show it (*d*).

It was a good plea in abatement, where a defendant was charged as administrator generally, that administration was granted to him *durante minore ætate* only: But it was necessary that such a plea should aver that the infant was still living and under age; for though the defendant was a special administrator at first, yet if that special administration were determined, as by the death of the infant, he might be administrator generally, as the declaration supposes (*e*).

It is submitted that, although the forms of pleading have been altered by the Judicature Acts, the averments above alluded to would still be properly introduced in like cases.

\*It has been laid down, that if an executor *durante minore ætate* has duly administered the assets, and paid over the surplus to the executor of full age, he is not chargeable to creditors, and he may show this matter under a general plea of *plene administravit* (*f*): but that if he has committed a *devastavit*, he will be liable to creditors (*g*); even though he should obtain a release from the infant, when of full age (*h*).

However, it is stated by Lord C. B. Gilbert (*i*), that such an administrator is not chargeable at the suit of a creditor after the

(*a*) Previous to this statute the administration determined on an infant executor attaining the age of seventeen, which explains what was said by Treby, C. J., in the case of *Beal v. Simpson*, 1 Ld. Raym. 408.

(*b*) *Piggot's Case*, 5 Co. 29, *a*.

(*c*) Bac. Abr. Exors. (B. 1), 2.

(*d*) *Beal v. Simpson*, 1 Lord Raym. 409, by Powell, J.

(*e*) *Sparkes v. Crofts*, 1 Lord Raym. 265. Bac. Abr. Exors. (B. 1), 3..

(*f*) Anon. 1 Freem. 150. See also *Brooking v. Jennings*, 1 Mod. 174.

(*g*) Bull. N. P. 145, citing *Palmer v. Litherland*, Latch. 160. *Packman's Case*, 6 Co. 19, *b*.

(*h*) Anon. 1 Freem. 150. Com. Dig. Admon. (F.).

(*i*) Bac. Abr. Exors. (B. 1), 2.

infant comes of age : but such creditor may sue the infant, who has his remedy against the executor (*k*). And it is said by Lord Hardwicke, in *Fotherby v. Pate* (*l*), that though an administrator *durante minore ætate* represents the deceased while his administration subsists, yet when it is determined, he has nothing more to do, nor can he be called to account but by the executor : and that whatever he may do during his administration, he is not liable to any other person.

His lordship proceeded to observe, that after such an administrator has possessed himself of effects, if he is brought before the court without the executor, he may demur for that cause : but as the court would allow a party to follow assets into any hands, if it were shown by proper charges that he had not accounted to the infant, but fraudulently and by collusion detained any part, there was no doubt but that such a bill might be maintained against an administrator *durante minore ætate* (*m*).

It seems clear that an administrator *durante minore ætate* who has wasted the goods of the deceased, cannot be charged \*by a creditor as executor *de son tort*, after the infant has attained his majority ; because the administrator at the time had lawful power to administer (*n*).

In *Taylor v. Newton* (*o*), an administration had been granted to a guardian *pendente minoritate* of a widow, and on her coming of age, she renounced for herself and her only child, an infant, and administration was granted to a creditor, to whom the guardian refused to account : whereupon he was called on by the creditor to give in an inventory and account : The guardian appeared under a protestation, because his administration was expired, and his counsel insisted that he was not liable to account, now his administration was expired : But Sir George Lee decreed him to give in an inventory and account by a day specified, and condemned him in costs.

With respect to the liability of such an administrator to the infant, after he has come of age, it was laid down, that if the administrator wasted the assets, the proper way for the infant to charge him was by action on the case (*p*). Also by some

(*k*) See also *Acc. Brooking v. Jennings*, 1 Mod. 175, by Vaughan, C. J.

(*l*) 3 Atk. 603.

(*m*) *Ib.* 605.

(*n*) *Palmer v. Litherland*, Latch. 160,

by Doddridge and Jones, Justices. *Lawson v. Crofts*, 1 Sid. 57.

(*o*) 1 Cas. temp. Lee, 15.

(*p*) Bac. Abr. Executors (B. 1), 2.

*Lawson v. Crofts*, 1 Sid. 57.

opinions the infant might bring detinue against him for those goods which he still continued in his possession, or he might oblige him to account in the Spiritual Court (*q*), but could not bring a writ of account against him at law (*r*).

If an administration *durante minore ætate* be repealed, and another made administrator *durante minore ætate*, and the second administrator brings the first administrator to account, and after releases to him, yet the infant at full age may compel the first administrator to account again to him, and the first account to the second administrator, and his release shall not be any bar to it (*s*).

\*It was held that if a man obtained judgment against an administrator *durante minore ætate*, and afterward the executor or administrator came of age, a *scire facias* (*t*) lay against him, upon the judgment (*u*).

Liability of infant on judgment against administrator.

Administrator *durante minore ætate* of executor of an executor.

Although an administrator of an executor is not administrator to the first testator, yet the administrator *durante minore ætate* of the executor of an executor is *loco executoris*, and the representative of the first testator (*v*). Therefore, in an action by a creditor of the original testator, such an administrator is properly charged as the administrator *durante minore ætate* of the second executor, and not as the administrator *de bonis non* of the original deceased (*w*). And he might formerly be sued in the Spiritual Court for a legacy bequeathed by the latter (*x*).

(*q*) 1 Anders. 34. Com. Dig. Administration (F.). Bac. Abr. Exors. (B.1), 2.

(*r*) 1 Anders. 34. Bac. Abr. Exors. (B. 1), 2.

(*s*) Roll. Abr. Exors. (M.), pl. 3.

(*t*) As to the proceedings now substituted in lieu of *scire facias* by the Judi-

cature Act, 1875, see *post*, Pt. II. Bk. III. Ch. IX.

(*u*) Sparkes v. Crofts, 1 Lord Raym. 265.

(*v*) Anon. 1 Freem. 288.

(*w*) Norton v. Molyneux, Hob. 246.

(*x*) Anon. 1 Freem. 288.

† Administration *durante minore ætate* is provided for by statute in many of the states. This is so in Arkansas, California, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, Washington, and Wisconsin.

Such administrator and the executor, as well as all successive administrators

in the same jurisdiction, are privies in law, but not so administrators appointed in different states. Taylor v. Barron, 35 N. H. 484. Where an infant is entitled to administration *cum testamento annexo* the surrogate is required in New York by Code C. P. § 2643, 2 R. S. 75, § 33, to grant letters to his guardian unless rendered incompetent because of facts specified as grounds of disqualification. Estate of Blanck, 4 Dem. 297.

## SECTION IV.

*Of administration pendente lite.*†

In case of a controversy in the Spiritual Court concerning the right of administration to an intestate, it seems to have been always admitted, that it was competent to the Ordinary to appoint an administrator *pendente lite*. Yet where the controversy before the Ordinary respected a will, it was once considered that a grant of this species of administration was utterly void (*y*). But since the case of *Walker v. Woollaston*, decided in K. B., on error from C. P., Trin. T. 1731 (*z*), it has been settled, that the court has the power to grant administration *pendente lite* as well touching an executorship as the right to administration (*a*).

\*And now by the 70th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is enacted, that "pending any suit touching the validity of the Will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court and act under its direction" (*b*).

20 & 21 Vict. c. 77, s. 70.  
Court may grant administration *pendente lite*.

† See American note at end of this Section.

(*y*) *Robin's Case*, Moore, 636. *Smyth v. Smyth*, 3 Keb. 54. *Frederick v. Hook*, Carth. 153.

(*z*) 2 P. Wms. 588.

(*a*) *S. P. Wills v. Rich*, 2 Atk. 286. *Maskeline v. Harrison*, 2 Cas. temp. Lee, 258.

(*b*) See *Charlton v. Hindmarsh*, 1 Sw. & Tr. 519, where the court directed that the administrator should not discharge claims on the deceased's estate until they had passed before the registrar. The court has power, under this section, to appoint an administrator *pendente lite* in contested testamentary and administration suits, on the applica-

tion of a person who is not a party to the suit.

In an administration suit which was likely to be protracted, the court appointed an administrator *pendente lite*, at the instance of a creditor who was not a party to the suit. *Tichborne v. Tichborne*, L. R. 1 P. & D. 730. In the Goods of *Evans*, 15 P. D. 215.

A suit having been instituted to try the validity of the will of the deceased, and judgment having been given to establish it, one of the parties appealed from such judgment to the House of Lords. A difficulty having arisen in the Court of Chancery as to the powers of the executors to give a good title to certain leasehold property belonging to the

\*And by stat. 21 & 22 Vict. c. 95, s. 22, "all the provisions contained in the Court of Probate Act, respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the House of Lords under the said Act."

Further, by the Court of Probate Act, 1857, s. 71, it is enacted, that "it shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid, or any other person, to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any Will of such deceased person, by which his real estate may be affected; and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct" (c).

By stat. 21 & 22 Vict. c. 95, s. 21, "It shall be lawful for the Court of Probate to require security by bond in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said Court, under section seventy-one of 'The Court of Probate Act,' and the Court may, on application made on motion or in a summary way, order one of the registrars of the Court to assign the same to some person to be named by such order; and such person, his executors or administrators, shall thereupon be entitled to sue on

deceased's estate, under the probate and pending the appeal, the court ordered the probate to be brought into the registry, and thereupon that letters of administration *pendente lite* should be granted to the executors. *Wright v. Rogers*, L. R. 2 P. & D. 179.

A married woman under a power executed a will, and her husband by his will made her universal legatee and sole executrix. She survived him but did not take probate of his will nor re-execute her own. Litigation having arisen on the question whether the wife's executors were entitled to a limited or general grant of probate, the court appointed an administrator *pendente lite* to the estate of the husband, as well as one to the estate of the

deceased. In the *Goods of Dawes*, L. R. 2 P. & D. 147..

This case has been followed by *Butt, J.*, in the case of *In the Goods of Fawcett*, 14 P. D. 152, where that learned judge is reported to have said that he was "not altogether satisfied that in that case the attention of the court had been sufficiently called to the words of the 70th section."

(c) See *Grant v. Grant*, L. R. 1 P. & D. 654, where it was held that the court has no jurisdiction to appoint a receiver of the real estate of the deceased when there is no suit pending touching the validity of the will, *e. g.*, when the only litigation is by petition in reference to the individual appointed executor.

the said security, or put the same in force in his or their own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof."

Before granting administration *pendente lite* the court must be satisfied as to the necessity of such an administrator (*d*), \*and also as to the fitness of the proposed administrator; or must be placed in a condition to determine between the two (its most usual office upon such occasions), an administrator, that is, being proposed by either party (*e*). The court will appoint an administrator *pendente lite* if it is just and proper to do so, although a receiver may have been appointed by the Court of Chancery in a suit pending between the same parties and affecting the same property as the testamentary or administration suit (*f*).

Of what the court must be satisfied before granting administration *pendente lite*.

Administration *pendente lite* granted though receiver appointed by Court of Chancery.

The later practice of the Prerogative Court was to appoint an administrator *pendente lite* in all cases where the Court of Chancery would appoint a receiver (*g*).

On the other hand, it is the practice of the court to decline putting a litigant party in possession of the property, by granting administration pending suit to him, always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties (*h*).

The administrator must be an indifferent person :

(*d*) *Young v. Brown*, 1 Hagg. 54. *Bellew v. Bellew*, 34 L. J. P. M. & A. 125. But where the estate of the deceased consists of his share of a business which he was carrying on in partnership at the time of his death, and which is continued to be carried on by the surviving partner, the court will not appoint an administrator *pendente lite* against the wish of the surviving partner, unless a strong case is made that he dealt improperly with the business. *Horrell v. Witts*, L. R. 1 P. & D. 103. Neither will the court appoint an administrator *pendente lite* where there is a person named in the will as executor, whose appointment is not questioned, and who can discharge the duties of such an administrator.

*Mortimer v. Paull*, L. R. 2 P. & D. 85.

(*e*) *Northey v. Cock*, 1 Add. 329.

(*f*) *Tichborne v. Tichborne*, L. R. 1 P. & D. 730.

(*g*) *Bellew v. Bellew*, 34 L. J. P. & M. 125.

(*h*) *Northey v. Cock*, 1 Add. 330. *Young v. Brown*, 1 Hagg. 54. *Stratton v. Stratton*, 2 Cas. temp. Lee, 49. However, in *Colvin v. Fraser*, 2 Hagg. 613, administration *pendente lite* and limited to certain property, was granted by consent to one of the litigant parties. *De Chatelain v. Pontigny*, 1 Sw. & Tr. 34. See further, as to the practice relating to the preference or rejection of nominees, *Hellier v. Hellier*, 1 Cas. temp. Lee, 381. *Bond v. Bond*, *ibid*.

Administrators *pendente lite* are the appointees of the \*court, and are not to be merely considered as the nominees or agents of the several parties on whose recommendation they are selected (*i*). Therefore, in an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the court refused to dispense with such administrators entering into a joint bond (*k*).

By stat. 20 & 21 Vict. c. 77, s. 72, "the Court of Probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court think fit."

Although doubts were entertained on the subject before the case of Walker v. Woollaston (*l*), it was settled, that the administrator *pendente lite* might maintain actions for recovering debts due to the deceased (*m*). So where a person, whether he is heir-at-law or next of kin, or any other man whatsoever, kept possession of the testator's leasehold estate, such an administrator was held entitled to bring ejectments for the recovery of the possession (*n*). But the nature of the authority conferred by such letters of administration was, before the passing of the Court of Probate Act, merely to collect the effects (*o*); and his power did not extend either to vest or distribute them (*p*). Therefore, even to enable him to lodge money in court, which he was not called upon to do, it was necessary for him to file a bill (*q*). And he had no authority to pay legacies; though if paid *bona fide* he would be allowed for them (*r*). But now it will be seen that the Court of Probate Act (s. 70) expressly enacts that he shall have all the rights and

333, 354. In the Queen's Proctor v. Williams, 2 Sw. & Tr. 353, a person who had been receiver in chancery of the same estates was, by consent, appointed administrator *pendente lite*.

(*i*) Stanley v. Bernes, 1 Hagg. 221.

(*k*) *Ibid*.

(*l*) 2 P. Wms. 576.

(*m*) *Ibid*.

(*n*) Wills v. Rich, 2 Atk. 286. Jones v. Goodrich, 10 Sim. 328.

(*o*) 1 Scho. and Lefr. 254. See also the observations of Sir H. Jenner

Fust in Goodrich v. Jones, 2 Curt. 457.

(*p*) Gallivan v. Evans, 1 Ball & Beatt. 192.

(*q*) *Ibid*.

(*r*) Adair v. Shaw, 1 Scho. & Lefr. 254: He has no business to construe the will; he is only to hand over the assets to the person entitled, or to dispose of them pursuant to the directions of a court of equity: *Ibid*. 255, 256.



powers of a general administrator, other than the right of distributing the residue (s).

The duties of an administrator and receiver *pendente lite* commence from the order of appointment, and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of (t).

Commencement and termination of duties of administrator *pendente lite*.

Such an administrator is not liable to interest upon a balance in his hands, during the pendency of the action (u).

During a litigation in the Ecclesiastical Court for probate or administration, the Court of Chancery used to entertain a bill for the mere preservation of the property of the deceased, till the litigation was determined, and appoint a receiver, although the Ecclesiastical Court, by granting an administration *pendente lite*, might have provided for the collection of the effects (v).

A receiver would formerly have been appointed by the Court of Chancery, notwithstanding an administration *pendente lite* might be also obtained :

But although the Chancery Division of the High Court of Justice has jurisdiction so to do, it would not now entertain an application for the appointment of a receiver, but would leave the matter to be dealt with by the Probate Division. Thus in *Barr v. Barr* (x), where there was a motion for the transfer to the Probate Division of an action, which had been commenced in the Chancery Division for the appointment of a receiver of the rents and profits of a testator's real estate, \*pending proceedings in the Probate Division to determine the validity of the will, Sir George Jessel, M. R., made the order for transfer, and pointed out that multiplicity of proceedings was one of the evils which the Judicature Acts was intended to meet, especially as shown in s. 24, sub-s. 7 of the act of 1873. And in *Re Ivory* (y), a motion for the

but Chancery Division would not now appoint receiver.

(s) See *ante*, p. \*428.

(t) *Taylor v. Taylor*, 6 P. D. 29.

(u) *Gallivan v. Evans*, 1 Ball & Beatt. 191.

(v) Mitf. Pl. 145, 136, 4th edit. *King v. King*, 6 Ves. 172. *Edmunds v. Bird*, 1 Ves. & Beam. 542. *Atkinson v. Henshaw*, 2 Ves. & Beam. 85. *Ball v. Oliver*, 2 Ves. & Beam. 96. *Watkins v. Brent*, 1 Mylne & Cr. 102 (overruling the distinction taken by Lord Erskine in *Richards v. Chave*, 12 Ves. 462). *Wood v. Hitchings*, 2 Beav. 289. Such a suit need not be brought to a hear-

ing: *Anderson v. Guichard*, 9 Hare, 275. In fact it never is brought to a hearing. But after the litigation is over in the Probate Court, the practice is to discharge the receiver and dispose of the costs. And if it appears that there was no reasonable ground for instituting the suit at all, the court will order the defendant to pay all the costs, though a receiver has been appointed: *Barton v. Rock*, 22 Beav. 81. S. C., *ibid.* 376.

(x) W. N. 1876, p. 44.

(y) 10 Ch. Div. 372.

appointment of a receiver and an injunction was refused, in an action in the Chancery Division for the administration of the personal estate of an intestate, against the defendant to whom letters of administration had been granted. Indeed, even before the Judicature Act, it was decided that having regard to the extended powers of the Court of Probate under sects. 70 and 71 of the act of 1857, the Court of Chancery ought not, in cases where an administrator *pendente lite* had been appointed by the Court of Probate, to continue its former practice as to the appointment of receivers pending litigation in the Court of Probate (z).

(z) Veret *v.* Duprez, L. R. 6 Eq. 329. Hitchen *v.* Birks, L. R. 10 Eq. 471. And see *ante*, p. \*432 (v).

† In proper cases it is not uncommon in the United States for the courts to appoint an administrator *pendente lite*, although this may be confined to cases authorized by statute. McCall *v.* McCurdy, 69 Ala. 65. And the same thing is accomplished in Texas where the name is not recognized by the statute, which provides for administration *pro tempore*. Fisk *v.* Norvel, 9 Tex. 13. Such administrator may be appointed, where the selection of general administrator is litigated, Walker *v.* Dougherty, 14 Ga. 653; Gresham *v.* Pyron, 17 Id. 263; Crozier *v.* Goodwin, 1 Lea 368; or where the appointment of a general administrator is delayed for any reason, Grece *v.* Helm, 91 Mich. 450; or the validity of a will is contested, Lawrence *v.* Parsons, 27 How. Pr. 26; Jordan *v.* Thompson, 67 Ala. 469; McIntire *v.* Worthington, 68 Md. 203; although the contest is being carried on in another court, Rogers *v.* Dively, 51 Mo. 193; or pending appellate proceedings on removal of an executor or administrator. Estate of Moore, 86 Cal. 72. A mortgagee is entitled to a grant of letters of administration *pendente lite*. Matter of Lothrop, 6 Stew. (N. J.) 246. But in Maryland, such appointment is confined to cases of contested probate. Munnikhuisen *v.* Magraw, 57 Md. 172. Where, upon

application for letters of administration, it appears that a paper has been propounded as a will, the better practice is to appoint a special administrator to preserve the assets, until the issue as to the existence of the will be determined. Jordan *v.* Thompson, 67 Ala. 469. But an administration *pendente lite* should not be granted after the will is set aside. Munnikhuisen *v.* Magraw, 57 Md. 172. If such administrator is appointed, it seems that in Maryland chancery cannot appoint a receiver of the estate. Estate of Colvin, 3 Md. Ch. 278. But letters of general administration, granted during the pendency of a controversy respecting the probate of a will, have been held to be valid as a grant of administration *pendente lite*. Patton's Appeal, 31 Pa. St. 465. Butsee, *contra*, Slade *v.* Washburn, 3 Ired. 557. An improper refusal to appoint an administrator *pendente lite* is subject to appeal (in Georgia, by mandamus). Gresham *v.* Pyron, 17 Ga. 263.

The court should not appoint the nominee of either party, Woerner on Admn. § 181; 3 Redf. on Wills 109; but an indifferent person should be selected. Mortrie *v.* Hunt, 4 Bradf. 173; Cornwell *v.* Cornwell 1 Dem. 1; Crandall *v.* Shaw, 2 Redf. 100. The proponent and chief beneficiary under a contested will should not be appointed,

if charged with undue influence in procuring the will and unfriendly relations with the family of the deceased. *Matter of Stearns*, 31 N. Y. St. Rep. 960; S. C. 31 N. Y. 9. But the executor named in the will may be appointed in the face of vague objections made by a party interested only to a small degree, and not otherwise supported. *Haas v. Childs*, 4 Dem. 137. The statutory preference of the widow as administratrix does not apply to such appointment. *Lamb v. Helm*, 56 Mo. 420.

Such administrators are officers of the court, whose office as administrator continues only to the termination of the suit, *Estate of Winpenny*, 11 Phila. 20; *Thompson v. Tracy*, 60 N. Y. 174; *Cole v. Wooden*, 3 Harr. 15; *Brown v. Ryder*, 15 Stew. (N. J.) 356; including appellate proceedings, if any are taken. *Gresham v. Pyron*, 17 Ga. 263. No agreement can continue the authority beyond the end of the controversy. *Cole v. Wooden*, *ubi supra*. And even the Probate Court cannot give him authority after that to bring suit against his co-administrator, or to call him to account for moneys received after the expiration of their office as such administrators. *Id.* But where the powers and functions of such an administrator have been suspended by the admission of the will to probate, they will revive upon an appeal from probate. *Brown v. Ryder*, *ubi supra*. On the rejection of the contested will a general administrator should be appointed, although an appeal is taken on the will. *Hayes v. Hayes*, 75 Ind. 395. As an officer of the court, the administrator *pendente lite* is removable at pleasure, *Flora v. Mennice*, 12 Ala. 836; but he should not be removed without cause before the end of the litigation. *Estate of Robinson*, 12 Phila. 14.

An administrator *pendente lite* must give bond. *Estate of Colvin*, 3 Md. Ch. 278. Where two wills are offered for

probate, one by the widow, and one by a brother, and the court appoints a person not related to either proponent administrator *pendente lite*, the question as to what security shall be required is discretionary. *Dietz v. Dietz*, 11 Stew. (N. J.) 483. But the sufficiency of the sureties cannot be questioned collaterally. *Lawrence v. Parsons*, 27 How. Pr. 26. Such a bond should call for an account to be rendered to a general administrator or executor to be appointed; and although it is made by mistake in the form of a general administration bond, neither the administrator nor his sureties will be liable on it to creditors, but only to the general administrator. *Stevenson v. Wilcox*, 16 S. C. 432.

For the protection of the estate and the collection of its assets, an administrator *pendente lite* may bring suits with all the rights and authority of a general administrator. *Estate of Colvin*, 3 Md. Ch. 278; *Kaminer v. Hope*, 18 S. C. 561. He may file a bill in equity to redeem mortgaged premises for the purpose of saving the Statute of Limitations. *Libby v. Cobb*, 76 Me. 471. And settlement by him of a claim belonging to the estate is binding upon the estate. *Greece v. Helm*, 91 Mich. 450, Rep. 1106. In like manner he may be sued for a debt of the intestate, *Benson v. Wolf*, 14 Vr. 78; and he is a necessary party to a proceeding by way of garnishment brought against a judgment creditor of the estate. *Matter of Flandrow*, 92 N. Y. 256. As he can sue and be sued for the estate, the Statute of Limitations runs from his appointment. *Todd v. Wright*, 12 Heisk. 442.

It is his duty to act as an officer of the court and under the direction of the court. *Ellis v. Wren*, 84 Ky. 255. If the court by order direct him to sell all personal property not sold, the administrator *pendente lite* as such has no right to appeal. *Johns v. Caldwell*,

60 Md. 259. He can only sell perishable property, and cannot retain goods or money of the estate for his own debt. *Satterwhite v. Carson*, 3 Ired. 549. He cannot sell real property belonging to the deceased, *Ellis v. Wren*, 85 Ky. 255; nor remove and sell the stone upon it, *Id.*

His authority does not extend to the payment of legacies or the distribution of the estate of the deceased. *Estate of Ellmaker*, 4 Watts 34; *Estate of Wimpenny*, 11 Phila. 20. And it is not his business to pay debts except as he may be expressly directed by the court.

When the suit is ended, his office ends with it, and he must render an account and pay over all moneys that have come to his hands to the persons then declared by the court to be entitled to receive them.

If he has without express direction of the court, by consent of all parties interested, collected the rents and paid out of them the debts of the estate, and the personal property proves afterward to be insufficient for full payment of the debts, he may be subrogated to the rights of the creditors against the land in the hands of the devisees or heirs. *Wooley v. Pemberton*, 14 Stew. (N. J.) 394. Any surplus proceeds of lands of the deceased sold on execution against the estate he must account for to the administrator *cum testamento annexo* afterward appointed, but without interest so far as he has not used the same. *Commonwealth v. Mateer*, 16 Serg. & R. 416. It has been held that commissions should be allowed him according to services rendered, and not

under the statute provided in the case of general administration. *Estate of Baxley*, 47 Md. 555.

Pending a contest of the will, or in any other case when necessary, a special administrator to collect the goods of the deceased and preserve them until letters duly issued may be appointed. *Alabama* (1886 Code, § 2020), *California* (Code C. P. § 1411), *Colorado* (1891 An. Stats. § 4703), *Dakota* (1887 C. L. §§ 5744, 5699), *Florida* (1892 R. S. § 1890), *Georgia* (1882 Code, §§ 2487, 2489), *Idaho* (1887 R. S. § 5390), *Illinois* (1891 R. S. c. 3, § 11), *Indiana* (1888 R. S. §§ 2237, 2239), *Iowa* (1888 R. C. § 2357), *Kansas* (1889 G. S. § 2799), *Kentucky* (1887 G. S. c. 39, § 21), *Maine* (1883 R. S. c. 64, § 32), *Maryland* (1888 P. G. L. Art. 93, § 60), *Massachusetts* (1882 P. S. c. 130, § 10), *Michigan* (1882 An. Stats. § 5851), *Minnesota* (1891 G. S. § 5690), *Mississippi* (1892 An. Code, §§ 1840-41), *Missouri* (1889 R. S. § 13), *Montana* (1887 C. S. p. 196, §§ 95, 97), *Nebraska* (1893 C. S. c. 23, § 180), *Nevada* (1885 G. S. §§ 2757-59), *New York* (Code C. P. 2668), *North Carolina* (1883 Code, § 1383), *Ohio* (1890 R. S. § 6007), *Oregon* (1892 An. Laws, § 1091), *Rhode Island* (1882 P. S. c. 184, §§ 22, 24), *Tennessee* (1884 Code, § 349), *Texas* (1880 R. S. Art. 1881), *Vermont* (1880 R. L. § 2081), *Washington* (1891 G. S. § 931), *Wisconsin* (1889 An. Stats. § 3810).

And the statutes provide that a special administrator must give bond as the court may direct, or as any other administrator.

## SECTION V.

*Of administration durante absentia.*

If the executor named in the will, or the next of kin, be out of the kingdom, the ecclesiastical courts always had the power, At common law before probate obtained, or letters of administration before probate : issued, of granting to another a limited administration *durante absentia* (a). In the case of *Clare v. Hedges*, 3 Wm. & M. (b), the court held clearly that such administration was grantable by law, and that it might be a great convenience to do so ; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost. So in *Slater v. May*, 3 Ann. (c), where an action was \*brought by an administrator *cum testamento annexo, durante absentia* of the executor, Lord Holt said that it was reasonable there should be such an administrator, and that this administration stood upon the same reason as an administration *durante minore ætate* of an executor, viz., that there should be a person to manage the estate of the testator till the person appointed by him is able. The absence of the executor, or next of kin, to justify such an administration must, it seems, be an absence out of the realm (d).

Such an administrator is such a legal representative as to entitle him to assign the leaseholds or other property of the deceased (e), and his power differs in this respect from power of such administrator : that of an administrator *durante minore ætate* (f).

But *when probate was once granted*, and the executor had gone abroad, 'the ecclesiastical courts did not feel themselves authorized to grant new administration on the ground after probate by stat. 38 Geo. III. c. 87. that the executor had left the kingdom. Nor could a court of equity interfere by appointing a receiver : because, although when once a person capable of sustaining the character of legal representative had been brought into court, equity could, in the case of his insolvency or misconduct, appoint another person to manage the affairs of the testator, and compel his legal representative to permit

(a) See 3 Bac. Abr. 56, tit. Exors. (G.).

(b) 1 Lutw. 342.

(c) 2 Lord Raym. 1071. See *ante*, p. \*376, as to administration to the attorney of the next of kin ; and *ante*, p. \*405, as to administration to the attorney of the executor.(d) *Ibid.*(e) *Webb v. Kirby*, 3 Sm. & G. 333. 7 De G. M. & G. 376.(f) See *ante*, p. \*423. But see *Re Cope*, 16 C. D. 49, in which case Jessel, M. R., doubts the authority of these limitations on the power of an administrator *durante minore ætate*.

such person to sue in his name ; yet, if the executor went abroad, a court of equity could entertain no suit, there being no person to stand in the situation of the testator (*g*). The consequence of this defect of the authority of the Spiritual Court, was \*that there was no person existing within the jurisdiction of the courts of law or equity

duly authorized to appear and collect the debts. To remedy this inconvenience, the statute 38 George III. c. 87 (usually called Mr. Simeon's Act), was passed, whereby after reciting that the laws now existing are not sufficient to enforce a speedy distribution of the assets of deceased persons, where the executor to whom probate of the will hath been granted is out of the jurisdiction of his Majesty's courts of law and equity, it is enacted, "that at the expiration of twelve calendar

months (*h*) from the death of any testator, if the executors or executor (*i*) to whom probate of the Will shall have been granted, are, or is, then residing out of the jurisdiction of his Majesty's Courts of Law and Equity, it shall be lawful for the Ecclesiastical Court, which hath granted probate of such Will, upon the application of any creditor (*k*), next of kin or legatee (*l*), grounded on affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned ; which administration shall be

(*g*) *Taynton v. Hannay*, 3 Bos. & Pull. 30. In the case of the estate of a deceased person who at the time of his death was domiciled within the jurisdiction a writ of summons can now by the order of a judge be served on an executor out of the jurisdiction. See R. S. C., Order XI., Rule 1.

(*h*) The words "at the expiration of twelve months" have been held when compared with the words given in the form of the affidavit in sect. 2, and the grant of administration, in the 3rd section, to mean at or after the expiration of that period : In the Goods of Ruddy, L. R. 2 P. & D. 330.

(*i*) It will be observed that the statute applies to *executors* only, and therefore administration could not be granted during the absence from the country of an administrator *cum testamento annexo* :

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In the Goods of Harrison, 2 Robert. 184. But now by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77, s. 74), the above statute "shall apply in like manner to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her Majesty's Courts of Law and Equity." The provisions of the above acts apply to the case of an executor of an executor. In the Goods of Grant, 1 P. D. 435.

(*k*) A creditor in equity, such as the assignee in bankruptcy of an absent administrator indebted to the intestate's estate, is a creditor within the meaning of this section. In the Goods of Hammond, 6 P. D. 104.

(*l*) As to the construction of these words, see *post*, p. \*437, note (*n*).

written or printed upon paper or parchment, stamped only with one five shilling stamp, and \*shall pay no further or other duty to his Majesty, his heirs, or successors."

Section 2 provided a form of affidavit to be made by the applicant, which contained an averment that the deponent was desirous of exhibiting a bill in equity; and section 3 contained a form of grant, limited for the purpose of proceedings in equity; and it was accordingly held that the statute applied only to cases where there were proceedings in equity, but stat. 21 & 22 Vict. c. 95, s. 18, extended the operation of stat. 38 Geo. III. c. 87, to all executors and administrators reading out of the jurisdiction of her Majesty's courts of law and equity, "whether it be or be not intended to institute proceedings in the Court of Chancery," and authorized an alteration in the language of the grant, so as to make it apply to grants under the last mentioned act.

The common administrator's oath is now used in place of the affidavit.

Section 4 which enabled a court of equity to appoint persons, to collect outstanding debts, has been repealed by stat. 42 & 43 Vict. c. 59, s. 2.

Section 5. "And be it further enacted, That it shall be lawful for the accountant general of the High Court of Chancery, or for the secretary or deputy secretary of the Governor and Company of the Bank of England, to transfer, and for the Governor and Company of the Bank of England to suffer a transfer to be made of, any stock belonging to the estate of such deceased person into the name of the accountant general, in trust for such purposes as the Court shall direct, in any suit in which the person, to whom such administration hath been granted, shall be, or may have been a party: Provided, nevertheless, that if the executors or executor, capable of acting as such, shall return to and reside within, the jurisdiction of any of the said Courts, pending such suit, such executors or executor shall be made party to such suit, and the costs incurred, by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons or out \*of such fund as the Court where such suit is depending shall direct."

This statute applies to the case of an executor resident out of the jurisdiction, and out of the reach of process

Sec. 2.  
Form of affidavit.

Sec. 3.  
Form of grant.

Statute only applied to cases where proceedings in equity.

Stat. 21 & 22 Vict. c. 95, s. 18.

Common administrator's oath substituted for affidavit.

Stat. 38 Geo. III. s. 87.

Sec. 4.

Stock belonging to the estate of the deceased may be transferred into the name of the accountant general in chancery in trust for such purposes as the court shall direct in any suit.

Executor returning to reside within jurisdiction of the court to be made a party in such suit.

Application of statute.

of her Majesty's courts of law and equity, as, for instance, the case of an executor residing in Scotland (*m*).

The stat. 38 Geo. III. c. 87, applied only to cases where there were proceedings in chancery, but this has been remedied by the stat. 21 & 22 Vict. c. 95, s. 18, by which it is enacted, that the provisions of an act passed in the 38th year of Geo. III. c. 87, and of the Court of Probate Act, shall be extended to all executors and administrators residing out of the jurisdiction of her Majesty's courts of law and equity, whether it be, or be not, intended to institute proceedings in the Court of Chancery, and to all grants made before and subsequently to, the passing of the last mentioned act, and it shall be lawful to alter the language of the grant prescribed by the first named statute, so as to make it apply to grants made in the Court of Probate under the said last-mentioned act (*n*).

When the Probate Court in the exercise of its ordinary jurisdiction grants administration during the absence of an executor or next of kin, before probate, or administration taken out by him, such administration is at an end the moment he returns (*o*). But under the statute of 38 Geo. III. \*it was held that the administrator was not appointed for a limited period, but for a limited purpose, *viz.*, to become and be made party to a bill or bills in equity, and to carry the decree or decrees into effect. The suit so instituted was not, therefore, to fall to the ground, and be at an end, by the return of the executor, but to go on, he being made a party in the usual course; and then the temporary administrator might account, have his costs, and be discharged (*p*).

(*m*) *Hannay v. Taynton*, 2 Add. 505.

(*n*) Under these acts a limited grant of administration with the will annexed was made to the personal representative of a legatee, as being within the spirit, if not the letter, of the statute of Geo. 3: In the Goods of Collier, 2 Sw. & Tr. 444. A similar grant was made to a trustee substituted by the Court of Chancery for an executor who had gone abroad. In the Goods of Hampson, L. R. 1 P. & D. 1. Where the applicant is residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside for and actually payable to the applicant,

the grant can be made under the 18th section of 21 & 22 Vict. c. 95: In the Goods of Ruddy, 2 L. R., P. & D. 330.

(*o*) *Secus*, as to an administration granted, *durante absentia*, to the attorney of an executor: In the Goods of Cassidy, 4 Hagg. 360. *Ante*, p. \*407. The power of such an administrator is wholly determined by the death of the executor: *Webb v. Kirby*, 7 De G. M. & G. 377, *ante*, p. \*407. *Suwerkrop v. Day*, 8 A. & E. 624.

(*p*) *Rainsford v. Taynton*, 7 Ves. 466. But now, by reason of 21 & 22 Vict. c. 95, sect. 18, the purpose would seem no longer so limited, and the provisions of the Judicature Acts and



It was held in *Clare v. Hedges* (q), that in the case of a common law administration *durante absentia*, if any of the debtors of the deceased paid his debt to the temporary administrator, though it was after the return of the executor or next of kin, yet, if the debtor had no notice of such return, it was a good payment.

It was held that when an administrator had been appointed under the statute (38 Geo. III.), if the executor died, the administration did not thereby come to an end, nor Effect of the death of the executor. the authority of the administrator determine (r). There is no provision made in the statute for the death of the executor: but the proper course upon such an event seems to be, that in case of his dying intestate, some person should take out general administration to the original testator, or if the former executor made a will appointing an executor capable of acting, such executor should obtain probate, so as to represent the original testator; and then such administrator or executor, being considered within the true meaning, though not the strict letter of the statute, may apply to be made a \*party to any pending action, and the matter can be dealt with in the same way as if the original executor had returned to this country (s).

In the case of an action brought by an administrator *durante absentia*, appointed independently of the statute, the statement of claim must aver that the executor at the time of the grant of administration was absent, and that his absence continues. If there is an averment of his absence, without saying where, the court will intend it to be in an absence beyond the jurisdiction (t). What administrator *durante absentia* must allege in his statement of claim.

In an action on a policy of insurance, brought by an administrator appointed under the statute, evidence was tendered by the defendants of declarations made by the executor, whilst he was executor and before the proceedings had taken place for having the present plaintiff appointed special administrator: But Lord Denman refused to receive the evi- Admissions of executor not evidence against the administrator *durante minoritate*.

Rules prevent enactment in any case falling to the ground. See R. S. C. 1883, Ord. XVII., r. 4.

(q) 1 Lutw. 342. S. C. cited from MS. in *Walker v. Woollaston*, P. Wms. 579.

(r) *Taynton v. Hannay*, 3 Bos & Pull. 26.

(s) *Rainsford v. Taynton*, 7 Ves. 460; and see the judgment of Chambre, J., in 3 Bos. & Pull. 34.

(t) *Slater v. May*, Lord Raym. 1071

dence, saying that the acts of the original executor, done by him in that capacity, might be admissible in evidence against the plaintiff, who had succeeded *durante absentia* to the office of executor; but that, in his opinion, the mere declarations of the executor did not stand on the same footing (*u*).

(*u*) *Rush v. Peacock*, 2 Moo. & Rob. 162.

† Some of the statutes providing for special administration, and administration during minority, expressly include administration during the absence of the executor at the death of the testator, and it is implied in nearly all of them.

Where a resident of Calcutta died possessed of a considerable amount in the American funds, which he bequeathed to his sons upon various trusts, it was held that a local administration *cum testamento annexo, durante absentia*, was entitled to the funds, in preference to that claiming under the foreign executor. *Willing v. Perot*, 5 Rawle 264.

But an administration *durante absentia testatoris* cannot be granted after probate of the will and letters testamentary granted, *Griffith v. Frazier*, 8 Cranch 9; and should be granted for temporary convenience or safety when the next of kin are in a foreign country, and have not nominated anyone in this country to take the administration for them, *Ritchie v. McCauslin*, 1 Hayw. 220. The court may, however, appoint a special administrator for a particular suit at the request of a foreign representative, although he might bring suit (in Florida) himself. *Epping v. Robinson*, 21 Fla. 36.

## SECTION VI.

*Of other temporary and limited administrations.†*

There are several other instances of temporary administrations, granted as well *cum testamento annexo* as in cases of complete intestacy.

It has already appeared that an executor may be appointed with limitations as to the time when he shall begin his office, \*as where a man is appointed to be executor at the expiration of five years from the death of the testator (x).

So the testator may appoint the executor of A. to be his executor : and then if he die before A. he has no executor till A. die (y).

Temporary administrations :  
*cum testamento annexo :*

in case of an executor limited as to time :

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office, the court must commit administration limited until there be an executor (z). It is plain, that this will be an administration *cum testamento annexo*, and the appointment made according to the rules connected with that sort of grant (a).

So it may be necessary to decree a limited administration till the will of the deceased can be produced in order to be admitted to probate. Thus where the deceased, a few days before his death, stated that he had made his will whilst in India ; and that the same was then remaining there ; administration was applied for “limited for the purpose of receiving and investing the interest and dividends due or to become due on certain stock of the deceased, and for receiving and investing the amount of an India Bill, and for otherwise protecting the property of the deceased,” “until the last Will and testament of the said deceased, or an authentic copy thereof, should be transmitted to this country :” Sir John Nicholl, on the consent of all parties apparently interested, granted the administration, and the learned judge observed, that the deceased could not be sworn to have died intestate, having, according to his own declaration, left a will in India : An administration *pendente lite* was out of the question, as no suit in the Spiritual Court was or ever might be pending : nor could there be an administration as *durante absentia* or *minoritate* of an executor ; for *non constat* who

administration limited till a will be transmitted to England :

† See American note at end of this Section.

(x) *Ante*, p. \*199.

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(y) *Ante*, pp. \*199, \*200.

(z) Godolph. Pt. 2, c. 30, s. 5.

(a) See *ante*, p. \*399, *et seq.*

the executor was : At the same time a long interval must elapse before the will would be forwarded from India, \*in which interval it was material there should be someone to protect and manage the property ; and, therefore, the court complied with the application (b).

Where a will, proved to have been in existence after the testator's death, is accidentally lost, and the contents unknown, limited till a lost death, is accidentally lost, and the contents unknown, will be found : the court will grant administration limited until the original will be found, and brought into the registry (c).

If the executor be disabled from acting, as if he becomes lunatic, or incapable of legal acts, then on the principle of necessity, there shall be a grant of a temporary administration with the will annexed (d). Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the court to make a limited grant to his committee, for his use and benefit, during his lunacy (e). By the consent, given or implied, of the committee of the lunatic, administration with the will annexed may be committed to a residuary legatee, during the lunacy of the executor (f).

It was also the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurred, the Ecclesiastical Court required affidavits, stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed : The court then granted administration to the next of kin of the lunatic, for the use and benefit of the lunatic pending the lunacy, and it required sureties in double \*the amount of the property, and such sureties must have justified (g).

(b) In the Goods of Metcalfe, 1 Add. 343. See also 1 Gibs. Cod. 574, where it is said that, though there be no suit or controversy depending touching the executorship, and though there be an executor, yet, if he does not come in, the Ordinary may grant a temporary administration until the executor comes in and proves the will.

(c) In the Goods of Campbell, 2 Hagg. 555.

(d) Hills v. Mills, 1 Salk. 36. Toller, 99. Ante, p. \*421. These are termed in 1 Oughton, tit. 219, s. 1, n. (a), "*Literæ administrationis durante Corporis aut Animi vitio.*"

(e) In the Goods of Phillips, 2 Add. 336, n. (b).

(f) In the Goods of Milnes, 3 Add. 55.

(g) See *Ex parte Evelyn*, 2 Mylne & K. 4, where the practice was laid down, as above stated, by Lord Brougham, C., from a communication made to him by Dr. Lushington. See also *Evans v. Tyler*, 2 Robert. 134. S. C. 7 Notes of Cas. 305, 306. Administration of the effects of a Jew was granted to the secretary of the Great Synagogue, for the use and benefit of the next of kin (a Jewess), who was of unsound mind, during her lunacy, her next of kin hav-

Where administration had been granted of an intestate's effects to a creditor for the use and benefit of the widow, a lunatic, on the renunciation of her children ; on the death of the creditor, leaving goods unadministered, the widow surviving and still lunatic, the court refused to grant administration *de bonis non* to a son of the deceased, who had retracted his renunciation ; but granted it to him for the use and benefit of the widow, during her lunacy, he giving justifying security to the amount of the goods unadministered (*h*).

In another case (*i*), the deceased died intestate in October, 1826, leaving his widow and several children him surviving : In the following November, administration was granted to his widow, who, in November, 1832, became a lunatic : In May, 1836, the court was prayed to revoke the administration granted to the widow, and to grant an administration to the son of the deceased : The court declined to revoke the administration ; but granted administration to the son, limited during the lunacy of the widow, the letters of administration theretofore granted to her being first brought in and impounded in the registry in order to be redelivered out in case of her recovery.

\*If an executor, who is also residuary legatee in trust, be incapable, and no committee is appointed, the *cestui que trust* may obtain administration under certain circumstances (*k*). In a case where one or two executors had renounced, and the other was a lunatic under confinement, and there was no committee of her person and estate, the court refused to grant administration to the residuary legatee, the daughter, during the lunacy of her mother, without the sureties in the bond justifying ; no reason being given for the renunciation of the co-executor, nor any obstacle assigned to the formal appointment of a committee, to whom the administration for the use of the widow would regularly be granted (*l*).

Until the year 1824, In the Goods of Phillips (*m*), no case of an

ing having been first cited : In the Goods of Joseph, 1 Curt. 907. Administration with the will annexed *de bonis non* was granted to the executors of a sister, the administratrix, deceased, for the use and benefit of the surviving sister, the sole next of kin, during her imbecility, without citing her next of kin : In the Goods of Southmead, 3 Curt. 28.

(*h*) In the Goods of Penry, 4 Notes of Cas. 659.

(*i*) In the Goods of Binckes, 1 Curt. 286.

(*k*) In the Goods of Crump, 3 Phillim. 497.

(*l*) In the Goods of Hardstone, 1 Hagg. 487.

(*m*) 2 Add. 335.

application to the court to supply a defect in the legal representation of the party deceased, occasioned by the lunacy of one of his several administrators, is believed to have occurred. In that case one of the three administrators, *cum testamento annexo*, was found to be a lunatic under a commission from the Court of Chancery, and committees had been appointed : There was standing in the name of the deceased, in the books of the Bank of England, certain sums, his property ; but of which neither the interest could be received, nor the principal stock transferred, as directed by the will, in consequence of such lunacy : Under these circumstances, the court directed that upon the letters of administration already granted being brought in by the two sane administrators, and the committees of the third, letters of administration *de bonis non*, &c., should by consent of the said committees, issue *de novo* to the two former administrators only (*n*). On the authority of this decision, the court ordered, in a case where one of two joint administrators had become imbecile and incapable of acting, that the joint letters of administration, having been brought into the registry, should be re\*voked, and special letters of administration granted to the sane administrator, without justifying securities (*o*). On another occasion (*p*), the deceased had appointed two executors, and probate had been granted to one, with a power reserved of making the like grant to the other : The executor who had obtained the grant became a lunatic, and a transfer of the deceased's stock at the bank could not, in consequence, be obtained : A double probate was taken by the other executor, and the court was prayed to revoke the probate granted to the lunatic, it having become inoperative : The court directed both probates to be brought in, and then revoked them, and granted a fresh probate to the other executor, and therein reserved a power of making a like grant to the lunatic executor, when he should become of sound mind and apply for the same.

There may also be a grant of administration limited to certain specific effects of the deceased ; and the general administration may be committed to a different person. But it should seem that this sort of grant is entirely exceptional, and should not be made unless a very strong reason be given (*q*).

(*n*) 2 Add. 336.

(*o*) In the Goods of Newton, 3 Curt. 428.

(*p*) In the Goods of Marshall, 1 Curt. 297.

(*q*) In the Goods of Watts, 1 Sw. & Tr. 538. In the Goods of Somerset, 1

Two administrations may well subsist together when there is no executor: But it should be observed that, regularly, no administration of any sort can be granted when there is <sup>if there is an executor there can be no administrator:</sup> an executor appointed; for he is *universi juris hæres* to his testator: Therefore where A. made his will, and appointed B. \*his executor, and by deed gave part of his estate to C.: and C. obtained in the Prerogative Court a limited administration to the deed only; the judges delegate set aside the grant of this administration on appeal (r).

It frequently happens that the personal administration of a party deceased is broken, and its revival is necessary merely for the performance of a single act. In such cases, <sup>administration limited to assign a trust term:</sup> administration *de bonis non* will be granted, limited to that particular object. For instance, when the representatives of a trustee, in whom a term of years or charge was vested, are dead, a limited administration to another trustee is requisite, for the purpose of making an assignment, and will be granted limited accordingly (s). So where a testator leaves the dividends on certain stock in the public funds to a legatee for life, and after his decease, the <sup>to a particular legacy:</sup> whole property to another, and makes the legatee for life executor, who dies intestate, administration *de bonis non*, with the will annexed, may be obtained by the representative of the substituted legatee, limited to the sum in the funds, and the dividends due thereon since the death of the legatee for life (t). So administration with a

L. R. P. & D. 350. Where a party applying for administration has no direct interest in the personal estate of the deceased, but only as assignee of part of it, the grant must be limited to the particular fund to which he is entitled. In the Goods of Dodgson, 1 Sw. & Tr. 259.

Again the court granted administration with a will and codicil annexed to a legatee of trust property belonging to the deceased, limited to such trust property, so far as it was personally bequeathed to him by the codicil. In the Goods of Prothero, L. R. 3 P. & D. 209.

(r) *Coswall v. Morgan*, 2 Cas. temp. Lee, 571. See *post*, p. \*451.

(s) In cases where the original trustee died testate, it was not the practice of

the Prerogative Office to annex the will to an administration granted for this purpose: In the Goods of Fenton, 3 Add. 36, n (a). It is not sufficient, in order to make out a title to the term, to refer to deeds deducing such title in affidavits: The deeds themselves must be brought into the registry; In the Goods of Keene, 1 Sw. & Tr. 265.

(t) In the Goods of Steadman, 2 Hagg. 59. But see in the Goods of Watts, 1 Sw. & Tr. 539. *Ante*, p. \*444 (q). On one occasion it appeared that a party had remitted from India a bill of exchange payable to the order of the deceased: The bill was accepted, but, previous to its arrival, the deceased died intestate, and his widow and children renounced administration: A grant was

will annexed was granted to the joint nominees of two charitable institutions to whom legacies, expectant on life interests, had been bequeathed, but limited to a fund \*appropriated for payment of the legacies ; the parties entitled to a general grant having been cited and not appearing (*u*).

Again, an administration may be granted, limited to <sup>limited to pro-</sup>commencing or substantiating proceedings in chan- <sup>ceedings in chan-</sup>cery (*x*).

Again, if a debt, by a covenant or obligation binding the heir of the debtor, is demanded in equity against the real assets in the hands of a devisee, under the statute 3 W. & M. c. 14, (repealed and re-enacted with additional provisions by stat. 11 G. 4 and 1 W. 4, c. 47,) the personal representative of the deceased debtor is generally a necessary party to the suit, as a court of equity will first apply the personal in exoneration of the real assets (*y*). And when there has been no general personal representative, a special representative by an administration limited to the subject of the suit has been required (*z*). In other cases where a demand is made against a fund entitled to exoneration by general personal assets, if there are any such, a like limited administrator is frequently required to be brought before the court. This seems to be required rather to satisfy the court that there are no such assets to satisfy the demand : for although the limited administrator can collect no such assets by the authority under which he must act, yet as the person entitled to general administration must be cited in the Ecclesiastical Court, before such limited administration can be obtained, and as the limited administration would be determined by a

applied for to the nominee of the remitter of the bill, limited to receive and give a discharge to a third party for it : But the court refused the motion, on the ground that it was in fact an application for a limited administration to be granted to the nominee of a debtor ; In the Goods of Lord Rivers, 4 Hagg. 355.

(*u*) In the Goods of Biou, 3 Curt. 739. Where there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trust* assent to the grant extending to their respective in-

terests : Pegg. v. Chamberlain, 1 Sw. & Tr. 527.

(*x*) Woolley v. Green, 3 Phil. 314. Maclean v. Dawson, 1 Sw. & Tr. 425. In the Goods of Dodgson, 1 Sw. & Tr. 259. Burdon v. Morgan, L. R. 2 P. & D. 371. But the appointment of an administrator *ad litem* is now in many cases unnecessary ; for by R. S. C., Ord. XVI., r. 46, the court may appoint some person to represent the estate of the deceased, or proceed in the absence of any such person. See *post*, Pt. V. Bk. II. Ch. II.

(*y*) See Mitford Plead. 176, 4th edition. *Post*, Pt. IV. Bk. I. Ch. II. § I.

(*z*) Mitf. Plead. 177, 4th edition.



subsequent grant of general administration, it must be pre\*sumed that there are no such assets to be collected, or a general administration would be obtained (*a*).

So where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the court to proceed to a decision on the claim. And when a right is clearly vested, as a trust term, which is required to be assigned, an administration of the effects of the deceased trustee, limited to the trust term, is necessary to warrant the decree of the court for assignment of the term (*b*).

But where a testatrix had a power of appointment, and a general probate of her will of 1829, and codicil thereto, had been granted, the delegates, reversing a decree of the prerogative, held that the court could not also grant an administration with a will of 1815, and codicils annexed, limited to become a party to proceedings in equity, touching the execution of the power by such wills: but must itself decide whether the will of 1815 was, under the circumstances, revoked by the will of 1829, and thereupon grant either a probate of the will and codicil of 1829 alone, or a probate of those papers and the will of 1815 and its codicils, as together containing the will (*c*).

It may be here observed, that in these cases the court will not grant a *general* administration, but only an administration limited for the purpose of substantiating and carrying on the proceedings in chancery. On one occasion (*d*) a defendant in a suit in equity having died intestate, Sir H. Jenner Fust refused to make a *general* grant of administration to a nominee of the plaintiffs in the suit, though the vice-chancellor (Sir L. Shadwell) had held (*e*) that an administration \*limited to substantiate proceedings (which had been previously granted) was insufficient, and had directed the cause to stand over to enable the plaintiff to cure the objection by obtaining a general grant.

But the decision of the vice-chancellor was afterward overruled by Lord Cottenham, on a careful consideration of the authorities (*f*); and it appears to be now settled, that if the grantee of such limited letters is made a party to

the estate of the deceased is properly represented in a suit in chancery by an ad-

(*a*) Mitf. Plead. 177, 4th edition.

(*b*) *Ibid.* 178.

(*c*) *Hughes v. Turner*, 4 Hagg. 30. See also *Brenchley v. Lynn*, 2 Robert. 441. *Accord. ante*, pp. \*328, \*329. See also pp. \*152, \*153.

(*d*) In the *Goods of Chanter*, 1 Robert. 273.

(*e*) *Davis v. Chanter*, 14 Sim. 212.

(*f*) 2 Phill. Ch. C. 545.

ministrator limited to substantiate proceedings in equity :

the suit, the estate of the deceased is properly represented, so as to enable the court to proceed in the cause; and a decree obtained against such an administrator will be binding on any future grantee of general letters of administration (g).

With respect to the power and interest of such administrators, a question arose in the case of *Brant v. King* (h), before Sir Launcelot Shadwell, V.-C., March 31, 1829 : In that case a bill had been filed by persons claiming certain bank annuities standing in the name of a trustee, who, pending a suit, died abroad, not leaving any personal representative in this country : Administration was therefore granted by the Prerogative Court of Canterbury, to a person residing in England, "limited for the purpose only to attend, \*supply, substantiate, and confirm the proceedings already had or that may be had in the cause, in the High Court of Chancery, or any other cause which may be commenced, touching the matters at issue in the case, and until a final decree shall be made therein, and the decree carried into execution, and the execution thereof fully completed" (i). On the petition of the plaintiff, the vice-chancellor made an order that the Bank of England should pay to the limited administrator (who had been made a party to the suit by supplemental bill), the dividends in arrear, and that he should pay thereout the costs of obtaining the administration and of the order ; and that the limited administrator should transfer (and the bank permit the transfer) the stock to the accountant general in trust in this

(g) See *Accord*. *Faulkner v. Daniel*, 3 Hare, 199, 208. *Ellice v. Goodson*, 2 Coll. 4. That is to say it binds the general administrator when appointed as to the particular question involved in the action, but, if the relief sought for is general administration, a general administrator has always been required : and this rule has in no way been altered by the Judicature Act. Thus in *Dowdeswell v. Dowdeswell*, 9 C. D. 294, although the only object of the suit was to establish the title of the plaintiff as sole next of kin, the court held that a general administrator of the intestate's estate was a necessary party to the suit and that the intestate was not sufficiently represented by an adminis-

trator *ad litem*. And an administrator *ad litem* of a married woman does not sufficiently represent her separate estate to enable the court to decide how far that estate is liable in respect of her acts as trustee: *Shipton v. Rawlins*, 4 De G. & Sm. 477.

(h) *Ex relations* Mr. Wilson, of counsel in the cause. As a general proposition, an administrator *ad litem* represents the estate to the extent of the authority which the letters of administration purport to confer. See *Daniell's Chancery Practice*, 5th ed., 207.

(i) This appears to be the usual form of letters of administration limited to substantiate proceedings in chancery. See 2 Phill. Ch. C. 549, 550.

case : Mr. Horne, for the bank, suggested a doubt whether an order for payment and transfer could be made in the case of a limited administrator, it not having been the practice of the bank to pay dividends to, or permit a transfer by, such an administrator : But the Vice-Chancellor thought the application proper, and made the order, observing, that, otherwise a limited administration would be useless (*k*).

In cases of such limited administrations, the parties entitled to the general grant may take out a *cæterorum* cæterorum representation. representation (*l*).

Further, such limited administrations in strictness ought not to be granted without either the *regular* renunciation (*m*) of the party entitled, according to the practice of the court, \*to the general grant ; or a citation of such party Citation of party entitled to the general administration before limited grant. "to accept or refuse : " But under peculiar circumstances this seems to have been sometimes dispensed with (*n*). However, on one occasion (*o*), where a testator died in 1823, and no step was taken to prove his will till 1846, and in the meantime an administration had been obtained limited to his interest in the remainders of two terms, on an allegation that he was dead intestate, without citation of, or renunciation by, the parties entitled to the general grant ; the court refused a *cæterorum* probate to the sole executrix, and stopped the practice of making such grants of administration for the assignment of terms without citation.

In the case of *Harris v. Milburn* (*p*), the testator died in March, 1827, having made a will, appointing two executors, and leaving his only two children, daughters, both married, his residuary legatees :

(*k*) This case was cited and recognized by Lord Cottenham in *Davis v. Chanter*, 2 Phill. Ch. C. 551.

(*l*) *Harris v. Milburn*, 2 Hagg. 62. But see *In the Goods of Currey*, 5 Notes of Cas. 54. *Infra*.

(*m*) In the *Goods of Fenton*, 3 Add. 35, where a renunciation was considered insufficient, because unaccompanied by the original will of the deceased.

(*n*) *Skeffington v. White*, 1 Hagg. 699. In the *Goods of Steadman*. 2 Hagg. 59. But see *Skeffington v. White*, 2 Hagg.

626. *Ante*, pp. \*414, \*415. See also In the *Goods of Watts*, 1 Sw. & Tr. 538, where a limited grant was refused, although the parties entitled to a general grant were more than nine in number, and their residences were widely apart, and their service with a citation would be attended with great difficulty and expense.

(*o*) In the *Goods of Currey*, 5 Notes of Cas. 54.

(*p*) 2 Hagg. 63.

A suit in chancery against the deceased abated by his death : From time to time search was made on the part of the suitor in chancery, if any will had been proved, or administration taken, but without success : and in October, 1827, his solicitor wrote to the husbands of the daughters, inquiring whether they would take out administration, and apprising them of the necessity of obtaining a personal representative to the deceased's estate : Similar communications had been made to the solicitor and nephew of the testator ; apprising them also of an intended application to the court ; but no answers were returned : A decree with intimation was then extracted, calling upon the daughters to show cause why an administration should not be granted to a nominee of the suitor in chancery, limited to substantiate \*proceedings there : Every reasonable effort was made to serve the decree on the daughters, but the husband of one would not permit access to his wife, and would give no information as to the other sister, whose residence could not be discovered : In December, 1827, the limited administration was decreed, and the proceedings in chancery were revived : In Easter Term, 1828, the executors, who at last proved the will, called in the administration, on the ground that the decree was not personally served : But the court, on petition, directed it to be redelivered out, and condemned the executors in costs ; observing that the regular course would have been to take probate *caeterorum*, and if there was any fear of collusion, the executors might have intervened in the chancery suit.

Finally, an administration limited to the effects of the deceased in one country or place may be committed to one administrator, and an administration limited to those in another country or place to another (g).

Administration limited to a particular place.

It might happen, under the old practice, that a man dying possessed of goods in two provinces made his will of the goods only in one of them, and died intestate as to the goods in the other province ; and in such case administration might have been granted as to the goods whereof he died intestate (r).

(g) Bac. Abr. Executor (C 4). Toller, 106. See in the Goods of Mann [1891], P. 293.

(r) Godolph. Pt. 2, c. 30, s. 5. *Supra*.

† An administration may be limited to a particular subject. Woerner on Admn. §§ 184, 248 ; *Martin v. Dry Dock &c. Railroad Co.*, 92 N. Y. 70 ; *Wolffe v. Eberlein*, 74 Ala. 99. Thus, a special administration may be granted as to so

much of an estate as does not pass by the will, if no executor is appointed or qualifies. *Dean v. Biggers*, 27 Ga: 73. Administrators *ad litem* are sometimes appointed for the sole purpose of defending or prosecuting particular suits,

Wade v. Bridges, 24 Ark. 569; Lothrop's Case, 6 Stew. (N.J.) 246; *e.g.*, where the estate has no representative, or the regular representative is interested adversely, *Ex parte* Lyon, 60 Ala. 650; Denning v. Todd (Tenn.), 19 S. W. Rep. 228. In Texas, he may be appointed to prosecute an action to recover land. Callahan v. Houston, 78 Tex. 494; see Mayes v. Houston, 61 Tex. 690. The court in which the suit is pending, although not a probate court, will sometimes appoint an administrator *ad litem*. Wolffe v. Eberlein, 74 Ala. 99; McNairy v. Bell, 6 Yerg. 302; Wade v. Bridges, 24 Ark. 569. But limited administration does not prevent a general grant to another person. Jordan v. Polk, 1 Sneed 430.

Probate courts have inherent power to grant limited administration within their discretion, whenever it is necessary for the purpose of justice, Woerner on Admn. § 184; *e.g.*, "with limited power to prosecute only, and not with power to collect or compromise," Martin v. Dry Dock & C. Railroad Co., 92 N. Y. 70. But this authority is confined to probate courts. Cadman v. Richards, 13 Neb. 383. Where there is a duly appointed executor, who has never been suspended, the court has no power to appoint a special administrator. *California* (Code C. P. § 1411); Schroeder v. Superior Court, 70 Cal. 343; Pickering v. Weiting, 47 Iowa 242.

The provisions of § 2668, Code Civ. Pro., in New York for the appointment of a temporary administrator of a decedent's estate, restrict the surrogate's power of appointment to cases where delay would necessarily occur in granting letters testamentary or of general administration. Tooker v. Bell, 1 Dem. 52; see Estate of Mallon, 13 Civ. Pro. 205; Matter of Chase, 32 Hun 318. His powers may be modified by an order of the surrogate. Estate of Molloy, 2 Civ. Pro. 15. The surrogate

may appoint anyone who possesses the capacity and qualifications, and not necessarily one entitled to ordinary administration. Matter of Plath, 31 N. Y. 101. Where a will is contested, and it appears that such contest will necessarily cause delay in granting letters, an executor named in the will, who has been charged by the testator with unduly influencing the testator, is not a proper person for temporary administrator under Code Civ. Pro. § 2668. Cornwell v. Cornwell, 1 Dem. 1. Nor should an executor or other person who is a party to the litigation be appointed collector or special administrator under § 23 of the act of 1837. Crandall v. Shaw, 2 Redf. 100. There cannot, of course, issue from the same tribunal having full jurisdiction, general letters testamentary and general letters of administration. Such claims are irreconcilable, and cannot both be valid. Ryno v. Ryno, 12 C. E. Gr. 522. But where several executors are named, the issuing of letters testamentary to one of them does not preclude letters subsequently to the other. Matter of Maxwell, 2 C. E. Gr. 611.

In many respects the powers of a temporary administrator are very limited. Thus, he cannot involve the estate by employing counsel either for or against the will, and the act should not be ratified by a permanent administrator subsequently appointed. Lester v. Mathews, 56 Ga. 655. He cannot interfere with the realty for any purpose. Langford v. Langford, 82 Ga. 202. He is appointed for some particular object, and beyond that he is powerless. He cannot allow claims against the estate. Estate of Sackett, 78 Cal. 300; Matter of Moore, 88 Cal. 1. An order authorizing any particular act must be strictly followed. Dull v. Drake, 68 Tex. 205. He cannot complete, and bind the estate by, a contract of the deceased which was void by the Statute of Frauds, Smith v. Brennan, 62 Mich.

349; but after one year a temporary administrator may be directed by the surrogate to pay debts, *Estate of Hammersley*, 15 Abb. N. C. 187; New York Code C. P. § 2764. An administrator regularly appointed supersedes him and succeeds to all the rights of the special administrator, *Cowles v. Hays*, 71 N. C. 230; *Cadman v. Richards*, 13 Neb. 383; and terminates his authority, *Brearfield Iron Works Co. v. Foster*, 54 Ala. 622. But where the same person is appointed general administrator, his authority as special administrator continues until he qualifies in the latter capacity. *Matter of Fisher*, 15 Wis. 567. As a temporary administrator, he cannot be cited to account by the heirs, but is only answerable to the permanent administrator, *Webster v. Thompson*, 55 Ga. 431; and commissions will be allowed to him again as administrator, on the ground that he must give security and may be ordered to pay debts, *Matter of Duncan*, 3 Redf. 153.

*Ancillary administration.* Where letters of administration are required ancillary to foreign letters, the proceedings are often regulated by statute, and are generally based on the regularity of the original appointment, which will be presumed five years after the death of the intestate. *Woodruff v. Schultz*, 49 Iowa 430; Georgia Code, § 2367. But in New York, on revocation of the original letters testamentary, the court will revoke the ancillary administration without notice to the original executors. *Matter of Gilleran*, 50 Hun 399. But the domiciliary administrator is an interested party, and can appeal from the appointment of the ancillary administrator. *Martin v. Gage*, 147 Mass. 204. There is no priority in

ancillary administration in Illinois. *Cheney v. Teese*, 108 Ill. 473. Administration *cum testamento annexo* may issue on the application of a foreign creditor. *Cheney v. Teese*, *ubi supra*. But the neglect of resident creditors to press claims against the foreign estate of a non-resident does not impair their right to ancillary administration. *Lawrence's Appeal*, 49 Conn. 411.

When a will devising real estate in Minnesota is proved in a foreign country and subsequently probated in Minnesota, the court should issue letters to the resident executor named in the will, although he was not appointed by the foreign court. *Bloor v. Myerscaugh*, 45 Minn. 29. This seems to accord with the general rule that neither probate nor letters are necessary in the domestic jurisdiction before ancillary administration in the foreign jurisdiction. *Bowdoin v. Holland*, 10 Cush. 17; *Pinney v. McGregory*, 102 Mass. 192; *Stevens v. Gaylord*, 11 Id. 256; *Shephard v. Rhodes*, 60 Ill. 301. And it seems that it is not necessary to show that the personal estate at the domicile is exhausted in order to warrant ancillary administration to sell foreign real estate to pay debts. *Rosenthal v. Remick*, 44 Ill. 202. If the foreign administrator himself receives the ancillary letters, he may be required to account here for assets received here, *Field v. Gibson*, 20 Hun 274; and if foreign assets are brought by the original administrator into the home jurisdiction, he must account for them there. *Cureton v. Mills*, 13 S. C. 409. A judgment against an ancillary administrator is not binding on the principal or primary administrator. *Turner v. Riser*, 54 Ark. 33.

## \*CHAPTER THE FOURTH.

## OF THE ADMINISTRATION BOND TO THE ORDINARY.†

In this chapter it is proposed to consider the security required of an administrator, upon administration being committed to him.

The statute 21 Hen. VIII. c. 5, s. 3, directs the Ordinary to grant administration, "taking surety of him or them to whom shall be made such commission:" and the statute 22 & 23 Car. II. c. 10, s. 1, further provides, that "all Ordinaries, as well as the Judges of the Prerogative Courts of Canterbury and York for the time being, as all other Ordinaries and Ecclesiastical Judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administrations of the goods of persons dying intestate, after the first day of June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties (a), respect being had to the value of the estate, in the name of the Ordinary, with the condition in form and manner following, *mutatis mutandis*, viz.

Practice before the Court of Probate Act, 1857.

Bond to the Ordinary by administrator under stat. 22 & 23 Car. II.

conditioned

"The condition of this obligation is such, that if the within-bounden, A. B., administrator of all and singular the goods, chattels and credits of C. D., deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased which have or shall come to the hands, possession or \*knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of Court, at or before the day of next ensuing :"

to make a true inventory, &c.;

"And the same goods, chattels and credits, and all other the goods, chattels, and credits of the said deceased at the time of his death, which, at any time after, shall come to the

to administer well and truly :

† See American note at end of this Chapter.

(a) By the practice of the Prerogative Court of Canterbury, a husband, taking

administration to his deceased wife, entered into bond with one surety : In the Goods of Noel, 4 Hagg. 208.

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hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law."

"And further do make or cause to be made, a true and just account of his said administration at or before the day  
to make a true and just account of his administration : of : And all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the Judge or Judges for the time being of the said Court, shall deliver and pay unto such person  
to deliver and pay the residue as the judge shall appoint : or persons respectively as the said Judge or Judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint : "

"And if it shall hereafter appear, that any last Will and testament was made by the said deceased, and the executor or  
and to deliver the letters, if a will shall appear. executors therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly, if the said A. B. within-bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court : Then this obligation to be void and of none effect, or else to remain in full force and virtue."

"Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any Courts of Justice."

But by the 80th section of the Court of Probate Act (20 & 21 Vict. c. 77), so much of the above statutes "as requires \*any  
Repealed by Court of Probate Act, Stat. 20 & 21 Vict. c. 77, s. 80. surety, bond or other security to be taken from a person to whom administration shall be committed, shall be repealed."

And by sect. 81, "Every person to whom any grant of administration shall be committed shall give bond to the Judge of the Court of Probate to inure for the benefit of the Judge for the time being, and, if the Court of Probate or, (in the case of a grant from a district registrar) the district registrar, shall require, with one or more surety or sureties conditioned for duly collecting, getting in and administering the personal estate of the deceased, which bond shall be in such form as the Judge shall from time to time by any general or special order direct ; provided, that it shall not be necessary for the solicitor for the affairs of the Treasury or the solicitor of the Duchy of Lancaster applying  
 [\*454]



for or obtaining administration to the use and benefit of her Majesty to give any such bond as aforesaid" (b).

By sect. 82, "Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or district registrar, as the Sect. 82. Penalty on bond. case may be, shall in any case think fit to direct the same to be reduced (c), in which case it shall be lawful for the Court \*or district registrar so to do; and the Court or district registrar may also direct that more bonds than one shall be given (d), so as to limit the liability

(b) Where, however, administration is granted to the Treasury solicitor he shall, notwithstanding that he does not give the bond which if such administration had been granted to him as a private individual he would be required by law to give, be subject as regards the administration to the liabilities and duties imposed by such bond (Treasury Solicitor Act, 1876), 39 & 40 Vict. c. 18.

And an exactly similar provision with regard to administration granted to the solicitor of the Duchy of Lancaster is contained in 15 & 16 Vict. c. 3, s. 2, repealed by 39 & 40 Vict. c. 18, s. 9, and Sched. I., but re-enacted by Sched. II. of the same act. See *ante*, p. \*372.

(c) In a case where an intestate left £3,000, and £45 of debt, and his mother solely entitled in distribution, the court granted administration on the mother entering into a bond in the amount of £100 with sureties. In the Goods of Gent, 1 Sw. & Tr. 54. Where administration was granted merely to enable a personal representative of the deceased to execute a formal release under a marriage settlement the court allowed the property to be sworn under £20. In the Goods of Stacpoole, 2 Sw. & Tr. 316. In a case where a *cessate* grant was required for £300, the value of two shares, the only property not distributed, the whole estate under the original grant having been sworn under £3,000, the court accepted a bond in a penalty of £600, being double the value

of the two shares. In the Goods of Fozard, 3 Sw. & Tr. 173.

Where an estate had been partly administered, and a further bond became necessary, the court allowed the administrator to take the grant for the amount then due to the estate, and to give security only for double that amount. In the Goods of Halliwell, 10 P. D. 198.

And where an estate was being administered in the Chancery Division and an order had been made that each individual share of the estate should be paid directly to the parties entitled, the court allowed the penalty of the administration bond to be limited to double the amount of the beneficial interest of the applicant. In the Goods of Paxton, 14 P. D. 40. In the Goods of Bennison, *ib.*

(d) See In the Goods of Weir, 1 Sw. & Tr. 506, where a sum of money had been received by the administrator which made it necessary to re-swear the amount for which administration was taken out, and the court under this section, directed an additional bond, which would, together with the original one, be double the amount under which the estate was to be re-sworn. And in a case where the property was large and the risk small, the court refused to dispense with sureties to a bond or to lessen the amount secured, but allowed the security to be made up of any number of bonds. In the Goods of Earle, 10 P. D. 196.

of any surety to such amount as the Court or district registrar shall think reasonable."

By sect. 83, "The Court may, on application, made on motion or petition in a summary way (e), and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled \*to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond." As to differences existing between the new form of bond, and that given under the statute of Charles and also as to the practice as established under the old law, see the former editions of this work, and the authorities there cited, Pt. I. Bk. V. Ch. 4.

In the case of *Sandrey v. Michell* (f), the Court of Queen's Bench appears to have been of the opinion that the Court of Probate Act made no alteration in the law beyond this that it enabled a creditor on having the bond assigned to him to sue in his own name.

In that case the action was against sureties to a bond conditioned according to the form given by the rule made in pursuance of the 81st section of the Court of Probate Act (g), and which consequently contained, as part of the condition, the terms (not to be found in the bond given under the statute of Charles), that *the administrator shall pay the debts which the deceased owed at his death*: The action was brought by a creditor, to whom the bond had been assigned under sect. 83, and the declaration alleged that assets came to the hands of the administrator, and that he had wasted the same, and did not pay the debt of the plaintiff: The plea was that the only breach of the condition of the bond was the non-payment of the debt to the plaintiff: The replication was,

(e) See In the Goods of Jones, 3 Sw. & Tr. 28. *Baker v. Brooks*, *Id.* 32. In the Goods of Young, L. R., 1 P. & D. 186, where it is decided that the court will allow an administration bond to be assigned upon being satisfied that the application for the order is made *bona*

*fide* and a *prima facie* case is made out and that the applicant is the proper person to whom the bond should be assigned.

(f) 3 B. & S. 405.

(g) See *ante*, p. \*454.

that the administrator had wasted assets of the deceased sufficient to pay the debt: And the Court of Queen's Bench held, that the defendant was entitled to judgment, as the bond could only be enforced for the general benefit of persons interested in the estate of the intestate, and not for the non-payment of a particular debt (*h*).

\*By stat. 21 & 22 Vict. c. 95, s. 15, "bonds given before 11 Jan. 1858, are to remain in force."

21 & 22 Vict. c. 95, s. 15, bonds given before Jan. 11, 1858, to remain in force.

It was held in *Young v. Hughes* (*i*), that this enactment had not a retrospective effect, so as to enable the assignee of a bond given to the Ordinary before the passing of the Court of Probate Act to maintain an action commenced by him before the stat. 21 & 22 Vict. c. 95 passed. But although it is plain that such a bond is not assignable under the 83rd section of the Court of Probate Act, yet there seems to be no doubt that, under the 15th section of the act above stated, a bond given to the Ordinary prior to Jan. 11, 1858 (the day on which the Court of Probate Act came into operation), may, at any time after the 15th section came into operation, be assigned and proceeded upon by the assignee in all respects as if it had been given to the judge of the Court of Probate subsequently to Jan. 11, 1858 (*k*).

Where the administration is not within the statute 21 H. VIII. as in the case of an administrator *durante minore ætate* with the will annexed (*l*), or other grant of administration when the deceased dies intestate, and the Ordinary had taken a bond from the administrator, conditioned for the due payment of debts and legacies, a breach might well be assigned that, though he had more than sufficient to pay all the debts, he had not paid a legacy (*m*).

Breach of bond given when the administration is not within 21 Hen. VIII.

(*h*) The court gave leave to amend the declaration, so that the plaintiff should sue as trustee under the 83rd section.

(*i*) 4 H. & N. 76. See also *Young v. Oxley*, 1 Sw. & Tr. 25, where Sir C. Cresswell directed an administration bond given in the Consistory Court of Chester to be assigned, so that it might be put in suit at common law.

(*k*) 4 H. & N. 84, by Pollock, C. B. It seems to have been the opinion of Martin, B., and Channell, B., that the 87th section of the Court of Probate Act, shows an intention to transfer to

the Court of Chancery the jurisdiction over such a bond: 4 H. & N. 84, 86. *Sed quære de hoc*. See *Bouverie v. Maxwell*, L. R., 1 P. & D. 272, where it was held that the Court of Probate had no jurisdiction to compel administrators, who had taken out administration in an ecclesiastical court, to file inventories and accounts in the registry of the court. Such inventories and accounts being by virtue of the 87th section returnable only into the Court of Chancery.

(*l*) See *ante*, pp. \*400, \*416.

(*m*) *Folkes v. Docminique*, 2 Stra. 1137.

\*Where a party had obtained from the Prerogative Court a general order to put the administration bond in suit against the surety, the Court of Common Law, in which the action was brought, could not restrain the party so empowered from suggesting as many breaches as he chose, notwithstanding it may appear, on affidavit, that the order was obtained from the spiritual judge solely on one particular ground (*n*).

An administratrix entered into the usual bond in the Prerogative Court to exhibit an inventory within a limited time, &c. : The time having elapsed without an inventory being exhibited, a creditor puts the bond in suit in the name of the archbishop, and the administratrix filed her bill for an injunction ; which was granted on the terms of her giving judgment in the action, which was to stand as a security for costs at law and in equity (but not for the debt) and amending the bill by submitting to account (*o*).

How many breaches might be assigned :  
how far equity will relieve against forfeiture of the bond :  
Stat. 20 & 21 Vict. c. 77, s. 81.  
Dispensing with sureties.

It must be observed that under the 81st section of the Court of Probate Act (*p*) the court has power to dispense with sureties altogether (*q*).

(*n*) *Archbishop of Canterbury v. Robertson*, 1 *Crompt. & M.* 181. See the observations of Sir H. Jenner Fust in *Crowley v. Chipp*, 1 *Curt.* 460. The defendant cannot plead payment of money into court as to some of the breaches and performance as to the rest : *Bishop of London v. McNeil*, 9 *Exch.* 490.

(*o*) *Thomas v. Archbishop of Canterbury*, 1 *Cox*, 399. See also *Bolton v. Powell*, 2 *De G. M. & G.* 1, 17.

(*p*) *Ante*, p. \*454.

(*q*) For instances where the court has exercised this power, see *Cleverly v. Gladdish*, 2 *Sw. & Tr.* 335, where the unadministered estate of a testator had been transferred to the Accountant General of the Court of Chancery and a bill filed praying for it to be administered by that court. And in the case of *In the Goods of De la Farque*, *ib.* 631, where the administrator was, in consequence of sickness, in great poverty and unable to induce any of his rela-

tions or friends to become sureties. In the cases of *Duchy of Cornwall v. Canning*, 5 *P. D.* 114, and *In the Goods of Cope*, 15 *P. D.* 107, the court dispensed with sureties. But in *Jackson v. Jackson*, *L. R.*, 1 *P. & D.* 12, the court declined to dispense with justifying sureties although a receiver had been appointed by the Court of Chancery.

So in a late case of *In the Goods of Paxton*, 14 *P. D.* 40, the court refused to dispense with justifying sureties, as being contrary to its practice, but, under the circumstances, as the estate was being administered in the Chancery Division, the court allowed the security to be limited to twice the amount of the applicant's beneficial interest. And see *In the Goods of Cormack* [1891], *P.* 151. *Askew v. Askew*, *ib.* 174.

The court will not dispense with sureties by reason of the property being large and the risk small. In the *Goods of Earle*, 10 *P. D.* 196. In the *Goods of McGowan*, 10 *P. D.* 197. It should

\*In an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the court will not dispense with such administrators entering into a joint bond (*r*).

Bond by administrator *pendente lite*.

If the administration be committed to a person out of England, it is requisite that the sureties to the bond shall be resident within the kingdom (*s*).

Administration bond when administrator is out of England.

When this rule was established the assignee of the bond could not have served the sureties out of England with process. But since the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 18, service of a person abroad may be effected. And the rule has consequently been relaxed (*t*).

Whether in such case the sureties must be resident within the kingdom.

Where there has been an administration *pendente minore ætate*, and the minor coming of age takes upon himself the \*administration, he is obliged to give security to the same amount that the administrator did in the first instance (*u*).

Administration bond when minor comes of age.

Justifying securities to the administration bond are called for at the court's discretion according to the circumstances of each case; except that there is one general rule, that where there is not a personal service of the decree on the party or parties having a prior claim to the grant, justifying securities are required (*x*). Where the securities are required to justify in the

Justification of sureties to the bond:

be observed that the court has no power to dispense with the *bond*: In the Goods of Powis, 34 L. J., P. & M. 55.

(*r*) Stanley *v.* Bernes, 1 Hagg. 221. But see sect. 83 of the Court of Probate Act, *ante*, pp. \*455, \*456.

(*s*) In the Goods of O'Byrne, 1 Hagg. 316. See also Cambiaso *v.* Negrotto, 2 Add. 439, as to bonds on grants of administration to foreigners.

(*t*) In the Goods of Reed, 3 Sw. & Tr. 439. In the Goods of Fernandez, 4 P. D. 229. But it is still maintained as to the sureties resident in Scotland; for the Common Law Procedure Act, s. 18, excepted places in Scotland or Ireland: Herbert *v.* Sheill, 3 Sw. & Tr. 479, overruling In the Goods of Ballingal, *ibid.* 444, in note. However, in the later case of In the Goods of Houston, L. R., 1 P. & D. 85, the court accepted sureties to an

administration bond resident in Scotland on the ground that the case was one in which greater latitude might be allowed, as the deceased had no creditors and the administrator was the only person beneficially interested in the estate. The procedure as to service of process out of the jurisdiction is now governed by R. S. C. 1883, Order XI., which has taken the place of the provisions of section 18 of the C. L. P. Act, 1852, referred to above. As to the exception of Scotland and Ireland, see Order XI. r. 2.

(*u*) Abbott *v.* Abbott, 2 Phillim. 578.

(*x*) Aitkin *v.* Ford, 3 Hagg. 194, n. (*a*): In the Goods of Milligan, 2 Robert. 108. The court will not dispense with this rule in favor of the official assignee of a deceased bankrupt: Belcher *v.* Maerberly, 2 Curt. 629.

ordinary course of practice, the court will not dispense with this, even partially, but under very special circumstances (y).

Where the application that the sureties may be directed to justify, is made on behalf of a next of kin, the court feels bound to grant it; but it may be sufficient for the sureties to justify in respect of the share of the party excluded from the administration (z).

Where administration *cum testamento annexo* was granted to the next of kin administrator *cum testamento annexo*: next of kin, on the ground of there being no executor or residuary legatee who survived the testator, the party, who had unsuccessfully claimed the administration derivatively from the residuary legatee, prayed that the sureties to the administration bond of the next of kin might be compelled to justify; but the court rejected the application, as contrary to the established practice (a).

But a residuary legatee for life, taking administration with the will annexed, may be compelled to procure justifying sureties (b). On another occasion, the court refused, on re-nunciation of a co-executor, to grant administration with the will annexed, without justifying securities, to the daughter, the residuary legatee, during the lunacy of her mother, the other executor and residuary legatee in trust (c).

Administration *de bonis non* with a will annexed, in which was no legatee: executor, was granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee; the sureties justifying in the amount of the surplus beyond the interest of the one legatee or (on a proxy of consent from the other) beyond the joint interests, and an affidavit of no outstanding debts being made (d).

A husband, resident abroad, was directed, on the application of creditors, to give justifying security resident within the jurisdiction, on taking a grant of administration to his wife (e).

(y) Howell v. Metcalfe, 2 Add. 348. The mere fact that a receiver of the personal estate had been appointed by the Court of Chancery according to the practice before the Judicature Act, was no ground for the dispensation: Jackson v. Jackson, L. R., 1 P. & D. 12; 35 L. J., P. & M. 3.

(z) Coppin v. Dillon, 4 Hagg. 376.

(a) Taylor v. Diplock, 2 Phillim. 280.

(b) Friswell v. Moore, 3 Phillim. 139.

(c) In the Goods of Hardstone, 1 Hagg. 487. See also In the Goods of Williams, 3 Hagg. 217.

(d) Pickering v. Pickering, 1 Hagg. 480.

(e) In the Goods of Noel, 4 Hagg. 207.

There may also be justifying sureties required to the administration bond in cases of temporary general administration ; temporary administrator : as *durante minore ætate* (*f*) ; or on a grant to a widow, where there is a minor daughter entitled in distribution, limited till a last will is found (*g*) ; or on a grant to the use and benefit of a lunatic, pending the lunacy (*h*).

Under the old practice if the court decreed a general grant, but, under special circumstances, required the sureties to justify only as to a *part* of the property, it would not allow *separate* bonds, so that *other* securities than those under the old practice the court would not allow separate bonds. who *justified* in the requisite amount entered into the *common* administration bond, in the double amount of the *whole* property (*i*).

In an administration *pendente lite* limited to recover certain \*sums, and granted jointly to the nominees of the two parties in the suit, the court would not dispense with such administrators entering into a joint bond (*k*).

Where a person is authorized by a simple power of attorney to take out administration as agent for the use and benefit of a party entitled to administration who is abroad, the court will only grant administration to the agent on the same terms as it would have granted it to the party himself, and, therefore, will not alter the usual conditions of the administration bond or the terms of the ordinary administration oath (*l*).

Administration bond by attorney of next of kin.

In a case decided before the Married Women's Property Act, 1882, the husband of a married woman who was entitled to administration refused to execute the administration bond or to assist in her obtaining the grant, and the court granted administration to her and allowed a third person to execute the bond (*m*). Where the administrator was in Japan, and a considerable sum became payable to the estate of the deceased under an order of

Administration bond by a third person for a wife entitled to administration when the husband refuses to execute one.

Third person allowed to file affidavit of increase and execute bond.

(*f*) Howell v. Metcalf, 2 Add. 350.

(*g*) In the Goods of Campbell, 2 Hagg. 555.

(*h*) *Ante*, p. \*441.

(*i*) Howell v. Metcalf, 2 Add. 348. But see now s. 82 of the Court of Probate Act, *ante*, p. \*454.

(*k*) Stanley v. Bernes, 1 Hagg. 221. See further as to the practice respecting the sureties to administration bonds, Bond v. Bond, 1 Cas. temp. Lee, 429.

Allen v. Allen, 2 Cas. temp. Lee, 244.

See further as to the practice with respect to suing on administration bonds, In the Goods of Irving, L. R., 2 P. & D. 658.

(*l*) In the Goods of Goldsborough, 1 Sw. & Tr. 295.

(*m*) In the Goods of Sutherland, 4 Sw. & Tr. 189. Since the Married Women's Property Act, 1882, however, when a married woman is administratrix, it is

the Court of Chancery, the court allowed another person to file an affidavit as to the increase of property, and to execute the bond to cover the increased duty (in the place of the administrator), with two sureties on the understanding that as soon as possible the administrator should execute a similar bond (*n*).

Court will not discharge original sureties. The court will not discharge the original sureties to an \*administration bond and allow other sureties to be substituted for them (*o*).

It remains to mention such rules of the Court of Probate as apply to administration bonds.

By rule 38, P. R. (non-contentious business), "Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person now or hereafter to be authorized to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95 ; but in no case are they to be attested by a proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix" (*p*).

Rule 38. P. R. (non-contentious business). Who are to attest the bond.

By rule 39, "In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant (*q*). The alleged value of such property is to be verified by affidavits if required."

Rule 39. Number of sureties and amount of bond.

By rule 40, "The administration bond is, in all cases of limited or special administrations, to be prepared in the registry.

Rule 40. Preparation of bond.

not necessary that her husband should join in the administration bond ; the husband incurring no responsibility, and the grant conferring no benefit upon him. In the Goods of Ayres, 8 P. D. 168.

(*n*) In the Goods of Ross, 2 P. D. 274.

(*o*) In the Goods of Stark, L. R., 1 P. & D. 76.

(*p*) But this rule may be dispensed with : In the Goods of Parker, L. R., 1 P. & D. 301.

(*q*) As to reducing the penalty of the bond, see *ante*, p. \*454, and as to dispensing with sureties, see *ante*, pp. \*454, \*458.



By rule 41, "The registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons" (r).

(r) The "Guarantee Society" has been accepted by the court as surety to a bond given by an administrator pending suit, even though the directors do

not by bond render themselves personally liable. *Carpenter v. Queen's Proctor*, 7 P. D. 235.

† *Executor's bonds.* The relation of executor is one of particular trust and confidence, and as such he was formerly not required to give bonds for the faithful performance of his duties. This is still the case in England and in some of the United States, but in many of them bonds are now required from an executor or may be required under certain circumstances as provided by statute. This is required *absolutely*, in *Arkansas* (1884 Dig. Stats. § 20), *Delaware* (1874 R. C. p. 542, § 13), *Iowa* (1888 R. C. § 2362), *Indiana* (1888 R. S. § 2242), *Michigan* (1882 An. Stats. § 5835), *Nebraska* (1893 C. S. p. 420, § 164). In other states an executor is required to give bond unless it is expressly dispensed with by the terms of the will. It is so in *Alabama* (1886 Code, § 2025), *California* (Code C. P. § 1346), *Colorado* (1891 An. Stats. § 4690), *Connecticut* (1888 G. S. § 548), *Georgia* (1882 Code, § 2447), *Illinois* (1891 R. S. c. 3, § 7), *Kansas* (1889 G. S. § 2787), *Kentucky* (1887 G. S. p. 587, § 3), *Maine* (1883 R. S. c. 64, § 9), *Massachusetts* (1882 P. S. p. 755, § 8), *Mississippi* (1892 An. C. § 1834), *Missouri* (1889 R. S. § 12), *Nevada* (1873 C. L. § 553), *New Hampshire* (1891 P. S. p. 527, § 13), *Ohio* (1890 R. S. § 5996), *Rhode Island* (1882 P. S. p. 477, § 10), *Tennessee* (1884 Code, § 3067), *Texas* (1888 C. S. Art. 1889), *Virginia* (1887 Code, § 2642), *West Virginia* (1891 Code, p. 682, § 7), *Wisconsin* (1889 An. Stats. § 3795). But even where the will exempts him, he is required by the statute to give bonds for the payment of the

debts, in *Connecticut* and *New Hampshire*; and generally, in the discretion of the court, in *Minnesota* and *Vermont*; and on the requirement of the court when it seems the estate is endangered for want of it, in *Alabama*, *California*, *Colorado*, *Connecticut*, *Georgia*, *Illinois*, *Kansas*, *Kentucky*, *Massachusetts*, *Mississippi*, *Missouri*, *Nevada*, *Ohio*, *Rhode Island*, *Tennessee*, *Texas*, *Virginia*, *West Virginia*, and *Wisconsin*. See statutes *supra*. Bond may be required even where the executor is universal legatee. Succession of Frazier, 33 La. An. 599; La. C. C. Art. 1670. In other states he need not give bond unless required by the court for cause and on application of the party interested, in *Florida* (1892 R. S. § 1864), *Vermont* (1880 R. L. § 269); or unless there are debts due by the estate or property in its possession claimed by other persons, in *Louisiana* (1876 R. S. § 1477); or unless he is a non-resident, in *Louisiana* (1876 R. S. § 1461), *North Carolina* (1883 Code, § 1515); or a non-resident not exempted by the terms of the will, in *New Jersey* (1877 Rev. p. 757, § 25), *Pennsylvania* (1883 Purd. Dig. p. 510, § 21); or a non-resident and not exempted by the terms of the will, and having no place of business within the state, in *New York* (Code C. P. § 2638); or unless his circumstances do not afford adequate security, in *New York* (Code C. P. § 2638); or unless the personal property is insufficient to pay debts, and real property must be sold, in *South Carolina* (1882 G. S. § 1932), *North Carolina* (1883 Code, § 1515). The failure to give bond when

Rule 41. Sureties to be responsible persons.

required is statutory cause for revocation of letters, in Alabama, California, Colorado, Connecticut, Georgia, Illinois, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin. And in Minnesota, Nebraska, Pennsylvania, Rhode Island, and Vermont letters already granted are made void on such failure. See statutes *supra*. And where the executor is authorized by the will to carry on testator's business and charge debts on the estate, he should give bond to the entire value of the estate. *Ellis v. Witty*, 63 Miss. 117. In North Carolina, the executor may give bond and proceed to collect the debts of the estate notwithstanding caveat filed. *Hughes v. Hughes*, 94 N. C. 56. And in that state (1883 Code, § 1515), if an executrix marries, her husband must give bond. In cases where executors are required to give bonds the bond is practically the same as the bond required from an administrator, and the remarks that follow in this chapter in regard to the administrator's bonds are in the main applicable to the case of an executor as well as to that of an administrator.

*Executor's insolvency or poverty.* A testator may trust whom he pleases, and, in the absence of fraud, irresponsibility and insolvency are not of themselves grounds for requiring the executor to give security. *Holcomb v. Coryell*, 1 Beas. 289; *Howard v. Howard*, 1 C. E. Gr. 486. So his poverty is not sufficient in the absence of proof of loss or danger to the estate by his negligence or misconduct. *Fairbairne v. Fisher*, 4 Jones Eq. 390. So, in New York, the surrogate should require bond under the statute, only when he is satisfied that the estate will not be safe in the executor's hands,

and the mere fact that the executor has not as much property as the value of the estate is not sufficient. The trust funds in his possession must be shown to be endangered by his want of pecuniary responsibility, his improvidence, &c., *Mandeville v. Mandeville*, 8 Paige 475; *Wood v. Wood*, 4 Paige 299; such as his insolvency, *Holmes v. Cock*, 2 Barb. Ch. 426; *Freeman v. Kellogg*, 4 Redf. 218; *Bowman v. Wooton*, 8 B. Mon. 67; *Felton v. Sowles*, 57 Vt. 382; or his having nothing but the legacy to him of one-half the residue, coupled with the facts of his claiming the other half adversely and proposing to move from the state. *Grigsby v. Cocke*, 85 Ky. 314. It may be required in such case, although the circumstances were known to the testator, but not on the application of beneficiaries who knew and consented to the appointment without security. *Freeman v. Kellogg*, 4 Redf. 218. A petition to compel an executor to give security should state particularly the pecuniary circumstances of the executor, and the value of the estate, so as to make it *prima facie* evident that the estate will not be safe in the hands of the executor. *Colgrove v. Horton*, 11 Paige 261. A mere allegation of irresponsibility is not sufficient. It must be shown that he is in precarious financial circumstances. And in determining this question the value of the estate and the claims against it should be considered. *Cotterell v. Brock*, 1 Bradf. 148.

*Non-resident executor.* An executor holding trust funds as implied trustee should give bonds, if he is not a resident of the state. *Montfort v. Montfort*, 24 Hun 120. But a bond will not be required, if no objection was made at the time of the appointment on the score of his non-residence. *Postley v. Cheyne*, 4 Dem. 492; *Estate of Demarest*, 1 Civ. Pro. 302; *Estate of Vernon*,

Id. 304. *Contra* in Kings County, New York. Estate of Emery, 13 Id. 365. And an executor's bond cannot be required in Pennsylvania from a resident of the state because of his residence in a different county from that of the probate. Harberger's Appeal, 98 Pa. St. 29. If an executor who has been a non-resident moves into the state, he must establish and show his residence in the state to avoid giving the required bond. Succession of Bodenheimer, 35 La. An. 1034.

*Misconduct and fraud.* Other grounds for requiring a bond from the executor are reasonable suspicions of fraud and maladministration, Clark v. Niles, 42 Miss. 460; misappropriation of funds of the estate to his own debts, McKennan's Appeal, 27 Pa. St. 237; or conversion of the property of his testator (even after the order of distribution), Cranson v. Wilsey, 71 Mich. 356; or such misconduct of the executrix's husband as endangers the estate. Powell v. Thompson, 4 Desaus. 162. And it has been held to be sufficient ground to require an executor to give security, that he neglected to have a mortgage recorded which had been given by him to the testator, and claimed false credits on it. Bird v. Wiggins, 8 Stew. (N. J.) 111. But where the widow is the executrix, the mere fact that she marries again is not sufficient ground to require her to give security. Oliva v. Bunaforza, 4 Stew. (N. J.) 396. But a bond will not be required from the executor simply because he is residuary legatee for life, Estate of Shipman, 23 Abb. N. C. 101, revg. 22 Id. 289; or a general legatee for life, Estate of Keene, 81 Pa. St. 133; especially where expressly dispensed with by the will. Amiss v. Williamson, 17 W. Va. 673. Equity will interfere, however, at the instance of a pecuniary legatee to compel an executor to give security, or pay into court a

legacy payable *in futuro*, whether absolute or contingent, and although payable out of particular assets. Randle v. Carter, 62 Ala. 95. And such relief must be by bill in equity, and not in the Probate Court. Johnson's Appeal, 12 Serg. & R. 317. On the other hand, the proceeding to require an executor to give security may be in the Probate Court by rule to show cause, Bird v. Wiggins, 8 Stew. (N. J.) 111; and is, in general, minutely provided for by the statute. A creditor's petition for that purpose must set out the debt as accurately as in a declaration at law; and its validity must be established *prima facie*. Smith v. Phillips, 54 Ala. 8. Stating a belief that the executor will misapply the assets is insufficient. It should state the facts on which the belief is founded. Neighbors v. Hamlin, 78 N. C. 42. The petitioner may be himself the proponent of a later will, and named as executor and legatee in it. Will of Merchant, Tuck. 17; Cunningham v. Souza, 1 Redf. 462.

*Exemption.* An executor's bond is sometimes dispensed with by the will itself. In such case, and where parties interested consent, and creditors do not object, no bond is required. Abercrombie v. Sheldon, 8 Allen 532; Wells v. Child, 12 Allen 330. But such dispensation is personal to the individual executor named. Langley v. Harris, 23 Tex. 564. Where the will appoints testator's wife and son as executors, and dispenses with executor's bonds, the exemption will not be extended to another executor appointed in a codicil "with my wife and son," Fairfax v. Fairfax, 7 Gratt. 36; nor to an administrator *cum testamento annexo* appointed to succeed the executor. Commonwealth v. Forney, 3 Watts & S. 353. But an ancillary administrator *cum testamento annexo* will not be required to give bonds in Alabama

where the will probated in Florida expressly dispenses with executor's bonds. *Leatherwood v. Sullivan*, 81 Ala. 458. And even in some cases where the will provides that the executor shall not be required to give bond the court may, upon application of a person interested in the estate, require a bond to be given. *Phillips v. Smith*, 62 Ala. 575; *Smith v. Phillips*, 54 Id. 8; *Grigsby v. Cocke*, 85 Ky. 314; *Atwell v. Helm*, 7 Bush, 504; *Bowman v. Wooton*, 8 B. Mon. 67; *Clark v. Niles*, 42 Miss. 460; *Felton v. Sowles*, 57 Vt. 382. And it seems that, conversely, where the statute requires a bond it may be construed as merely directory, and the executrix relieved from giving it where she was the widow and sole beneficiary, and there were no debts to be paid. *Bankhead v. Hubbard*, 14 Ark. 300. For cases requiring an executor to give bonds, see *Guttridge v. Vanatta*, 27 O. St. 366; *Mighton v. Dawson*, 38 Id. 650; *Ruby v. State*, 55 Md. 484; *First National Bank v. How*, 28 Minn. 150; *Hatheway v. Sackett*, 32 Mich. 97; *Hall v. Cushing*, 9 Pick. 395; *Baldwin v. Standish*, 7 Cush. 207; *Woodworth v. Woodworth*, 70 Mo. 601; *State v. James*, 82 Id. 509; *Judge of Probate v. Adams*, 49 N. H. 150; *Pettingill v. Pettingill*, 60 Me. 411; *Cluff v. Day*, 55 N. Y. Super. Ct. 460; *Gould v. Steyer*, 75 Ind. 50; *Martin v. Ellerbe*, 70 Ala. 326; *Holbrook v. Bentley*, 32 Conn. 502; *Wall v. Allen*, 4 Baxt. 210; *Pierce v. Wallace*, 48 Tex. 399; *Lacy v. Stamper*, 27 Gratt. 42; *Holcomb v. Coryell*, 1 Beas. 289; *Bird v. Wiggins*, 8 Stew. (N. J.) 111. If the bond is insufficient a new bond may be required. *National Bank v. Stanton*, 116 Mass. 435.

*Exemption.* The estate still remains under the control of the court when the will dispenses with the executor's bond. *Smithwick v. Kelly*, 79 Tex. 564. And the court may require bond, as has

been seen, under a change of circumstances notwithstanding the exemption in the will. *Felton v. Sowles*, 57 Vt. 382; *Foss v. Sowles*, 62 Id. 221. In New York, the statutory requirement of a place of business in New York, in case of express exemption of non-resident executors, is satisfied by executors who are officers of a foreign corporation having its office in New York, and are as such daily in its office, Code C. P. § 2638; *Laws 1873*, c. 657; *Postley v. Cheyne*, 4 Dem. 492; but not by a resident in Nebraska (three days distant) who has a desk-room in New York and is director of a bank there and makes irregular visits in the state. *Van Wyck v. Van Wyck*, 22 Hun. 9. In *Massachusetts*, the statute provides for an exemption from bond by consent of all parties interested on notice to creditors (P. S. c. 129, § 8). So, in *Illinois* (1885 An. Stats. c. 3, § 8)

*Bond as residuary legatee.* Where the executor is also the residuary legatee the statute of some states authorizes a special bond for the payment of debts and legacies without inventory or account. *Conant v. Stratton*, 107 Mass. 474; *Alger v. Colwell*, 2 Gray 404. But where only one of two executors is residuary legatee, he cannot give such statutory special bond. *Tappan v. Tappan*, 24 N. H. 400. Such bond amounts to an admission of assets. *Jones v. Richardson*, 5 Met. 247; *Buel v. Dickey*, 9 Neb. 285. And vests the property in the residuary legatee, *Heydock v. Duncan*, 43 N. H. 101; after his position as residuary legatee is established, *Estate of Jones (Wis.)*, 54 N. W. Rep. 916; not subject to be afterward divested or released by the court without his consent, *Commonwealth v. Rogers*, 53 Pa. St. 470. It binds him to pay the debts and legacies, although they exceed the assets; but he is entitled to personal notice of proceedings by a creditor. *Durfee v. Abbott*, 50 Mich. 278. And

his surety may have a bill in equity against him and the other sureties for an account, receiver, and administration in chancery. *McElroy v. Hatheway*, 44 Mich. 399. Such a bond renders him personally liable, but does not exonerate the estate of his testator or bar suit against the administrator *de bonis non* by a legatee, *Collins v. Collins*, 140 Mass. 502; nor does it suspend the Statute of Limitations as against *bona fide* purchasers of the testator's realty. *Davis v. Smith*, 58 N. H. 16. Claims against the executor and his sureties on the bond are barred, however, by the statute in Massachusetts, in four years. *Holden v. Fletcher*, 6 Cush. 235. The liability on the bond extends to costs awarded out of the estate in a successful probate contest. *Will of Coles*, 52 Wis. 591.

*Administration bond necessary.* An administrator is required by statute in the United States, as in England, to give bond before entering upon his duties. *Alabama* (1886 Code, § 2024), *Arkansas* (1884 Dig. Stats. § 18), *California* (Code C. P. § 1388), *Colorado* (1891 An. Stats. § 4701), *Connecticut* (1888 G. S. § 565), *Delaware* (1874 R. C. p. 542, § 13), *Florida* (1892 R. S. § 1863), *Georgia* (1882 Code, § 2447), *Illinois* (1891 R. S. c. 3, § 23), *Indiana* (1888 R. S. § 2242), *Iowa* (1888 R. C. § 2362), *Kansas* (1889 G. S. § 2798), *Kentucky* (1887 G. S. p. 598, § 9), *Louisiana* (1876 R. S. §§ 17, 10), *Maine* (1883 R. S. c. 64, § 9), *Maryland* (1888 P. G. L. Art. 50, § 49), *Massachusetts* (1882 P. S. c. 130, § 2), *Michigan* (1882 An. Stats. §§ 5850, 5835), *Minnesota* (1891 G. S. § 5687), *Mississippi* (1892 An. C. § 1852), *Missouri* (1889 R. S. § 17), *Nebraska* (1893 C. S. p. 423, § 179), *New Hampshire* (1891 P. S. p. 527, § 12) *New Jersey* (1877 Rev. p. 761), *New York* (Code C. P. § 2667), *North Carolina* (1883 Code, § 1388), *Ohio* (1890 R. S. § 6000), *Pennsylvania*

(1883 *Purd. Dig.* p. 510, § 22), *Rhode Island* (1882 P. S. p. 476, § 10), *South Carolina* (1882 G. S. § 1898), *Tennessee* (1884 Code, § 3063), *Texas* (1888 R. S. Art. 1889), *Vermont* (1880 R. L. § 2066), *Virginia* (1887 Code, § 2040), *West Virginia* (1891 Code, p. 682). And this applies generally to an administrator *de bonis non*. *New York Code C. P.* § 2693. See p. \*415, n., *supra*. So, an administrator *cum testamento annexo* must give bond. *Ex parte Brown*, 2 Bradf. 22; *New York Code C. P.* § 2594. See p. \*407, n., *supra*. So, a testamentary trustee may be required to give bond, and that not only on direct petition (Code C. P. § 2815), but on motion to open and modify his accounts. *Kelsey v. Van Camp*, 3 Dem. 530. And his successor must give bond like an administrator *cum testamento annexo*, although there is no express provision for it in the statute. *Matter of Whitehead*, 3 Dem. 227; *Lane v. Lewis*, 4 Id. 468. But this applies only to court appointments, and not to a trustee appointed by the donee of a testamentary power of appointment. *Rogers v. Rogers*, 4 Redf. 521. And in case of an executor as trustee of real estate the amount of the penalty of the bond is discretionary with the surrogate. *Matter of Hart*, 2 Redf. 156.

The general bond of the public administrator takes the place of the separate bond for each administration committed to him, but does not dispense with the bond required by statute on sale of lands of the deceased. *Heth v. Wilson*, 55 Miss. 587.

Where the administrator's bond is executed before his appointment, it will not render his letters void. *Morris v. Chicago &c. Railroad*, 65 Iowa 727. On the other hand, his appointment is not complete until the bond is given. *Croswell on Exrs.* § 271; *Woerner on Admn.* § 253. Until then he is liable *de son tort* for his actions as adminis-

trator. *Cleveland v. Chandler*, 3 Stew. (Ala.) 489. And failure to give bond renders the appointment void in *Pennsylvania* (1883 *Purd. Dig.* p. 511, § 23; Act 1832, § 27). So, where an executor is required to give bond as a non-resident, it is the bond (and not the oath) that qualifies him to act as such. *Succession of Bodenheimer*, 35 La. An. 1034. And it has been held, that if an executor fails to give the required bond, he cannot be recognized as such by the court, nor his accounts settled. *Tappan v. Tappan*, 24 N. H. 400. But the regularity of an administrator's appointment will not by reason of his failure to give bond be questioned collaterally in another action. *Sullivan v. Tioga Railroad*, 44 Hun 304. He cannot, however, be substituted for his intestate as plaintiff in a pending suit, until he has filed his administration bond. *O'Neil v. Tisdale*, 12 Tex. 40. And he will be superseded by the appointment of another administrator, after the time has elapsed, which was designated by the court for filing his bond. *Howard v. Worrill*, 42 Ga. 397. The time for the presentment of debts to an executor runs, in Massachusetts, from his filing the required bond, and will be extended by his neglect to do so, *Morgan v. Dodge*, 44 N. H. 255; and until he gives a proper bond, *i. e.*, with proper sureties, *Abercrombie v. Sheldon*, 8 Allen 532. An administrator's failure to give bond, it is said, does not avoid his appointment, *Ex parte Maxwell*, 37 Ala. 262; but renders it voidable, *Leatherwood v. Sullivan*, 81 Ala. 458; and is of course ground for his removal. But in Texas, the statute does not authorize his removal except for disobedience of the order of the court. *Perkins v. Wood*, 63 Tex. 396. And if he has been suffered to act as administrator for several years without objection to his failure to give bond,

another will not be appointed administrator, if the person first appointed even then puts in a proper bond. *Feltz v. Clark*, 4 *Humph.* 79. This is true also of an executor, when required to give bond, *Morgan v. Dodge*, 44 N. H. 255, 261; or of an executrix, when she marries and her husband fails to give bond. *Yates v. Clark*, 56 Miss. 212. But the cancellation and discharge of an administrator's bond does not *ipso facto* revoke his appointment, or even disqualify him, in Rhode Island, from bringing suit as an administrator. *Clarke v. Rice*, 15 R. I. 132.

*Form of administration bond.* The signature of the principal is essential to the bond; and if the administrator does not sign, the surety will not be bound by his signature. *Wood v. Washburne*, 2 *Pick.* 24. On the other hand, the mere expectation of the sureties that the bond was to be signed by other sureties (where this was not an express condition), and the want of the additional signatures, will not relieve the sureties, *State v. Gregory*, 119 Ind. 503; *Berkey v. Judd*, 34 Minn. 393; although it was known to the probate judge at the time of the delivery of the bond to him. *Wolff v. Schaeffer*, 74 Mo. 154. But if they signed in good faith, without knowing that the sureties who had already signed were discharged by the subsequent alteration of the bond, they will not be liable. *Howe v. Peabody*, 2 *Gray* 556. Alteration, however, by adding a word clearly intended immediately after the execution of the bond will not relieve a surety, who knows of it and makes no objection for years, but his assent will be presumed. *Jackson v. Johnson*, 67 Ga. 167. The omission by fraud or mistake of matter which had been agreed upon can be supplied by parol evidence; but it cannot be inserted, if left to be added afterward. *Brown v. Davenport*, 76 Ga. 799.

It is essential that the bond should conform substantially to the provisions of the statute. *Frye v. Crockett*, 77 Me. 157. And it must be an instrument binding personally at common law. Thus, a married woman, although sureties are expressly dispensed with by the will, cannot give a sufficient bond as executrix, nor can her husband's bond be substituted for hers. *Hammond v. Wood*, 15 R. I. 566. Although the husband is a competent surety in New York, where his wife's bond is a sufficient instrument. *Matter of Grove*, 6 Dem. 369. The statutes generally require the administrator's bond to be conditioned for a true inventory and a faithful administration, account, and discharge of duties required. The phrases of the statutory requirement should be used. A substantial compliance is, however, sufficient. *Lanier v. Irvine*, 21 Minn. 447. But in Maine, an executor's bond, which omits to require the principal to account upon oath within one year, is not conformable to the statute. *Frye v. Crockett*, 77 Me. 157. A bond will not, however, be rendered invalid by want of recital of the administrator's appointment. *Dayton v. Johnson*, 69 Wis. 419. And where, on the sureties' petition, a new bond is filed, it may contain a clause indemnifying the former sureties. *Pepper v. Donnelly*, 87 Ky. 259; G. S. c. 104, §§ 1-6. The bond of an administrator *cum testamento annexo* is the same in form as that of an administrator. *Judge of Probate v. Claggett*, 36 N. H. 381; *Small v. Commonwealth*, 8 Pa. St. 101. And where this is expressly provided by an old statute in Massachusetts as to executor's bonds, the language is held to mean an administration in accordance with the will. *Hall v. Cushing*, 9 Pick. 395. So, where the executor's bond calls for performance of the duties of executor within one year, it applies only to the

provisions of the will which were to be executed within one year. *Holbrook v. Bently*, 32 Conn. 502. So, where an executor was required by the will to give bond, a bond to legatees has been held to be meant, and not the more enlarged administration bond to the people. *Estate of Sullivan*, 1 Tuck. 94. And the bond may be to the probate judge without naming him, where he is the proper obligee. *Buel v. Dickey*, 9 Neb. 285. In this case the bond was that required of an executor who is residuary legatee.

*Form—joint and several.* Some statutes require the obligation of the sureties to be joint and several. *California* (Code C. P. § 1388), *Colorado* (1891 An. Stats. §§ 4690, 4701), *Georgia* (1882 Code, §§ 2447, 2507), *Indiana* (1888 R. S. § 2242), *Illinois* (1891 R. S. c. 3, §§ 3, 7), *New York* (Code C. P. § 2664), *Rhode Island* (1882 P. S. p. 477). The *Delaware* statute says "joint or several" (1874 R. C. p. 543, § 14). When there are two or more administrators or executors appointed, the statute requires in general a separate bond from each. In such case a joint bond of two administrators would be construed as the separate bond of each, *Nanz v. Oakley*, 120 N. Y. 84; *State v. Wyant*, 67 Ind. 25; and after the resignation of one administrator the other may sue him and his sureties on the bond, *State v. Wyant*, *supra*. "This joint and several bond (co-administrators as joint guardians) is easily susceptible of the distributive construction which reconciles it with rules of law and holds the guardians liable jointly in some cases and severally in others." *Kirby v. Turner*, Hopk. Ch. 309. On a joint and several bond suit may be brought against any one or more of the obligors. *Field v. Van Cott*, 15 Abb. Pr. N. S. 349; N. Y. Code C. P. § 120. But on a joint bond the sureties are entitled to have the judgment entered against all

the principals for their benefit. *Little v. Knox*, 15 Ala. 576. By a joint and several bond co-executors or co-administrators become sureties for one another and liable each for the other's misdoings, *Ames v. Armstrong*, 106 Mass. 15; *Caskie v. Harrison*, 76 Va. 309; *Brazier v. Clark*, 5 Pick. 96; *Yates v. Wilson*, 86 Va. 625; *Moore v. State*, 49 Ind. 558; although the will expressly dispensed with sureties on their bond, *Ames v. Armstrong*, *supra*. And the sureties are liable for the joint acts and the separate acts of both principals. *Nanz v. Oakley*, 120 N. Y. 84. But they cannot hold the representatives of the deceased administrator for a default made after his death by the surviving administrator. *Towne v. Ammidown*, 20 Pick. 535. Although the contrary has been held as to a joint administrator's bond under the Missouri statute. *Dobyns v. McGovern*, 15 Mo. 662. On a joint bond co-administrators are liable for the devastavit of one another. *Clarke v. State*, 6 Gill & J. 288; *Boyd v. Boyd*, 1 Watts 365; *Morrow v. Peyton*, 8 Leigh 54; *Sparhawk v. Buell*, 9 Vt. 41; *Albro v. Robinson* (Ky.), 19 S. W. Rep. 587. As to third parties and sureties on the bond, they are joint principals, but toward one another each has the rights of a surety, and if one pays for the default of the other, he may be subrogated to his rights against the estate for his share of the commissions and allowances. *Albro v. Robinson*, *supra*. On a joint administration bond a surety is not liable to one administrator for the other's default. *Hoell v. Blanchard*, 4 Desaus. 21.

*Amount.* This is generally fixed by statute; in some states, for both executor's and administrator's bonds at not less than twice the value of the estate. This is so in *Alabama* (1886 Code, § 1388), *Arkansas* (1884 Dig. Stats. § 19), *Delaware* (1874 R. C. p. 542, § 14), *Georgia* (1882 Code, §§ 2505, 2447),

*Illinois* (1891 R. S. c. 3, §§ 7, 23), *Indiana* (1888 R. S. § 2242), *Kansas* (1889 G. S. §§ 2787, 2797), *Missouri* (1889 R. S. § 17), *Tennessee* (1884 Code, § 3063), *Texas* (1888 R. S. Art. 1889). In many states the amount is left to the discretion of the court. This is so in *Connecticut* (1888 G. S. § 448), *Florida* (1892 R. S. §§ 1863-64), *Iowa* (1888 R. C. § 2362), *Maine* (1883 R. S. c. 64, § 9), *Massachusetts* (1882 P. S. p. 756, §§ 2, 5), *Michigan* (1882 An. Stats. §§ 5850, 5835), *Minnesota* (1891 G. S. §§ 5687, 5672), *Nebraska* (1893 C. S. p. 420, §§ 164, 199), *New Hampshire* (1891 P. S. p. 527, §§ 12, 14), *New Jersey* (1877 Rev. p. 761, as may be reasonable), *Ohio* (1890 R. S. §§ 6006, 5996), *Pennsylvania* (1883 Purd. Dig. p. 511), *Rhode Island* (1882 P. S. p. 476, § 10), *Vermont* (1880 R. L. § 2066), *Wisconsin* (1889 An. Stats. §§ 3794, 3809). In *South Carolina* (1882 G. S. § 1898), administrator's bonds must be in twice the value of the personalty. In *California* (Code C. P. § 1388), both administrator's and executor's bonds must be for twice the value of the personalty and twice the probable value of the realty. In *New York*, not less than twice the value of the personalty and the probable amount recoverable in any statutory right of action, which may be reduced by consent of the next of kin to twice the amount of the debts of the estate, being not less, however, than \$5000 (Code C. P. §§ 2664, 2677), and the executor's bond should also cover double the value of any real property subject to a testamentary power of sale (*Id.* § 2645). The provision as to consent of creditors to a smaller bond does not apply to that of an administrator *cum testamento annexo*. *Matter of Leroy*, 1 Connolly 491. In *North Carolina*, twice the value of the personalty, and if there is not sufficient for debts and realty must be sold, and the original bond is less than twice the value of both real and



personal property, an additional bond must be given for twice the value of the real property to be sold (1883 Code, §§ 1388, 1515). In *Colorado* (1891 An. Stats. §§ 4690, 4701), twice the value of the personalty and of the rents accruing on real property subject to debts. In *Mississippi*, executor's bonds must be for the full value of the estate (1892 An. Code, § 1834); and administrator's bonds for the full value of the personalty at least (Id. § 1852). In *Virginia* (1887 Code, § 2641) and *West Virginia* (1891 Code, p. 682, §§ 6, 7), both executor's and administrator's bonds must be for the full value of the personalty, and where there is a testamentary power of sale of land, for the realty also. In *Louisiana* (Civ. Code, §§ 1048, 1677), executor's and administrator's bonds need not exceed one-fourth more than the inventory after making deduction for bad debts. In *Kentucky*, they must be "sufficient to secure the value of the whole estate to the administrator" (1887 G. S. p. 587, § 3, p. 589, § 9).

If the sureties in an executor's bond are bound in half of the sum for which the executor binds himself, they will still be liable on the bond although the bond might be held to be insufficient on direct appeal. *Baldwin v. Standish*, 7 Cush. 207. The amount of the bond is to be fixed by the court, irrespective of any arrangement between co-administrators for an unequal division of the responsibility. *Senior v. Ackerman*, 2 Redf. 302. But on application for an order on the administrator to file a new bond it has been held sufficient to file two new bonds each for one-half of the original penalty. *People v. Lott*, 27 Ill. 215. If the bond is approved by the court, it is sufficient, although it is for a less amount than that ordered. *Matter of Winona Bridge Railway Co.* (Minn. 1892), 52 N. W. Rep. 1079. And

the surrogate has power to modify the bond and reduce the amount, even after the time limited for filing the bond has expired. *Matter of Filley*, 47 N. Y. St. Rep. 428. On the other hand, the adequacy of the bond (of an administrator *de bonis non*) cannot be questioned collaterally, *e. g.*, in a suit brought by him against his predecessor for an accounting. *Curtis v. Williams*, 3 Dem. 63. If a bond is executed by the sureties in blank and so delivered to the principal, and by him filled in with a larger penalty than that agreed on, the sureties will be liable notwithstanding. *White v. Duggan*, 140 Mass. 18.

The value of the property fixing the amount of the bond is to be determined by the court, and not necessarily from the statement of the petition applying for letters. *Williams v. Verne*, 68 Tex. 414. Where it is the bond of an administrator *de bonis non*, this cannot be less than the property left unadministered by his predecessor. *Sutton v. Weeks*, 5 Redf. 353. On letters *cum testamento annexo* it should include the amount of an unpaid legacy, even where the assets necessary for its payment have been already paid over to distributees by the executor. *Matter of Nesmith*, 6 Dem. 333. And on letters testamentary it should include all the "estate" which the executor has a testamentary power to charge. *Ellis v. Witty*, 63 Miss. 117. In a case in New Jersey where the personal property amounted to \$1,000,000 the bond was fixed at \$100,000, and the administrator directed to deposit the funds in court. *Lewis' Case*, 1 Stew. (N. J.) 234. In fixing the amount of an administrator's bond only the excess of value of a pledge over the debt should be taken, that being the entire interest the estate has in the pledge. *Estate of Kidd*, Myrick's Prob. 239. And property fraudulently assigned by the testator in his lifetime should not be taken into account. *Peck v. Peck*,

3 Dem. 548. And the bond of an ancillary administrator need not include the disputed claim of a non-resident, which can probably not be enforced for want of legal evidence. New York Code C. P. § 2699; *Matter of Musgrave*, 5 Dem. 427.

*Sureties.* In most of the states the statute requires at least two or more residents of the state. This is so in *Alabama* (1886 Code, § 2024), *Arkansas* (1884 Dig. Stats. § 18), *California* (Code C. P. § 1388), *Florida* (1892 R. S. §§ 1863-64), *Georgia* (1882 Code, §§ 2505, 2447), *Indiana* (1888 R. S. § 2242), *Kansas* (1889 G. S. §§ 2787, 2797), *Missouri* (1889 R. S. § 17), *New Jersey* (1877 Rev. p. 761), *New York* (Code C. P. § 2664), *North Carolina* (1883 Code, §§ 1515, 1388), *Ohio* (1890 R. S. §§ 5996, 6006), *Pennsylvania* (1883 *Purd. Dig.* p. 510, § 21), *Tennessee* (1884 Code, § 3063), *Texas* (1888 R. S. Art. 1889). Others require "good and sufficient security," "residents of the state." *Colorado* (1891 An. Stats. §§ 4690, 4701), *Delaware* (1874 R. C. p. 542, § 14), *Illinois* (1891 R. S. c. 3, §§ 7, 23), *Maine* (1883 R. S. c. 64, § 9), *Massachusetts* (1882 P. S. p. 755, § 5), *Minnesota* (1892 An. Code, §§ 1834, 1852), *New Hampshire* (1891 P. S. p. 527, §§ 12, 14), *Rhode Island* (1882 P. S. p. 476, § 10). Others require "one or more" residents of the state. *Connecticut* (1888 G. S. § 448), *Michigan* (1882 An. Stats. §§ 5835, 5850), *Nebraska* 1893 C. S. p. 423, § 179, p. 420, § 164), *Vermont* (1880 R. S. § 2066), *Wisconsin* (1889 An. Stats. §§ 3794, 3809). In *Kentucky* (1887 G. S. p. 587, § 5, p. 598, § 9) and *South Carolina* (1882 G. S. § 1898), there must be two or more sureties, but they need not be residents of the state. So, *Jones v. Jones*, 12 Rich. 623; *Rutherford v. Clark*, 4 Rush. 27. Formerly one was sufficient in Texas. *Delk v. Punchard*, 64 Tex. 360 (1888). And where two sureties are required by statute, the bond is

not void because executed by one only, but may be enforced on condition broken as a voluntary bond against the sole surety. *Steele v. Tutwiler*, 68 Ala. 107. But in Pennsylvania, such a bond is held to be void and no action lies on it. *Bradley v. Commonwealth*, 31 Pa. St. 522. In the words of the court in this case, "by the very terms of the law, the letters of administration are void, and the person acting under them became administratrix of her own wrong, which is inconsistent with the attribution of any validity to the bond." See too, *McWilliams v. Hopkins*, 4 Rawle 382; *Tappan v. Tappan*, 24 N. H. 400. So, an executor's bond given without any security was held to be void although the court had approved it. *Abercrombie v. Sheldon*, 8 Allen 532. And the sureties must be resident in the state, *Picquet's Appeal*, 5 Pick. 65; *Clarke v. Chapin*, 7 Allen 425; although it is not important that they should reside in the same county, *Barksdale v. Cobb*, 16 Ga. 13; or even that a third supernumerary surety should reside in the state. *Clarke v. Chapin*, 7 Allen 425. Where an attorney is prohibited by statute as a surety, he cannot set up the defense, if he executes the bond and is accepted by the court. *Wright v. Schmidt*, 47 Ia. 233.

In *California* (Code C. P. § 1393), administration bonds must be approved by the court by a prescribed procedure of justification, and formal approval is provided for in other states. But this provision is directory merely and for the protection of creditors, and approval is not essential to the validity of the bond, which is binding without it, as a voluntary bond. *State v. Crenshauer*, 68 Mo. 254; *Bloomfield v. Ash*, 1 South. 314; *Carpenter v. Probate Judge*, 48 Mich. 318; *Mundorff v. Wangler*, 44 N. Y. Super. Ct. 495; *Brown v. Weatherby*, 71 Mo. 152; *Cameron v. Cameron*, 15 Wis. 1. The want of ap-

proval can only be objected to on direct appeal. *Cameron v. Cameron*, *supra*. And the appointment is not rendered voidable for the original failure of the sureties to justify. *Garrison v. Cox*, 95 N. C. 353. But executor's bonds are not such "official bonds" as require the statutory justification of sureties provided for in Maryland. *Bissell v. Durfee*, 58 Mich. 237; Act 1885, No. 179. In general, sureties having no property except their legacies are insufficient. *Ellis v. Witty*, 63 Miss. 117. But in New York, one surety having more than sufficient may make up the deficiency of the other. *Matter of Thompson*, 6 Dem. 56; Code C. P. § 813; but see, *contra*, *Trask v. Annett*, 1 Dem. 171. Corporate security is a recent feature in administration bonds. The rate of charge or indemnity paid to such a company is no part of the expense of the estate, however, and cannot be charged as such in the administrator's account. *Jenkins v. Shaffer*, 6 Dem. 59.

*Irregularity.* The regularity of the bond cannot be questioned collaterally. *Farley v. McConnell*, 7 Lans. 429; *Baldwin v. Standish*, 7 Cush. 207. And its irregularity does not make the appointment of the administrator void, *Baldwin v. Standish*, 7 Cush. 207; and conversely, the failure to name the public administrator as such in the letters issued to him will not affect the liability of the sureties on his bond. *Mitchell v. Hecker*, 59 Cal. 558. The sufficiency of the bond is not necessary to the jurisdiction of the court, and recital of a sufficient bond in the letters is conclusive (except on direct appeal). *Mumford v. Hall*, 2 Minn. 347. And if the court has recognized an executor as duly qualified, notwithstanding an informal bond, it has been held that he is entitled to have the court receive and audit his account. *Pettingill v. Pettin-gill*, 60 Me. 411.

Irregularities often explain themselves by the context, and are readily corrected if not deemed wholly immaterial. Thus, the omission of the name of the deceased has been held to be sufficiently explained by the correct name in the letters. *State v. Price*, 15 Mo. 375. So, in letters *cum testamento annexo*, the name of the original executor inserted by mistake for that of the testator may be corrected on petition to the Probate Court. *White v. Spillus*, 85 Ga. 555. So, the bond is not vitiated by naming the surrogate of the wrong county, *Gerould v. Wilson*, 81 N. Y. 573, revg. 16 Hun 530; or designating the obligee only by his official name, *Ordinary v. Updike*, 2 Green 270; or requiring the administrator to file his inventory with the surrogate instead of the register of the Prerogative Court, *Ordinary v. Smith*, 2 Green 479; and the surety who signs a bond will be bound, although his name is omitted in the condition, *Luster v. Middlecoff*, 8 Gratt. 54. So, a bond is not rendered void by the omission of the formal conclusion, *Rose v. Winn*, 51 Tex. 545; or by formal irregularities not adding to the burden of the statutory requirements. *Ordinary v. Cooley*, 1 Vroom 179; *Newton v. Cox*, 76 Mo. 352. So, on the bond of an administrator *de bonis non, cum testamento annexo*, in the form of an original administrator's bond, the sureties will be liable for the proceeds of sale of real property under the direction of the will. *Shalter's Appeal*, 43 Pa. St. 83.

*Counter-security.* The surety who deems himself to be in danger of loss may apply to the court for an order requiring his principal to furnish new security. In Maryland, this is matter of right, and not in the discretion of the court, *Sifford v. Morrison*, 63 Md. 14; although the statute says that the court "may require," &c., G. L. Art. 90, § 1. So, in *Virginia* (1887 Code, § 2687) and

*West Virginia* (1891 Code, c. 87, § 10). In other states the statute is peremptory in its form. *New Jersey* (1877 Rev. 779), *Illinois* (1891 R. S. c. 3, § 32), *Alabama* (1886 Code, § 2046), *Kentucky* (1887 G. S. 599, § 13). But sureties cannot demand counter-security for the administrator's neglect to file an inventory at their own suggestion. *Estate of Mullin*, 15 Phila. 613. An order requiring the administrator to furnish a new bond suspends his administration, in Texas, except for the preservation of property, unless appeal taken with proper security. *Bills v. Scott*, 49 Tex. 430. The original sureties remain liable in Massachusetts for breaches of the bond already committed, *McKim v. Blake*, 132 Mass. 343; but not for the estate in hand and not misappropriated at the time of the discharge and of the giving of the new bond. *McKim v. Bartlett*, 129 Mass. 226. In many states the new sureties become liable, however, for devastavits before their bond was given, *Gower v. Shelton*, 16 Lea 652; *Foster v. Wise*, 46 O. St. 20; *Ohio R. S.* §§ 5996, 6204; in some states jointly and as co-sureties with the original sureties if the breach is a continuing one, *Dugger v. Wright*, 51 Ark. 232; *Wolff v. Schaeffer*, 74 Mo. 154; in others primarily liable, *Morris v. Morris*, 9 Heisk. 814; *Bobo v. Vaiden*, 20 S. C. 271. But not for a loss due to errors in the vouchers of the first surety. *Bobo v. Vaiden*, 20 S. C. 271. In some states the new bond discharges the original sureties from liability for any subsequent breach, *Pepper v. Donnelly*, 87 Ky. 259; *G. S. c.* 39, Art. 2, § 13; in others from all liability, *People v. Lott*, 27 Ill. 215; except litigations then pending. *Hooper v. Hooper*, 29 W. Va. 299. And the new sureties are liable to indemnify the original sureties against a judgment rendered against them on a prior devastavit. *Brown v. Murdock*, 16 Md. 521. Where the original sureties are discharged by

statute on giving the new bond, it will not have that effect unless it complies exactly with the statute. *Wood v. Williams*, 61 Mo. 63. And unless the new bond is required and given on their application. *Jones v. Ritter*, 56 Ala. 270. On the other hand, a new bond given after the death of one trustee, discharging his original sureties, is not an "additional bond," although approved as such, and therefore the formal discharge of the original sureties does not discharge the new sureties (as provided by *G. S. c.* 101, § 15). *Brook v. Whitmore*, 139 Mass. 356.

*Additional security.* Distributees and creditors may also petition for further security on account of the insolvency or insufficiency of the original sureties. This is provided for by statute in all, or most, of the United States. *Alabama* (1886 Code, § 2046), *California* (Code C. P. §§ 1397, 1399), *Colorado* (1891 An. Stats. § 4721), *Connecticut* (1888 G. S. § 449), *Florida* (1892 R. S. § 1865), *Georgia* (1882 Code, §§ 2511, 2447), *Illinois* (1891 R. S. c. 3, § 32), *Indiana* (1888 R. S. § 2242), *Iowa* (1888 R. C. § 2364), *Kentucky* (1887 G. S. p. 599, § 12), *Louisiana* (1876 R. S. § 10), *Maine* (1883 R. S. c. 64, § 49), *Massachusetts* (1882 P. S. c. 143, § 5), *Michigan* (1882 An. Stats. §§ 6005-09), *Mississippi* (1892 An. Code, § 1862), *Missouri* (1889 R. S. § 27), *New Jersey* (1877 Rev. 778, §§ 119, 120), *New York* (Code C. P. § 2597), *North Carolina* (1883 Code, § 1518), *Pennsylvania* (1888 Purd. Dig. p. 511), *Texas* (1888 R. S. Arts. 1896-98), *Virginia* (1887 Code, § 2687), *West Virginia* (1891 Code, c. 87, § 10). The insufficiency of a surety is not his inability to pay the amount of the bond, but to afford adequate protection to parties interested in the estate. *Atkinson v. Christian*, 3 Gratt. 428. Insolvency of the administrator is not, however, a sufficient ground for requiring

additional security if the original sureties are sufficient. *Estate of Sharkey*, 2 Phila. 276. The amount and sufficiency of the additional bond are to be determined by the court irrespective of the consent or waiver of legatees. *Estate of Weeks*, 1 Civ. Pro. 164. Additional security may also be required if the original bond proves to be inadequate in amount, *Ellis v. McBride*, 27 Miss. 156; *Killcrease v. Killcrease*, 8 Miss. 311; *e. g.*, for newly discovered property, but not for an inadvertent inventory of property which did not belong to testator. *Calhoun v. McKnight*, 36 La. An. 414. And an executor's letters may be suspended pending the application for additional security. *Estate of White*, 53 Cal. 19.

The additional sureties are liable for the balance shown on final settlement of the administration account, although the waste may have occurred before the new bond was given. *Brown v. Stats*, 23 Kan. 235. The two bonds are cumulative, and all the sureties are liable without regard to the time of execution of the new bond. *Lacosta v. Splivalo*, 64 Cal. 35; *Pinkstaff v. People*, 59 Ill. 148; *Haskell v. Farrar*, 56 Mo. 497; *State v. Wolff*, 10 Mo. Ap. 95. Judgment on one bond is no bar to suit on the other. *State v. Berning*, 74 Mo. 87. And the party entitled to an action may elect to sue upon either bond or both. *Pinkstaff v. People*, 59 Ill. 148. In like manner, additional guardian's bonds are cumulative. *State v. Fields*, 53 Mo. 474; *State v. Drury*, 36 Id. 281. And the sureties on both should be parties in a statutory summary proceeding to ascertain and pay over the balance in hand. *Lewis v. Gambs*, 6 Mo. Ap. 138. But when an administrator resigns and is reappointed and gives a new bond, the second sureties, and not the first, are liable on settlement of account and default, although the principal

part of the account was the balance on the first account, *Steele v. Graves*, 68 Ala. 17; such balance having been paid over to him and held in his latter capacity. *Modawell v. Hudson*, 57 Ala. 75. So, the new sureties on a reappointment of the administrator as administrator *de bonis non* after the expiration of the term as administrator in chief, are liable for failure to turn over the assets previously received. *Whitworth v. Oliver*, 39 Ala. 286. But in Massachusetts, where a new bond is given by a testamentary trustee on the death of one of his sureties, the two sets of sureties are liable as co-sureties in proportion to the several liabilities assumed by them. *Brooks v. Whitmore*, 142 Mass. 399. An appeal from probate, however, only suspends the operation of the executor's bond, and on its affirmance no new bond need be given. *Durham v. Durham*, 16 Gray 577.

*General principles of liability.* The administration bond is to be construed strictly as against the obligors. *Ordinary v. Cooley*, 1 Vr. 179. And if duly executed, it will be valid as a common-law bond irrespective of the validity of the letters, *e. g.*, where the estate was in the hands of the public administrator under an appointment not vacated, *Power v. Speckman*, 126 N. Y. 324; or letters were granted on the estate of a living person, *Williams v. Kiernan*, 25 Hun 355; or were otherwise void for want of jurisdiction. *McChord v. Fisher*, 13 B. Mon. 193. Until breach of the bond the surety's liability is contingent and may be presented as such against the estate of a deceased surety, *Palmer v. Pollock*, 26 Minn. 433; *Minnesota* (G. S. c. 53, § 49); and need not be presented within the time limited for debts. *McWilliams v. Norfleet*, 60 Miss. 987. For further consideration of this subject, see *infra*, Vol. II. p. \*858, Am. note.

A joint bond of co-executors renders

each of them liable for all assets coming to the joint possession of the principals. *Ames v. Armstrong*, 106 Mass. 15. And a joint and several bond renders both liable for the acts of each. *Stephens v. Taylor*, 62 Ala. 269. The sureties, in like manner, are liable for the defaults of either principal. *Nanz v. Oakley*, 120 N. Y. 84; *Boyle v. St. John*, 28 Hun 454. And on the removal of one administrator for misappropriation, the other may sue. *Boyle v. St. John*, 28 Hun 454. And the sureties are liable for the negligence of the surviving administrator to proceed against the first administrator's estate for his defaults. *Keowne v. Love*, 65 Tex. 152.

*Proceedings against principal.* In general, a surety is bound by proceedings against the administrator. *Harri-son v. Clark*, 87 N. Y. 572; *Heard v. Lodge*, 20 Pick. 53; *Irwin v. Backus*, 25 Cal. 214; *Matter of Webster*, 3 Gr. Ch. 588; *Raglan v. Calhoun*, 36 Ala. 606. Thus, a judgment by default against the administrator is conclusive as to assets in a suit against the surety on the bond. *Brown v. McKee*, 108 N. C. 387. But a judgment against the administrator is only presumptive evidence of the amount of liability in an action against the sureties. *Bennett v. Graham*, 71 Ga. 211; *Kam-ner v. Hope*, 9 S. C. 253; and see *Barksdale v. Butler*, 6 Lea 450. On the other hand, sureties who are not parties will not be bound by a decree in equity against the successor (*de bonis non*) of their principal to surcharge the original account, *Cranch v. Edwards*, 52 Ark. 499; or against the personal representatives of their principal, settling his account. *Martin v. Ellerbe*, 70 Ala. 326.

The settlement of the administrator's account in the Probate Court is conclusive as to the fact and amount of the liability of the sureties, *Irwin v. Backus*,

25 Cal. 214; *State v. Berning*, 74 Mo. 87; *Martin v. Tally*, 72 Ala. 23; *George v. Elms*, 46 Ark. 260; *Hall v. Bramble*, 2 Dak. 189; although not parties to it, *Martin v. Tally*, 72 Ala. 23. And the sureties are not bound, in Tennessee, by the accounting unless they are parties. *Gambill v. Campbell*, 12 Heisk. 737. So, in California, without statutory notices, *Estate of Aveline*, 53 Cal. 259; but if the decree of settlement recites due notice the fact cannot be questioned in a suit brought on the bond by the distributees. *McClellan v. Downey*, 63 Cal. 520. The original sureties remain liable for the balance shown to be due on the settlement, notwithstanding the negligence of their principal's successor to collect it. *Estate of Connolly*, 73 Cal. 423. So, where the default amounted to a conversion which might have occurred, as far as shown, either during or after their principal's term. *State v. Howarth*, 48 Conn. 207. A surety is liable to distributees, but not to a legatee who was executor and debtor of the estate, and whose insolvency made the estate insufficient. And he may be relieved in equity against such legatee, because of fraudulent representations inducing him to execute the bond. *Lyon v. Os-good*, 58 Vt. 707. But a surety cannot, after the accounting, order of distribution, and judgment on the bond, and upon application for payment of a distributive share, set up the intestacy of a debtor of the deceased, and consequent failure of assets. *Ordinary v. Kershaw*, 1 McCart. 527. On the other hand, he need only account for assets actually received, where the legatee has knowingly allowed the executrix to misappropriate property of the deceased, and is thereby estopped from objecting to the deficiency created. *Jenkins v. Keith* (Ky.), 18 S. W. Rep. 1033. And he may rely on the order for distribution and pay a legacy voluntarily, without prejudice to his rights against

any collateral held as indemnity, although the estate was insolvent and the order improvidently made. *Smith v. Harry*, 91 Pa. St. 119. And the liability of the sureties extends to a claim barred by the statute, but admitted by the administrator and ordered paid. *Weber v. North*, 51 Iowa 375. The surety's right to apply for a reopening of the account is neither greater nor less than that of his principal. *Bush's Appeal*, 102 Pa. St. 502.

Where the principal is dead, a settlement by his representatives is presumptive evidence of the amount due as against his sureties. *Williams v. Flippin*, 68 Miss. 680. So, as to a guardian's account filed by his administrator, *State v. Martin*, 18 Mo. Ap. 468; or an administrator's account filed by his administrator, but inadvertently in the form of an account as administrator *de bonis non* (which he also was). *Weir v. Monahan*, 67 Miss. 434. But in Alabama, an account by representatives of a deceased administrator, and decree in favor of the administrator *de bonis non*, does not bind his sureties, and they must be sued in equity by the administrator *de bonis non*. *Stallworth v. Farnham*, 64 Ala. 259.

*Amount of liability.* This is, in general, the same for principal and surety, *Ward v. Tinkham*, 65 Mich. 695; and cannot exceed the penalty of the bond, *Commonwealth v. Forney*, 3 Watts & S. 353; even as interest. *Commonwealth v. Meyerhaven*, 17 Phila. 108. The penalty is not, however, the measure of the liability, but the amount is to be ascertained, *Brown v. Jacobs*, 24 Neb. 712; *e. g.*, the actual damage consequent on the failure to account, *McKim v. Bartlett*, 129 Mass. 226; or damages that may be "equitably due" by reason of the failure to make an inventory. *State v. French*, 60 Conn. 478. The liability includes legal interest on an order to pay money.

*Bell v. Arndt*, 24 Nev. 261. Such interest being reckoned not from the date of the misappropriation, but of the decree for settlement. *Hood v. Hayward*, 124 N. Y. 1. But in the case of the devastavit of an absent distributee's share after accumulating interest for ten years in a savings bank, interest is chargeable at the full legal rate from the date of the order for distribution and the retention of the fund. *Matter of Doremus*, 6 Stew. (N. J.) 234.

*Extent of liability.* An executor's bond covers all money received by him under color of his official authority. *Clark v. Fredenburg*, 43 Mich. 263. So, an administrator and his sureties are liable for personal property that came to his possession before his appointment, *McClure v. People*, 19 Ill. Ap. 105; and for proceeds of lands sold for debt before giving the additional bond required. *May v. Kelly*, 61 Ala. 489. So, for proceeds of sales actually received by the administrator, although afterward set aside. *Musick v. Beebe*, 17 Kan. 47. So, for rents collected under the statute, but not for rents collected after removal from office. *Brooks v. Jackson*, 125 Mass. 307; G. S. c. 98, § 8. On an executor's bond the surety is liable for the exercise of the testamentary trusts and powers. *Warfield v. Brand*, 13 Bush 77. But only if the bond covers all the duties imposed in the will and to the extent of its stipulations and conditions, *Tennessee Code*, § 222; *Walker v. Potilla*, 7 Lea 449; but not on a bond conditioned for the performance of "the duties which are enjoined by law," *Carter v. Young*, 9 Lea 216. And where a surety afterward becomes administrator *de bonis non*, in Massachusetts, he is chargeable with the balance of his predecessor's account, although not fixed by settlement of account or judgment or charged in his own account against himself as assets received by him. *Choate v.*

Thorndike, 138 Mass. 371. And the sureties of a second administration are alone liable, and not those of the first, if there has been a settlement and order to carry the balance to the second administration. *Modawell v. Hudson*, 80 Ala. 265. But see *contra* in Ohio. *Shields v. Odell*, 27 O. St. 398. But sureties will not be responsible for the proper administration of equitable assets coming into the hands of the executor, *Wall v. Allen*, 4 Baxt. 210; or of any moneys which he had no right to collect and which were not assets or subject to distribution, *Pace v. Pace*, 19 Fla. 438; although the court had erroneously authorized him to receive them, *Young v. People*, 35 Ill. Ap. 363; nor for moneys which he was not authorized to receive as administrator, but supposed himself authorized to receive as guardian, *Ordinary v. Lippincott*, 5 Halst. 35; nor for income collected which belonged to the remainderman, the intestate having been life tenant only, *Snodgrass v. Snodgrass*, 1 Baxt. 157; nor for rents received by the administrator as an agent, *Gregg v. Currier*, 36 N. H. 200; *Hutcherson v. Pigg*, 8 Gratt. 220; the statutory rents provided for in the bond being those accrued at the intestate's death, and not rents on leases made without authority by the administrator, *Wilson v. Unsell*, 12 Bush 215. So, the liability of the surety does not extend to personal property acquired after intestate's death, *e. g.*, proceeds of real property sold, though in the administration account, *Reed v. Commonwealth*, 11 Serg. & R. 441; *Commonwealth v. Hilgert*, 55 Pa. St. 236; nor for the proceeds of land sold in another state and brought into the jurisdiction of the ancillary administration, *State v. Osborn*, 71 Mo. 86; nor to a fine laid on the administrator for contempt in not appearing when cited. *Loop v. Northrup*, 59 Hun 75.

*Date of breach.* An executor's bond

covers a devastavit already committed, although its terms may not seem to relate back. *Choate v. Arrington*, 116 Mass. 552; *Scofield v. Churchill*, 72 N. Y. 565, affg. *Scofield v. Hustis*, 9 Hun 157.

So, the liability of the sureties on an administrator's bond extends to a devastavit committed after the death of the surety, *Mundorff v. Wangler*, 44 N. Y. Super. Ct. 495; *Stevens v. Stevens*, 2 Dem. 469; or after the expiration of the principal's term, and before his final discharge, as in the case of a temporary administrator, *Estate of Aveline*, 53 Cal. 259; or of the public administrator, *Buckley v. McGuire*, 59 Ala. 226; but not to a devastavit caused after the administrator's death by his personal representative paying prematurely unpreferred debts. *Williams v. Flippin*, 68 Miss. 688.

*Proceeds of lands sold.* Where a will directs the sale of the testator's land, the sureties of the administrator *de bonis non, cum testamento annexo*, will be liable for the proceeds of the sale, *Cornish v. Wilson*, 6 Gill 299; *Zeigler v. Sprenkle*, 7 Watts & S. 175; *Commonwealth v. Forney*, 3 Id. 353. But see, *contra*, *Probate Judge v. Hazard*, 13 R. I. 3. In New Hampshire, on the other hand, it has been held to be so, even where the land was in another state. *Probate Judge v. Heydock*, 8 N. H. 491. Where an executor petitions for construction and leave to sell land, he becomes a special commissioner of the court and sells the land as such, and if he dies before final decree of confirmation, the distributees may have a bill in equity for confirmation and to render his sureties liable for the proceeds. *Brandon v. Mason*, 1 Lea 615. So, an administrator's sureties are liable for the proceeds of land sold under an order of the court for distribution, *Clark v. Fredenburg*, 43 Mich. 263; and in a suit on the bond they cannot question the regularity of



the order. *Id.* So, for land sold under an order of the court for debts, *Matter of Givens*, 7 Stew. (N. J.) 191; irrespective of the fact that the administrator had not first exhausted the personalty, as he should have done. And this is true as to a special administrator's bond given for the express purpose, although the sale was made for debts without an order of the court and before the execution of the bond. *Fleece v. Jones*, 71 Ind. 340.

But an administrator's sureties will not be liable where he sells lands which are not covered by the order of sale, *Matter of Givens*, 7 Stew. (N. J.) 191; or which lie in another state, *Snodgrass v. Snodgrass*, 1 Baxt. 157; nor, in general, for sales made for distribution of equitable or real property which is not assets in his hands. *Gambill v. Campbell*, 12 Heisk. 737. So, the sureties of an executor on a general bond given for sale of lands for debts and legacies are not liable for the proceeds of sale of real property for special purposes (and with a special bond), although the executor has charged himself with such proceeds in his general account. *Robinson v. Millard*, 133 Mass. 236. And their liability by the terms of their bond for land sold for debts or legacies does not include sales made under a power of sale in the will for certain charitable purposes. *White v. Ditson*, 140 Mass. 351.

*Administrator's indebtedness.* An administrator's sureties are liable for default in his debt to the estate to its full amount, if he is solvent; but otherwise only for such diligence as would be required in collection from other parties. *Harker v. Frick*, 2 Stockt. 269; *Rader v. Yeargin*, 85 Tenn. 486. And where such debt is secured by a lien and would have been collected by ordinary diligence, the sureties will not be relieved by the administrator merely charging himself with it in his

account. *Murray v. Luna*, 86 Tenn. 326. But the mere failure of an insolvent administrator to inventory a debt from himself will not render them liable beyond the amount lost by the negligence. *State v. Gregory*, 119 Ind. 503.

And where the testator appoints a debtor his executor, the soundest rule is that the sureties on the bond will be responsible for this debt to the same extent and on the same principle as for other debts due the estate. *Spurlock v. Earles*, 8 Baxt. 437. But they are liable, in Maryland, as for so much money in hand, irrespective of his solvency. *Lambrecht v. State*, 57 Md. 240; Code, Art. 93, § 224. And in South Carolina, the sureties are liable for the amount of a note held by the intestate, at the time of his death, against the administrator, although the latter was insolvent when he administered, and has continued so ever since. *Twitty v. Houser*, 7 S. C. 153.

*Double capacity.* The liability of the sureties is sometimes rendered doubtful by the fact that his principal holds two offices, as executor and trustee, or administrator and guardian, while the sureties' liability relates to the faithful performance of only one of them. Where the offices are not clearly separable, the original sureties generally remain liable. Thus, the sureties of an executor are liable for his default under an implied trust for a legacy in remainder after a life estate, where no trustee has been appointed, *Dorr v. Wainwright*, 13 Pick. 328; *Towne v. Ammidown*, 20 Id. 535; or where there is an express trust, and he has rendered his final account as executor, but without any formal discharge as executor, or charge or act indicating his assumption of the trust, *Cluff v. Day*, 124 N. Y. 195, revg. 55 N. Y. Super. Ct. 460; or where the residue is devised to the executor in trust for certain charities, and he has given no special bond as

such trustee, *White v. Ditson*, 140 Mass. 351. But in the absence of any willful breach, only simple interest should be charged from the proper time for performance of the trust, and his commissions should be allowed and deducted. *Id.* On the other hand, where a residue is bequeathed to the executor conditioned on future payment to A., the executor, after ascertainment of the residue holds as residuary legatee, and his sureties are not liable to A. for non-performance of the condition. *State v. Hewlett*, 48 Md. 138. So, where the executor is also the testator's surviving partner in a business in another state and is insolvent, his sureties are not liable for his partnership indebtedness or management of the partnership affairs. *Hooper v. Hooper*, 32 W. Va. 526. See too, *Gilman v. Baker*, 24 W. Va. 72. And where the duties of executor and trustee are plainly distinct, the executor's bond cannot be enlarged by construction to cover the trustee's default, *Hinds v. Hinds*, 85 Ind. 312; although he may have included the items (for which he had given a special bond) in his general account. *Robinson v. Millard*, 133 Mass. 236. So, where a special administrator was afterward appointed executor and subsequently misappropriated funds which had previously been in his hands as administrator, his sureties as administrator will not be liable, even though he had rendered no account as such. *Taylor v. McArthur* (Iowa), 54 N. W. Rep. 228. So, the sureties of an administrator are discharged where funds are turned over to him by order of the Probate Court as trustee under the will, *Barker v. Stanford*, 53 Cal. 451; or where he has surrendered property to the widow on a settlement and afterward sold it by order of the court as its commissioner, *Odell v. Howell*, 77 Va. 361; or where he is also guardian

of a distributee, after settlement of administration and lapse of reasonable time (charging balance in his private book, but not in court records, to guardian account), *Bell v. People*, 94 Ill. 230; even without a formal accounting and transfer of assets. *Watkins v. Shaw*, 2 Gill & J. 220; *Ruffin v. Harrison*, 81 N. C. 208. So, where an administratrix marries and her husband is appointed guardian for the distributee. *Seegar v. State*, 6 Harr. & J. 162. In such case, where distribution should be made and the parties are represented by one person, the law presumes the transfer of the fund. *Id.*; *United States v. May*, 4 Mackey 4. But it is sometimes held that the old liability ends, and the fresh liability begins, with the formal settlement of the administration account. *Ezell v. Hamilton*, 4 Baxt. 304; *Johnson v. Fuquay*, 1 Dana 514.

*Breach.* In general, any failure to perform an official duty or obey the orders of the court having jurisdiction over the matter constitutes a breach of the administration bond. Thus, the failure to file an inventory, as required by the statute, is a breach of the bond, *Johannes v. Youngs*, 45 Wis. 445; *People v. Hunter*, 89 Ill. 392; *Ellis v. Johnson*, 83 Wis. 394; and a legatee may sue for such breach, *Mighton v. Dawson*, 38 O. St. 650; without showing any special damage, *Forbes v. McHugh*, 152 Mass. 412. But where the executor is sole legatee of the personal and life tenant of the real property, his omission to file an inventory is immaterial, and will be cured by filing it after suit brought. *McKim v. Harwood*, 129 Mass. 75. It is also a breach to knowingly omit assets from the inventory. *Bourne v. Stevenson*, 58 Me. 499. But moneys held by deceased in trust may be paid over to the *cestui que trust* without inventory or account. *State v. Tubbs*, 22 Mo. Ap. 91.

So, it is his duty to collect the assets, and he commits a breach if a debt due the estate is lost through negligence, *Lacy v. Stamper*, 27 Gratt. 42; or if property is lost by failure to sue until the suit is barred. *Meeks v. Vassault*, 3 Sawy. 206.

So, any want of faithfulness or diligence in preservation and investment of the estate is a breach. This is true of a loan of the trust funds without security. *Judge of Probate v. Mathes*, 60 N. H. 433; *Fuhrer v. State*, 55 Md. 150; *Borders v. People*, 31 Ill. Ap. 483; *Pierce v. Wallace*, 48 Tex. 399; *Hatheway v. Sackett*, 32 Mich. 97; *State v. Crawford*, 23 Fla. 289; *Gutridge v. Vanatta*, 27 O. St. 366; *Parsons v. Milford*, 67 Ind. 489; *State v. Dilley*, 64 Md. 314. So, of the conversion of a bequest, *Nelson v. Corwin*, 59 Ind. 489; or the waste of assets. *Lansdell v. Winstead*, 76 N. C. 366. So, where an administrator makes a devastavit and absconds, *Liddicoat v. Treglown*, 6 Col. 47; or absconds, without proof of a devastavit. *Giles v. Brown*, 60 Ga. 658; Code, §§ 3384, 2507.

So, imprudent or unfaithful management amounting to negligence is a breach, *e. g.*, the taking of a promissory note from an insolvent purchaser of personal property, *Lindley v. State*, 116 Ind. 235 (the burden as to due care being on the administrator); or preventing an order for the sale of land by false representations to the court. *Chapin v. Waters*, 110 Mass. 195. So, the failure to sell land as authorized to raise an annuity fund, *Prescott v. Pitts*, 9 Mass. 376; but a failure to apply for an order to sell lands for assets is not of itself a breach, *Hawkins v. Carpenter*, 88 N. C. 403; nor the neglect to sell the land on the order of the court for debts (no loss being occasioned), *State v. Smith*, 68 Mo. 644; nor breach of a private agreement with

the distributees to hold certain property for their benefit for private sale. *Kennedy v. Adickes* (S. C.), 15 S. E. Rep. 922.

The failure to render an account is a sufficient breach, *Webster's Case*, 1 Halst. Ch. 89; *Johannes v. Youngs*, 45 Wis. 445; *Ordinary v. Barcalow*, 7 Vr. 15; *Dickerson v. Robinson*, 1 Halst. 195; *Ordinary v. Hart*, 5 Halst. 64; *Commonwealth v. Bryan*, 8 Serg. & R. 126; *Bennett v. Russell*, 2 Allen 537; although it is settled out of court after order for accounting. *Clarke v. Clay*, 31 N. H. 393. And a prior citation to account is not necessary before breach, *Bennett v. Overing*, 82 Mass. 267; *Webb v. Gross*, 79 Me. 224; although the rule is otherwise in New Hampshire. *Probate Judge v. Couch*, 59 N. H. 39. So, it is a breach to wrongfully delay the settlement of the estate. *Stanton v. State*, 82 Ind. 463. The rule that there has been no breach of an administrator's bond until he has been cited to render an account does not apply to insolvent estates. *Webb v. Gross*, 79 Me. 224. So, where the probate court, having jurisdiction of the matter, finds that there are sufficient funds of the estate in the hands of the executor for the purpose and orders the payment of an allowance, such order is final in its nature and binding on the executor, and the failure to pay such allowance after the making of the order is a breach. *State v. James*, 82 Mo. 509; *Hilton v. Briggs*, 54 Mich. 265.

It is also the duty of the administrator or executor to pay the debts of the estate, and in their proper order of priority. It is therefore a breach of his bond to pay general debts before preferred debts (*e. g.*, a judgment debt), *State v. Brown*, 80 Ind. 425; or to apply a special fund to debts for which it was not liable, *Glass v. Howell*, 2 Lea 50. But non-payment of a simple debt or common-law judgment is not of itself a

breach. *Dickerson v. Robinson*, 1 Halst. 195. *Contra*, if averred as a non-performance of his duty as administrator generally. *Hazen v. Durling*, 1 Green Ch. 133. The order for payment should show a default as administrator. *Power v. Speekman*, 126 N. Y. 354. And debt approved or ordered paid by the proper probate court. *Huntsman v. Hooper*, 32 Minn. 162. So, in New Hampshire, where estate is insolvent. Probate Judge *v. Couch*, 59 N. H. 39. Most of the United States provide by statute for the settlement of insolvent estates, to be considered *infra*, with Payment of Debts generally. Failure to obey an order for payment made by the proper probate court is a breach for which a suit will lie against him and his sureties. *State v. Crenshaw*, 68 Mo. 254. And the plaintiff should aver an allowance of his claim by the court. *First National Bank v. How*, 28 Minn. 150. See also, *Chapron v. Chapron*, 41 La. An. 486. So, non-payment by the personal representatives of a deceased administrator of moneys ordered to be paid is a breach of his bond. *Chaquette v. Ortet*, 60 Cal. 594. If creditors are not paid according to the order of the court, they should sue on the bond, and not for the improper payment of the residue to the distributees. *Ordinary v. Crosby*, 1 Vr. 271. So, the failure to pay a legacy is a breach, *Ruby v. State*, 55 Md. 484; or the non-payment of income to a legatee for life, *Sanford v. Gilman*, 44 Conn. 461; or the failure to pay for a legatee's education as directed by the will. *Heady v. State*, 60 Ind. 316. But there must first be an accounting showing a balance for distribution to legatees, *Ordinary v. Barcalow*, 7 Vr. 15; and an order for the payment. *Probate Court v. Kimball*, 42 Vr. 320. So, the failure to distribute the residue is a breach only after decree for distribution, *Ordinary v. Smith*, 3 Green (N. J.) 92; *Hurlburt*

*v. Wheeler*, 48 N. H. 73; Probate Judge *v. Kimball*, 42 Vt. 320; and on proof that the distributee tendered a refunding bond. *Ordinary v. White*, 14 Vr. 22.

*Contribution and subrogation.* As in other cases of co-suretyship, a surety who pays in excess of his share has a right of contribution against his co-sureties, which may be enforced by action at law or in equity. *Handley v. Heflin*, 84 Ala. 600. And he may have a creditor's bill as a judgment creditor against the representatives of a deceased co-surety if he pays a judgment rendered against both on the bond. *Rynearson v. Turner*, 52 Mich. 7; *Stephens v. Meek*, 6 Lea 226. The claim must be proved against the deceased co-surety's estate either as a contingent debt or within the year after it becomes absolute, and cannot be sued otherwise. *Ernst v. Nau*, 63 Wis. 134. And such liability is a preferred debt, in North Carolina, as a specialty. *Howell v. Reams*, 73 N. C. 391. But sureties on separate bonds of A. as a guardian of B. have no right of contribution against one another, *Somers v. Johnson*, 57 Vt. 274; nor claim on collateral held by the other. So, where co-executors sign a joint bond, as against the sureties on the bond, they are both principals and each liable as such for the devastavit of his co-executor; as against the defaulting co-executor, the other is a co-surety (and as such is subrogated to his share of the commissions). *Albro v. Robinson* (Ky.), 19 S. W. Rep. 587, overruling *Collins v. Carlisle*, 7 B. Mon. 13.

And where a bond is given by two administrators, the surety may call upon either principal for indemnity. *McCoun v. Sperb*, 53 Hun 165. If he pays a judgment on the bond after the death of the administrator insolvent, he should be subrogated by bill in equity against his estate, *Stetson v. Moulton*, 140 Mass. 597; and against securities held by the creditor, whose debts he has paid.

*Bane v. Gray*, 18 Mo. Ap. 164. But he cannot retain moneys of the estate collected by him as attorney for an administrator *de bonis non* to indemnify himself against possible liability as surety for the original administrator (although so agreed by the original administrator), *Conyers v. Gray*, 67 Ga. 329; and such agreement of the original administrator is not binding on the administrator *de bonis non*. *Gray v. Conyers*, 70 Ga. 349. Payment by a surety after the death of the principal is a debt, which must be presented and paid as such. *Bane v. Gray*, 18 Mo. Ap. 164. The surety's rights are not lost by voluntary payment without forcing a creditor to sue on the bond. *Hazen v. Durling*, 1 Green Ch. 133. In such case he may sue the administrator on the bond, but he has the burden of showing the payment to be correct. *Martin v. Ellerbe*, 70 Ala. 326. If the surety becomes administrator *de bonis non* and indorses his receipt for the balance due on the original bond and charges himself by inventory with the amount, he thereby discharges the administrator as such, and may sue him for money paid to his use. *Hazelton v. Valentine*, 113 Mass. 472. But the surety must, in general, exhaust his legal remedies against the administrator before proceeding in equity against the estate of the intestate. *Hazen v. Durling*, 1 Green Ch. 133.

If there is a decree for distribution and a judgment on the bond for failure to obey it, and it is paid by the surety, he is subrogated to the distributee's rights under the decree. *Townsend v. Whitney*, 75 N. Y. 425. If he pays a preferred debt, he is entitled to retain the preference. *Muldoon v. Crawford*, 14 Bush 125; *Schoolfield v. Rudd*, 9 Id. 291. If the administrator has committed a breach by taking notes from an insolvent purchaser of personal property, the surety paying for the

devastavit is entitled to the notes. *Lindley v. State*, 116 Ind. 235. But where the administrator misappropriates the personalty and pays a debt of the estate by the note of himself and his surety, the surety is not subrogated to the right of the creditor against devisees, having by his own act changed the debt into an individual debt of the administrator. *Huss v. Rice* (Ky.), 17 S. W. Rep. 869.

*Discharge and release.* In most of the United States the statute provides for the release of sureties from future acts of the administrator or executor, at their own request on notice to him, the court in general requiring the principal to give new bond, and in default thereof revoking his letters. This is so in *California* (Code C. P. § 1403), *Colorado* (1891 An. Stats. § 4723), *Connecticut* (1888 G. S. § 450), *Delaware* (1874 R. C. p. 543, § 14), *Georgia* (1882 Code, §§ 2511, 2447), *Illinois* (1891 R. S. c. 3, §§ 35-36), *Kentucky* (1887 G. S. p. 599, § 13), *Louisiana* (Civ. Code, §§ 3069-70), *Maryland* (1888 P. G. L. § 2252), *Michigan* (1882 An. Stats. §§ 6005-9), *Mississippi* (1892 An. Code, § 1863), *Missouri* (1889 R. S. § 27), *New Jersey* (1877 Rev. p. 779, § 124), *New York* (Code C. P. §§ 2600-01), *North Carolina* (1883 Code, § 1519), *Tennessee* (1884 Code, § 3071), *Texas* (1888 R. S. Arts. 1899-1901). And where action is brought upon an administrator's bond, an answer, that before breach the sureties were by proper order of court released and a new bond given, is good on demurrer. *State v. Gregory*, 88 Ind. 110. When properly applied for, such relief is a matter of right, and not of discretion, *Gilliam v. McJunkin*, 2 S. C. 442; *Valcourt v. Sessions*, 30 Ark. 515; *Allen v. Sanders*, 7 Stew. (N. J.) 203; *Lewis v. Watson*, 3 Redf. 43; in *South Carolina*, without proof of danger, *McKay v. Donald*, 8 Rich. 331; *Gilliam v. McJunkin*, 2 S. C. 442; in

Louisiana, on due proof of the existence of a statutory cause. Succession of Boutté, 32 La. An. 556. And the surety is not deprived of the right by the fact that he is indebted to the estate. *Allen v. Sanders*, 7 Stew. (N. J.) 203. As the statutory proceedings are for relief of the surety and not of the distributees, the notice required is to the administrator or executor only, and his waiver of notice is sufficient. *Harrison v. Turbeville*, 2 Humph. 242. And if the executor is a non-resident, the notice may be served personally, where the statute makes no provision for a service by publication. *Stevens v. Stevens*, 3 Redf. 507.

Where the appointment of the administrator is set aside and new administrators appointed and a new bond given, it will have the same effect to discharge the original sureties as the proceeding on the sureties' petition. *Lingle v. Cook*, 32 Gratt. 262. And if the administrator is discharged by order of the court from his bond, it will discharge the sureties. *Austin v. Raiford*, 68 Ga. 201. On the other hand, a formal order discharging the sureties from "further responsibility" will not relieve them from liability for prior defaults. *McKim v. Blake*, 132 Mass. 343. But they will not be discharged as to creditors by a decree fixing the amount due the creditors and allowing further time to account, *Lanier v. Irvine*, 24 Minn. 116; nor by the delay of the creditors in proceeding against the administrator on his bond. *Avery v. Miller*, 81 Mich. 85.

The bond may also be discharged by release. But a release of the interest of a distributee will be set aside, and its effect in relief of the sureties revoked, if obtained by fraud of the administrator, *Jenkins v. State* (Md.), 23 Atl. Rep. 608; or of the sureties themselves. *Cleere v. Cleere*, 82 Ala. 581.

So, the bond may be discharged by payment. But a payment made by the administrator by his note to the guardian of an insane distributee, and afterward stated in his account as paid, will not discharge the surety unless the note is paid. *Hoge v. Vintroux*, 21 W. Va. 1. So, if one of the sureties of the administrator on his death becomes administrator *de bonis non* of the original intestate, he is not charged with the balance in the hands of the original administrator until the account is stated and the balance duly ascertained, and his co-surety cannot therefore claim a discharge as for payment over of the balance to the administrator *de bonis non*. *Chick v. Farr*, 31 S. C. 463. In this case the co-surety was the co-surety for the administrator *de bonis non*, and would have been charged as such in case of a different decision. But if a creditor accepts the note and mortgage of a third person in payment of his claim, he cannot sue on the administration bond as a creditor of the estate. *Rawson v. Piper*, 34 Me. 98.

*Action on administration bonds—statutory provisions.* In most of the United States provision is made by statute for action on bonds of executors and administrators. See *Alabama* (1886 Code, § 2272), *Arkansas* (1884 Dig. Stats. § 199), *Colorado* (1891 An. Stats. §§ 4807-08), *Connecticut* (1888 G. S. §§ 448-53), *Florida* (1892 R. S. §§ 1869-71), *Georgia* (1882 Code, §§ 2468, 2507), *Illinois* (1891 R. S. c. 3, § 25), *Indiana* (1888 R. S. §§ 2458-59), *Iowa* (1888 R. C. §§ 2435, 2482), *Kansas* (1889 G. S. §§ 2966-70), *Kentucky* (1887 G. S. c. 39, § 12), *Maine* (1883 R. S. c. 72, §§ 5-16), *Massachusetts* (1882 P. S. c. 143, §§ 10-14), *Michigan* (1882 An. Stats. §§ 5994-99), *Minnesota* (1891 G. S. §§ 5905-07), *Mississippi* (1892 R. C. §§ 1854-55), *Missouri* (1889 R. S. § 283), *Montana* (1887 C. S. p. 293, § 79), *Nebraska* (1893 C. S. c. 23, §§ 312-15),

*Nevada* (1885 G. S. § 2742), *New Hampshire* (1891 P. S. c. 199, §§ 4-6), *New Jersey* (1877 Rev. p. 788, § 164), *New York* (Code C. P. §§ 2607-09), *North Carolina* (1883 Code, § 1516), *Ohio* 1890 R. S. §§ 6710-11), *Pennsylvania* (1883 *Purd. Dig.* p. 512, § 25), *Rhode Island* (1882 P. S. c. 191, §§ 3-15), *South Carolina* (1882 G. S. § 1885), *Tennessee* (1884 Code, §§ 3072-73), *Vermont* (1880 R. L. § 2303), *Virginia* (1887 Code, § 2658), *West Virginia* (1891 Code, c. 85, § 23), *Wisconsin* (1889 An. Stats. §§ 4014-16), *Wyoming* (1887 R. S. § 2211). Any bond given by an executor or administrator as such may be sued in the name of the party aggrieved, in Alabama, Kansas, Montana, Nebraska, Nevada, North Carolina, and (by leave of the court) in New York; by any person interested, in the name of the state to the use of that person, in Arkansas, Colorado, Illinois, Maryland, Missouri, Pennsylvania, Tennessee, Wyoming, and now in Connecticut; in the name of the Ordinary, in New Jersey; in the name of the Governor for the use of the party injured, in Florida; in the name of the judge of probate, in Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Rhode Island, South Carolina, Vermont, Wisconsin, and formerly in Connecticut. Any person interested, whose interest has been ascertained by decree of the judge of probate or by judgment at law, may sue in *Massachusetts* (1882 P. S. c. 143, §§ 10-14), *Michigan* (1882 An. Stats. §§ 5994-95), *Nebraska* (1893 C. S. c. 23, §§ 312-13), *Ohio* (1890 R. S. §§ 6210-11), *Rhode Island* (1882 P. S. c. 191, §§ 5-7), *Wisconsin* (1889 An. Stats. § 4014); without applying to the judge of probate, but in his name, in *Maine* (1883 R. S. c. 72, §§ 10-15).

The judge of probate may authorize any party interested to commence a suit on a probate bond, after citation to account, for the benefit of the estate,

in *Maine* (1883 R. S. c. 72, § 16) and *Rhode Island* (1882 P. S. c. 191, § 15). When the executor or administrator has failed to perform his duty (other than payment of an ascertained debt or share), the court may authorize any person aggrieved to bring action on the bond, in Massachusetts, Michigan, Nebraska, Ohio, and Wisconsin. When the judge of probate is the obligor in a bond to a former judge, suit may be brought in the name of the judge named in the bond or his representatives, the register of probate authorizing the suit, in *Massachusetts* (1882 P. S. c. 143, § 14). Whenever an executor or administrator refuses to perform an order of the judge of probate, he may cause the bond to be prosecuted, in *Michigan* (1882 An. Stats. § 5997), *Nebraska* (1893 C. S. c. 23, § 315), *Wisconsin* (1889 An. Stats. § 4014). On application of any person authorized to bring suit, the judge of probate shall grant permission to prosecute the bond, in *Michigan* (1882 An. Stats. § 5999), *Minnesota* (1891 G. S. § 5907), *Nebraska* (1893 c. 23, § 317), *New Hampshire* (1891 P. S. c. 199, § 4), *Rhode Island* (1882 P. S. c. 191, § 3), *Vermont* (1880 R. L. § 2303); *Wisconsin* (1889 An. Stats. § 4016); "by and on the relation of" the party interested, in *Indiana* (1888 R. S. § 2459); and several persons may join in the action, in *Kansas* (1889 G. S. § 2970), *Maine* (1883 R. S. c. 72, § 10), *Mississippi* (1892 R. C. § 1855).

When an execution on a judgment or decree is returned unsatisfied, an action may be forthwith brought on the bond, in Virginia and West Virginia. So, as to executions on surrogate's decrees, in New York. Action may be brought for any mismanagement, waste, or other breach of condition, in Arkansas, Colorado, Missouri, and Wyoming; for any breach of conditions, in Minnesota, Mississippi, North Carolina, South Carolina, and Vermont; for fail-

ure to comply with the provisions of the statute, in Colorado; for any injury by reason of neglect or improper conduct, in Illinois; for failure to pay a debt of the estate after allowance, in Iowa, and also for non-payment of a legacy or distributive share after order ascertaining the amount due, or for failure to perform his duty in any other particular, in Kansas; for any devastavit, in Mississippi and Florida; for devastavits and defaults specially enumerated, in Indiana. In Iowa, summary proceedings are provided for. In Georgia, it is expressly provided that it shall not be necessary to establish the devastavit by a prior judgment before suit on the bond.

An action on the bond may be brought against all or any one or more of the obligors, in Colorado, Georgia, Illinois, and Kentucky, or against those executors doing the acts complained of without joining the other parties to the bond, in Maine.

*Leave to sue.* This is generally regulated by statute, as already stated. It has been held to be necessary in an action by a legatee, *Buel v. Dickey*, 9 Neb. 285; by an administrator *de bonis non*, *Balch v. Hooper*, 32 Minn. 158; and generally, Probate Court *v. Hull*, 58 Vt. 306. In Massachusetts, it is necessary in a suit by a creditor in the name of the judge, except where the amount of the debt has been ascertained by a judgment or by a decree for distribution of an insolvent estate, and demand made on the administrator, and if the required leave is not granted the judge of probate cannot recover in his own right for the benefit of the general estate. *Paine v. Stone*, 10 Pick. 75. But it is not required in a suit for a distributive share by the personal representatives of the deceased next of kin after decree of the Probate Court has ascertained the amount due. *White v. Weatherbee*, 126 Mass. 450. Where

it is necessary, it is sufficient if made and dated before action brought, although not put into writing until afterward. *Richardson v. Hazelton*, 101 Mass. 108. A judge's certificate indorsed on the bond is a sufficient order. *Johannes v. Youngs*, 48 Wis. 101. To sustain an action in New Jersey upon the bond of an administrator, it must appear that an order for its prosecution has been made at the request of a party aggrieved, *Ex parte Webster*, 3 Gr. Ch. 558; and such order should be filed in the Prerogative Court, *Dickerson v. Miller*, 1 Green 3. And such an order made by the Ordinary is conclusive in all collateral proceedings. *Ordinary v. Poulson*, 14 Vr. 33. The objection of want of authority to sue is in the nature of a plea in abatement, and to entitle the party to the benefit of such defense, he must set it up in his answer at the proper stage of the cause. *Johannes v. Youngs*, 48 Wis. 101; *Fay v. Rogers*, 2 Gray 175. Leave may be granted *ex parte* on the application of a creditor, *Elwell v. Prescott*, 38 Wis. 274; Wisconsin R. S. c. 104, § 2; and without notice to the obligors in the bond, *Richardson v. Oakman*, 15 Gray 57; and without a prior accounting, *Id.*; and in the suit on the bond the sureties cannot attack the regularity of the order granting leave, *Bennett v. Woodman*, 116 Mass. 518; *Choate v. Jacobs*, 136 Mass. 297. Leave must be granted by decree in writing, not orally. *Fay v. Rogers*, 2 Gray 175. It will not be revoked on affidavit of the administrator that he believed nothing was due, *Matter of Northampton County Savings Bank*, 5 Stew. (N. J.) 689; nor because a decree of distribution has not been made, nor the petition for leave verified, nor a bond for costs required on granting it, *Ex parte Green*, 4 Halst. Ch. 550. In New York, the surrogate has no jurisdiction to give leave to an administrator *de*



*bonis non* to sue the sureties of the deceased administrator for property in his possession at the time of his death and not delivered to his successor, *Scofield v. Adriance*, 1 Dem. 196; where no execution has been returned against the administrator and no order of the surrogate disobeyed by him. *Estate of Scofield*, 3 Civ. Pro. 323.

*Preliminary decree.* In many states suit can be brought on the bond for loss of moneys by neglect, etc., only after citation to account. *Potter v. Cummings*, 18 Me. 55; *Behrle v. Sherman*, 10 Bosw. 292; *People v. Corteis*, 1 Sandf. 228; *Ordinary v. McClure*, 1 Bailey 7. And where such suit was allowed without a prior account, the burden was on the creditor to establish his claim, and the sufficiency and waste of assets. *Ordinary v. Hunt*, 1 McMull. 380. So, action on the bond for not accounting does not lie until the administrator has been cited to account. *Gilbert v. Duncan*, 65 Me. 469. So, a bill in equity will not lie against an administrator and his sureties for an accounting, and to set aside a former account for fraud and charge the sureties on the bond for the balance due (the sureties not knowing of the fraud), until the administrator's liability has been first fixed by account and decree. *Grady v. Hughes*, 80 Mich. 184. But a prior decree of the surrogate must be had in case of gross negligence and bad faith on the part of an executor in failing to sell real estate as directed by the will, the surrogate having power to remove him therefor and to compel him to account, and upon such accounting to charge him with any loss to the estate resulting from such negligence and bad faith. 100 N. Y. 219, revg. *Haight v. Brisbin*, 36 Hun 579; *Hood v. Hood*, 85 N. Y. 561. In general, the sureties are entitled before suit to have the administration account settled in the Probate Court. *Weihe v. Stat-ham*, 67 Cal. 84; *Chapron v. Chapron*,

41 La. An. 486; but want of such settlement is no defense after judgment rendered, *McNulty v. Marcus*, 57 Ga. 507. And in Illinois, proof of a devastavit is dispensed with as a prerequisite by the statute. *Tucker v. People*, 87 Ill. 76. To maintain a creditor's suit against the sureties on the bond, he must first obtain judgment at law, in some states. *May v. Kelly*, 61 Ala. 489; *Commonwealth v. Moltz*, 10 Pa. St. 527. Or a devastavit must be first established against the administrator by action or accounting, *Wilbur v. Hutts*, 25 S. C. 246; and so averred, *Id.* There must be an order for the payment of the claim, *State v. Stafford*, 73 Mo. 653; *George v. Elms*, 46 Ark. 260; *Hall v. Bramble*, 2 Dak. 189; although this seems not to be necessary in Missouri, if there are ample assets and no refusal of the order is shown. *State v. Shelby*, 75 Mo. 482. But if a judgment against the administrator is unsatisfied, suit lies without proceeding against him for a devastavit. *Dobbins v. Halfacre*, 52 Miss. 561. And a prior suit is unnecessary against a concealed or absconding principal. *Commonwealth v. Wenrich*, 8 Watts 159. So, an action lies against the surety in Georgia, by statute, without judgment of devastavit against the administrator, if the administrator removes from the state. *Giles v. Brown*, 60 Ga. 658. And a judgment against the administrator *de bonis non* will support an action against the sureties of the administrator in chief for his devastavit. *Pilcher v. Drennan*, 51 Miss. 873.

In like manner, a legatee is not entitled to sue on the executor's bond, until after decree for distribution, unless the executor has admitted the claim, *Coffin v. Jones*, 5 Pick. 61; *Beall v. New Mexico*, 16 Wall. 535; *Probate Judge v. Adams*, 49 N. H. 150; except in the case of a residuary legatee, *Williams v. Cushing*, 34 Me. 372. So,

an action for a distributive share must be preceded by a probate decree fixing the amount. *Ordinary v. Smith*, 3 Green 92; *Groton v. Tallman*, 27 Me. 68. But if the suit fail for want of such averment and proof, it will not bar a second action properly brought. *State v. Roth*, 47 Ark. 222. A suit for such share lies, however, against the surety after final order for distribution served on the administrator without formal demand of the surety. *Elwell v. Prescott*, 38 Wis. 274; and before the administrator's discharge by the Probate Court. *Stewart v. Morrison*, 81 Tex. 396. But suit may be brought on the bond, under the Missouri statute, by the residuary legatee (after the estate is discharged of other trusts) without charging the executor in equity as a trustee or proceeding in the Probate Court against him. *State v. Grigsby*, 92 Mo. 419. So, the administrator *de bonis non* may by leave of the court sue, in Minnesota, for the balance of the administrator's account without previous order for payment. *Balch v. Hooper*, 32 Minn. 158.

*Who may sue.* An action upon the administration bond may be prosecuted in the name of the probate judge as the successor of the Ordinary to whom the bond was given. *Johnson v. Dawkins*, 20 S. C. 528. The Code allows either the real party in interest or the probate judge to sue. *Id.* Under the former practice, in South Carolina, the parties at whose instance the action was prosecuted were required to indorse their names on the record, and only they could claim any rights in the action or be liable for costs. *Bomar v. Ezell*, 22 S. C. 394. A bond given to the governor may be used by his successor. *Livingston v. Courts*, Cox 42. But where an executor as residuary legatee gives bond in the form of an ordinary executor, it is enforceable only as a common-law obligation, and not as a statutory bond, and therefore suit can-

not be brought on it by the successor of the probate judge. *Cleaves v. Dockray*, 67 Me. 118. So, the bond of an administrator *cum testamento annexo* executed in the form of an original administration bond cannot be enforced by the successor of the probate judge to whom it was made. *Frye v. Crockett*, 77 Me. 157. When the action is in the name of the people, to the use of, etc., the people may sue for the use of more than one person in the same action. *People v. Stacey*, 6 Ill. Ap. 521. And where the bond runs to the people, the order of the surrogate is a sufficient assignment of it. *Rowe v. Parsons*, 6 Hun 338; *Crider v. Curry*, 66 Barb. 336. In Missouri, a suit on the bond of an executor or administrator can be maintained only in the name of the state, to the use of the party aggrieved; the bond being given to the state as obligee, the state is the trustee of an express trust. *Woodworth v. Woodworth*, 70 Mo. 601. So too, in North Carolina. *Norman v. Walker*, 101 N. C. 24. Thus, the administrator *de bonis non* may sue in the name of the state *ex rel.*, &c. *Grant v. Rogers*, 94 N. C. 755. But where the creditor has brought suit in his own name instead of "the state *ex rel.*," the court may properly allow an amendment. *State v. Shelby*, 75 Mo. 482. If no successor is appointed or suit brought by him, the state may sue, in Indiana, on the administrator's bond, after the default and removal of the administrator, for surplus escheated to the state. *Fuhrer v. State*, 55 Ind. 150.

Where one bond is given by several administrators, it may be treated as the separate bonds of all, on which one can sue for a devastavit of the other. *Nanz v. Oakley*, 120 N. Y. 84. But in general, the sureties cannot bring an original suit on the administrator's bond. *Dunnell v. Providence*, 9 R. I. 189.

In general, creditors, heirs, legatees,

or surviving executors or administrators or their successors, are authorized to sue on the bond of any executor or administrator after the violation of any of the duties of his trust. *Lucas v. Donaldson*, 117 Ind. 139. And a creditor is a "party grieved," and entitled as such to an order for prosecution of the bond, if he show a *prima facie* case of indebtedness. *Matter of Hormass*, 1 McCart. 493. Creditors who may sue are those whose claims have been formally allowed. *First National Bank v. How*, 28 Minn. 150. But a creditor, who proves his debt in the state of the principal administration, cannot sue on the ancillary administrator's bond for his default in not paying over to the principal administrator the balance of account ordered to be paid (although the principal administrator is therefore unable to pay creditors). *Probate Court v. Brainard*, 48 Vt. 620. After judgment in his favor against the deceased administrator a creditor may sue although there is an administrator *de bonis non* (who has no assets and refuses to sue). *Thornton v. Park*, 61 Ga. 549. But statutory preferences of debt do not apply in such a suit. *Commonwealth v. Meyerhaven*, 17 Phila. 108.

*Successor in office.* The administrator *de bonis non* may bring suit on the administrator's bond for his default or devastavit by force of the statute in most of the United States. *Wickham v. Page*, 49 Mo. 526; *Badger v. Jones*, 66 N. C. 305; *Franklin County v. McIlvain*, 5 Ohio 200; *State v. Porter*, 9 Ind. 342; *State v. Brown*, 80 Ind. 425; *Carter v. Trueman*, 7 Pa. St. 315; *State v. Smith*, 64 Md. 101. So, the administrator *cum testamento annexo*, on the executor's bond. *Prescott v. Farmer*, 59 N. H. 90; *Foster v. Wise*, 46 O. St. 20. An administrator *de bonis non* is "interested in his official capacity" and, without application to the probate judge for leave, may sue under the

statute, in Maine. *Probate Judge v. Dockray*, 78 Me. 139. But his suit must be brought in the name of the probate judge. *Probate Judge v. Claggett*, 36 N. H. 381. A statute authorizing such suit is sufficient authority, although passed after the bond was given. *Graham v. State*, 7 Ind. 470. On the removal of an administrator the proper party to sue on the bond is his successor in office, and not the heirs. *Peveler v. Peveler*, 54 Tex. 53. So, his successor in office, and not the next of kin of the intestate, should sue on the bond of the administrator *de bonis non*. *Lansdell v. Winstead*, 76 N. C. 366. In Mississippi, the action on the administrator's bond is brought by the administrator *de bonis non*, if the money is needed for payment of debts, otherwise by the distributees. *Weir v. Monahan*, 67 Miss. 434; Code, § 1998. But the sureties of the administratrix (who is also the widow of the intestate) are liable only to the children, and not to the administrator *de bonis non*, for a policy of life insurance collected by the widow and not accounted for. *Kelley v. Mann*, 56 Iowa 625. And an administrator *de bonis non* cannot sue on the administrator's bond for his failure to file an inventory and account, if the estate has been fully administered. *State v. Smith*, 52 Conn. 557. At common law an administrator's sureties are liable on the bond to the administrator *de bonis non* only for unadministered assets remaining in hand, and to creditors or next of kin for waste and conversion by the former administrator. *Probate Judge v. Dockray*, 78 Me. 139.

*By legatee or distributee.* Suit may be brought on the bond by a legatee, *Mighton v. Dawson*, 38 O. St. 650; without proving special damage, *Forbes v. McHugh*, 152 Mass. 412. But such suit must be authorized by the probate judge, in Nebraska, and should be in the name of the judge. *Buel v. Dickey*, 9 Neb. 285. So, execution

may issue on the bond for the benefit of a devisee of land charged with debts and legacies, who is injured by a sale for debts ordered on the misrepresentation of the executor. *Chapin v. Waters*, 110 Mass. 195. But if the bond does not comply with the statute, *e. g.*, the bond of an administrator *cum testamento annexo* in the form of an ordinary administration bond, it may be valid as a voluntary bond but not enforceable for the payment of legacies. *Small v. Commonwealth*, 8 Pa. St. 101; *Walker v. Crossland*, 3 Rich. Eq. 23. Suit may be brought in some states by any party injured, *Crawford v. Tribble*, 69 Ga. 519; or for all persons interested (the writ not being specially indorsed for the benefit of any particular person), *Newcomb v. Williams*, 9 Met. 536; *Bennett v. Russell*, 84 Mass. 537; or by a distributee in his own name, *Kaminer v. Hope*, 9 S. C. 253; or the guardian of an infant distributee, *Stevens v. Cole*, 7 Cush. 467; or by husband and wife, where the wife is distributee. *Burch v. Clarke*, 10 Ired. 172. Where distributees can sue, actions may be brought by separate distributees based on separate judgments against the administrator. *Bramley v. Forman*, 15 Hun 144.

*Against whom.* The suit on the bond is not against the estate, but against the administrator individually, *Scroggs v. Tutt*, 23 Kan. 181; although it may be in form against him as administrator, *McNulty v. Marcus*, 57 Ga. 507. On a joint and several bond it may be against one of the obligors. *O'Gorman v. Lindeke*, 26 Minn. 93. And on a joint bond a non-resident surety need not be joined as defendant. *Teague v. Corbitt*, 57 Ala. 529. But in Missouri, the public administrator is a necessary party to an action on his bond against his sureties. *Brown v. Weatherby*, 71 Mo. 152. In Indiana, however, the personal representatives and creditors of a deceased administrator need not

be joined in an action on the bond by creditors against the sureties. *Embree v. State*, 85 Ind. 368. In an action on the bond against the surety it is sufficient to prove judgment against the administrator, *fi. fa. de bonis testatoris* not paid and sufficient assets received. *Grimmet v. Henderson*, 66 Ala. 521. But evidence of the insolvency of the administrator is insufficient without proof of the steps taken to enforce the liability (as required in Louisiana). *Pickett v. Gilmer*, 32 La. An. 991; *Gaillard v. Bordelon*, 35 La. An. 390. So, in Indiana, the representatives of a deceased surety have an equitable right to have the property of the principal exhausted before resort can be had to the estate of the surety. *Strong v. Taylor School Township*, 79 Ind. 208.

*Equity jurisdiction.* In general, the remedy against the sureties on the bond is by an action at law only, and not by a bill in equity. *Edes v. Garey*, 46 Md. 24. And in Mississippi, it has been held that the attempt to confer upon chancery courts power and jurisdiction to entertain suits on the bonds of executors and administrators (R. C. § 976) is unauthorized by the constitution and void. *Smith v. Everett*, 50 Miss. 575.

But where the executor dies before account filed or order for payment, a court of equity may compel account and determine the amount of the devastavit, *Trust Co. v. Pratt*, 25 Hun 23; since there can be, after his death, no judicial settlement of the liability, which would be evidence against the surety, and without it no action at law on the bond could be maintained. *Martin v. Ellerbe*, 70 Ala. 326. The statute providing for an action at law on the bond, under conditions which cannot be complied with, does not exclude such remedy. *Haines v. Meyer*, 25 Hun 414. And where a distributee files a bill in equity to compel the administrator to account, he

can maintain no action at law upon the bond until the equity case is finally settled and the amount of liability thereby ascertained. *State v. Dilley*, 64 Md. 314.

*Procedure.* In an action on the bond of an administrator several breaches may be joined, even though they relate to several persons, provided they are all covered by the bond. *State v. Hoover v. Berryhill*, 84 N. C. 132. But an action on the bond for a devastavit cannot be joined with an action against the clerk for taking an insufficient bond. *Mitchell v. Mitchell*, 96 N. C. 14. So, fraud in an account settled in the Probate Court cannot be tried in an action on the bond for not settling a true account. *Paine v. Stone*, 10 Pick. 75. Formal demand before suit is unnecessary. *Pickens v. Miller*, 83 N. C. 543. But a suit on an executor's bond may be stayed, where he filed an inventory, but did not account within the time required by law, his sureties being financially responsible. *Lee's Case*, 16 Stew. (N. J.) 172. So, where judgment is given for the penalty of a bond, proceedings may be stayed until the administration account is settled in the Probate Court. *Probate Judge v. Lane*, 51 N. H. 342. And a bill may be filed for an injunction against a *scire facias*, or any other proceeding against the defendant, as executor of the deceased surety, with reference to the suretyship. *Tunnele v. Burton*, 4 Del. Ch. 382.

In a common-law action on the bond for any breach the judgment is for the entire penalty, *Ordinary v. Snook*, 5 Halst. 65; *Probate Judge v. Arrington*, 116 Mass. 552; *Defriez v. Coffin*, 155 Mass. 203; *Probate Judge v. Lanc*, 51 N. H. 342; but the Ordinary may stay execution and settle the amount due, *Ordinary v. Snook*, *ubi supra*. In Massachusetts the amount is assessed afterward, *Choate v. Arrington*, *ubi supra*; but assessment by a jury is discretionary with the court, and not a matter of

right, *Defriez v. Coffin*, *ubi supra*. Interest in excess of the penalty of the bond is not recoverable. *Commonwealth v. Meyerhaven*, 17 Phila. 108. But in Pennsylvania, the courts give judgment for the penalty in favor of the commonwealth and for damages to parties for whose use, etc. *Miltenberger v. Commonwealth*, 14 Pa. St. 71. The measure of damages recoverable by an administrator *de bonis non* on the bond of his predecessor is all the property not duly administered, wasted, or converted. *State v. Smith*, 64 Md. 101. Under a bequest of a comfortable support of testator's widow in his house, the recovery may include damages for inconvenience and discomfort as well as for necessary repairs. *Conant v. Stratton*, 107 Mass. 474. A judgment on the administration bond for non-payment of a prior judgment does not merge the prior judgment. *McLean v. McLean*, 90 N. C. 530.

*Defenses and pleading.* The regularity of the administrator's appointment cannot be questioned by the sureties in a suit on the bond, whether recited in the bond, *Moore v. Earl*, 91 Cal. 632, or not, *Zeigler v. Sprengle*, 7 Watts & S. 175; *Plowman v. Henderson*, 59 Ala. 559; nor the regularity of the order removing his predecessor, *Kelly v. West*, 80 N. Y. 139; *Harrison v. Clark*, 87 N. Y. 572, affg. 20 Hun 404; N. Y. Laws of 1870, c. 359; nor the character of the distributees under an order for distribution to them as administrators of deceased next of kin. *White v. Weatherbee*, 126 Mass. 450. But it is a good defense that the bond was obtained from the surety by fraudulent collusion of the administrator and the plaintiff. *Campbell v. Johnson*, 41 O. St. 588. And where suit on the bond is based on a judgment in the state court, the executor may set up insufficiency of assets by reason of a judgment in the United

States court and pray for leave to make payment *pro rata*. *Ames v. Slater*, 27 Minn. 701. But a settlement in another state (decedent's domicile) is no defense if there has been no accounting here. *Grant v. Rogers*, 94 N. C. 751. In a suit on the bond, alleging only that the administrator failed to sell land for payment of the plaintiff's claim, he may claim as a set off the plaintiff's indebtedness to the estate as surviving partner of the intestate. *Everett v. Waymire*, 30 O. St. 308. But action lies on the bond upon a judgment rendered against the estate, although the judgment creditor may owe a note to the estate, and although the estate is solvent. *Pence v. Makepeace*, 75 Ind. 480. It is sufficient to aver that the administrator has not turned over certain moneys, as by the condition of the bond and the order of the Probate Court he was in duty bound to do. *State v. Bartlett*, 68 Mo. 581. No greater certainty is required in assigning breaches upon the bond of an administrator than if the suit were against the surety himself. *Morris Canal &c. Co. v. Van Vorst*, 3 Zab. 98. But a creditor of the business of the deceased, carried on by the administrator by direction of the court, should allege the devastavit of trade assets, although the court had ordered such debts to be paid out of the general estate. *Altheimer v. Hunter*, 56 Ark. 159. It is in general a sufficient answer that the administrator "duly administered," *State v. Cloud*, 94 Ind. 174; subject, however, to a motion to make it more specific, *State v. Barrett*, 121 Ind. 92.

*Statute of limitations.* The bond is part of the administration proceedings, and not an independent cause of action, and will be barred with the liability which is the ground of the action. *Biddle v. Wendell*, 39 Mich. 452. As against the surety, the statute runs not

from the date of the bond, but from the time when a cause of action accrues against him, *Ricks v. Gauntt*, 35 La. An. 920; *i. e.*, from the return of the *fi. fa.* against the administrator, *Morrison v. Lavelle*, 81 Va. 519; or from the decree settling the devastavit (and not from the devastavit), *Wright v. Lang*, 66 Ala. 389; or from the creditors' leave to sue, *Lanier v. Irvine*, 24 Minn. 116; G. S. c. 60, § 6. In Kentucky, the bond is barred against the administrator in fifteen years, and against the surety in five years, and with it all implied liability. *Hargis v. Sewell*, 87 Ky. 63. The Statute of Limitations on a special executor's bond fixing the time of payment runs from the expiration of the time, not from the time for presentment against the estate. *Blackmore v. Kent*, 95 Mich. 446. In North Carolina, the statute runs from the time of a debtor's death to relieve his estate. *Morris v. Syme*, 88 N. C. 453. An administrator *de bonis non* may proceed against his predecessor's bond immediately after his appointment, although twenty years had elapsed since the original administrator's appointment and two years since his death. *Grant v. Rogers*, 94 N. C. 755. The statute is suspended from the death of the administrator until the appointment of his successor. *Brawley v. Brawley*, 109 N. C. 524. But it runs from demand made by the administrator *de bonis non* against the representatives of the deceased administrator, and not from judgment thereon, *Gill v. Cooper*, 111 N. C. 311; or from the decree on accounting by the representatives of the deceased administrator, and not from the death of the administrator, *Williams v. Flippin*, 68 Miss. 680. Where an executor is directed to pay the income to the widow for life, and then to pay legacies, the statute runs as to a default in paying the legacies from the widow's death, and not from the original failure to invest the princi-

pal properly. *Thayer v. Keyes*, 136 Mass. 104.

*Evidence.* The administrator's appointment is sufficiently proved, though not recited in the bond, by evidence of actions as such, accounting, probate decree, and revocation of letters. *Dayton v. Johnson*, 69 N. Y. 419. In a suit for misappropriation by an administrator his account is admissible, although filed after his appointment as executor of the will. *Taylor v. McArthur* (Iowa), 54 N. W. Rep. 228. The burden is on the defendant alleging an alteration of the bond. *Peveler v. Peveler*, 54 Tex. 53. If the bond is lost, the burden is on the plaintiff as to its contents. *Kaminer v. Hope*, 9 S. C. 253. And where a copy is substituted by a statute for a lost bond, the recital in record and decree of substitution is conclusive as to loss, prior existence, and replacement of the bond, but not as to its execution. *Tanner v. Mills*, 50 Ala. 356. A foreign bond, filed in another state and not removable, may be proved by copy. *Jackson v. Jackson*, 67 Ga. 167. In a suit to recover the proceeds of real property the record of the sale is admissible, as well as parol evidence of the amount actually received, *State v. Lindley*, 98 Ind. 48; but where the petition of a creditor alleges failure to pay his claim, and conversion of assets as breaches, proof of failure to pay will not be taken as sufficient proof of conversion, *Embree v. State*, 85 Ind. 368.

But in a suit on a surrogate's decree the decree alone is insufficient evidence if objected to for want of the entire record. *Nanz v. Oakley*, 60 Hun 431. But the statute provides, in Wisconsin, for proof of the order of distribution by copy, without the rest of the record. *Elwell v. Prescott*, 63 Wis. 274. In a suit on the bond upon a decree for distribution the sureties cannot question the original jurisdic-

tion of the surrogate, *Field v. Van Cott*, 15 Abb. Pr. N. S. 349; or the regularity of the decree, *Johnson v. Smith*, 25 Hun 171; but in such a suit, in South Carolina, the previous account and decree may be restated and corrected by a reference. *Kennedy v. Adickes* (S. C.), 15 S. E. Rep. 922. A decree of distribution on account rendered is also conclusive as to the amount of assets received. *Holden v. Curry* (Wis.), 55 N. W. Rep. 965; and presumptive evidence of the devastavit, even when a statute requiring judgment and execution at law had not been complied with. *People v. Gould*, 4 Denio 551; *Potter v. Ogden*, 136 N. Y. 384; 2 R. S. 72, § 19. A decree on an account rendered after the death of the administrator is admissible and presumptive evidence against the sureties. *Williams v. Flippin*, 68 Miss. 680. See, also, *Mumford v. Overseers*, 2 Rand. 315; *Craddock v. Turner*, 6 Leigh. 116; *Lyles v. Caldwell*, 3 McCord 225; *Ordinary v. Condry*, 2 Hill (S. C.) 313; *Bryant v. Owen*, 1 Kelly 355; *Douglass v. Haviland*, 24 Wend. 35; *Liscomb v. Postell*, 38 Miss. 476. A judgment against the administrator for a devastavit precludes him, but in some states does not preclude his sureties, from showing that there were no assets. *Hobbs v. Middleton*, 1 J. J. Marsh. 176. And in a suit on the bond for non-payment of the judgment it is *prima facie* evidence that the claim had been duly presented. *People v. Gray*, 72 Ill. 343. But a judgment against the administrator obtained without fraud is conclusive against his sureties as to defenses available in the former suit. *Heard v. Lodge*, 20 Pick. 53. In Alabama, a creditor must reduce his claim to judgment before he can sue on an administrator's bond, and such judgment is conclusive against the surety as to the existence of the debt. *May v. Kelly*, 61 Ala. 489.

## \*BOOK THE SIXTH.

OF THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION, AS LONG AS THEY ARE UNREVOKED :—OF THE REVOCATION OF THEM, AND OF THE CONSEQUENCES THEREOF.

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### CHAPTER THE FIRST.

OF THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION AS LONG AS THEY REMAIN UNREPEALED.†

It is a legal consequence of the exclusive jurisdiction of the Probate Division in deciding on the validity of wills of personalty, and granting administration, that its sentences pronounced in the exercise of such exclusive jurisdiction, should be conclusive evidence of the right directly determined (*a*). Hence a probate, even in common form, unrevoked, is conclusive both in the courts of law and of equity (*b*), as to the appointment of executor, and the validity and contents of a will, so far as it extends to personal property : and it cannot be impeached by evidence even of fraud (*c*).

Therefore, it is not allowable to prove that another person was appointed executor, or that the testator was insane, or \*that the will of which the probate has been granted was forged : for that would be directly contrary to the seal of the court in a matter within its exclusive jurisdiction (*d*). So the probate of a will conclusively establishes

† See American note at end of this Chapter.

(*a*) 1 Phil. Ev. 343, 7th edit.

(*b*) *Allen v. Dundas*, 3 T. R. 125. *Griffiths v. Hamilton*, 12 Ves. 298. *Jones v. Jones*, 3 Meriv. 171. All the cases on this subject will be found collected and commented on with great ability in Hargrave's Law Tracts, p. 459, *et seq.* A probate obtained, as a matter of course, on a Scotch confirma-

tion, under stat. 21 & 22 Vict. c. 56 (see *ante*, p. \*298), stands on the same footing ; and it makes no difference that proceedings are pending in Scotland for a reduction of the confirmation : *Cumming v. Fraser*, 28 Beav. 614.

(*c*) *Griffiths v. Hamilton*, 12 Ves. 307. *Ante*, p. \*38, n. (*m*). *Post*, pp. \*472, \*473.

(*d*) *Noel v. Wells*, 1 Sid. 359.

[\*464]      [\*465]



in all courts that the will was executed according to the law of the country where the testator was domiciled (*e*).

In short, without the *constat* of the Court of Probate, no other court can take notice of the rights of representation to personal property; and when that court has, by the grant of probate or letters of administration, established the right, no other court can permit it to be gainsaid (*f*).

By the Court of Probate Act (20 & 21 Vict. c. 77, s. 75), "After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in, or affected by such grant of administration, until such administration shall have been recalled or revoked."

Stat. 20 & 21 Vict.  
c. 77, s. 75.

So, in *Bouchier v. Taylor* (*g*), it was decided by the House \*of Lords that after a sentence in the Ecclesiastical Court determining the question who are the next of kin of the intestate, and granting letters of administration to the person found to be such next of kin, the Court of Chancery is precluded from directing any issue to try that question. And this decision was held by Lord Lyndhurst in *Barr*

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tion.

(*e*) *Whicker v. Hume*, 7 H. of L. 124. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country, but it proves nothing else: *Whicker v. Hume*, 7 H. of L. 124. Therefore the fact that probate of a will has been granted by an English court is not conclusive that the testator was domiciled in England, even though the will is in such form that, though admissible as a testamentary instrument according to the English law, it would not have been entitled to probate, according to the law of the country of the true domicile of the deceased: *Bradford v. Young*, 26 C. D. 656; 29 C. D. 617. And it would seem from the decision of the House of Lords in *Concha v. Concha*, 11 App. Cas. 541, that even though the facts had been such that the court in granting probate decided, and necessarily decided, the question of domicile (which was not the case in *Concha v. Concha*),

yet the judgment would not have bound everybody as a judgment *in rem*, but would leave open the question of domicile, so far as regards the distribution of the residuary sum of the testator's property after all the creditors, who had a right to come upon it, had been sufficiently paid off.

(*f*) *Attorney-General v. Partington*, 3 Hurl. & C. 204. *Re Ivory*, 10 C. D. 372.

(*g*) 4 Bro. C. 708, Yoml. edit. See Hargraves, Law Tracts, pp. 472-476. The case of *Bouchier v. Taylor* was much discussed in the House of Lords in *Concha v. Concha* (*ubi sup.*), and distinguished on the ground, 1stly, that the question as to which the residuary legatee under the will of Alice Merchant was held bound by reason of the decision against his predecessor in title, was the very point which had to be decided by the Spiritual Court in the litigation between Dr. Bouchier and the

v. Jackson (*h*) (reversing the decree of Knight-Bruce, V.-C.) (*i*), to be a binding authority for the proposition, that if the sentence of the Ecclesiastical Court, in a suit for administration, turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in the Court of Chancery, between the same parties, for distribution (*k*).

Upon this principle it was decided, that payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the deceased, notwithstanding the probate be afterward declared null in the Ecclesiastical Court, and administration be granted to the intestate's next of kin (*l*): for if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor, as long as the probate was unrepealed: and the debtor was not obliged to wait for a suit, when he knew that no defense could be made to it (*m*).

When there is a question, whether particular legacies given by a will are cumulative or substituted, it is often determined by the circumstance of the bequest having been given by distinct instru-

executors of Alice Merchant: and 2ndly, that at that time the Spiritual Court was a court of distribution as well as a court merely to determine the question of the validity of the testament, and to grant probate or administration.

(*h*) 1 Phill. C. C. 582.

(*i*) 1 Y. & Coll. C. C. 585.

(*k*) So long as letters of administration remain in force they are conclusive evidence that the administrator to whom as next of kin they were granted, is in fact such next of kin. Re Ivory, 10 C. D. 372; *per* Lush, J., 374. In Long v. Wakeling, 1 Beav. 400, where A. B. being entitled to a fund in court, died, and administration was granted to a person, as "the natural and lawful sister" of A. B.; and it appeared from the proceedings in the cause, that A. B. was illegitimate, the court refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it

should not be paid out of court without notice to the Crown.

(*l*) Allen v. Dundas, 3 T. R. 125. See also Prosser v. Wagner, 1 C. B., N. S. 289, and stat. 20 & 21 Vict. c. 77, s. 77, *post*, p. \*500.

(*m*) Allen v. Dundas, 3 T. R. 129. Where, however, a sum of stock was standing in the name of a testatrix, which her executors overlooked, and the dividends remaining unclaimed, the stock was transferred to the National Commissioners; and afterward, one Sanders procured a probate in the name of T. Hunt, of a forged will of the testatrix, and obtained a transfer; it was held by Lord Langdale, M. R., that the probate did not authorize a payment to Sanders, and that a party giving faith to the probate was bound to see that the person claiming under it was a real T. Hunt: *Ex parte* Jolliffe, 8 Beav. 168.

ments (*n*). In such a case, if the probate has been granted, *as of a will and codicil*, this is conclusive of the fact of their being distinct instruments, though written on the same paper (*o*).

The probate is also conclusive as to every part of the will in respect of which it has been granted : † for example, in *Plume v. Beale* (*p*), where an executor proved a will of personal property, and then brought a bill in equity to be relieved against a particular legacy, on the ground of its having been interlined in the will by forgery, Lord Cowper dismissed the bill with costs, observing that the executor might have proved the will in the Ecclesiastical Court, with a particular reservation as to that legacy (*q*).

Probate conclusive as to every part of will.

But though courts of equity were bound to receive, as testamentary, a will, in all its parts, which had been proved in the proper spiritual court, yet courts of equity, in certain cases, affect with a trust a particular legacy or a residuary bequest, which has been obtained by fraud (*r*). For instance, if the drawer of a will should fraudulently insert his own \*name, instead of that of a legatee, he would be considered in equity as a trustee for the real legatee (*s*). And it has never been thought that

In what cases a court of equity will interfere.

(*n*) See *infra*, Pt. III. Bk. III. Ch. II. § VIII.

(*o*) *Baillie v. Butterfield*, 1 Cox, 392.

† See American note at end of this Chapter.

(*p*) 1 P. Wms. 388.

(*q*) See *ante*, p. \*315 (*t*).

(*r*) Mitf. Plead. 257, 4th edit.

(*s*) *Marriot v. Marriot*, 1 Stra. 666. Mitf. Pl. 258, 4th edit. See *post*, p. \*473, note (*f*). So in *Segrave v. Kirwan*, 1 Beat. 157, the executor, who was a barrister, had himself prepared the will, the rule of law at the time being, that the executor was entitled to the residue unless otherwise disposed of, or unless a legacy was bequeathed to him. (See *post*, Pt. III. Bk. III. Ch. V. § II.) And Sir A. Hart held that it was the duty of the executor to have informed the testator that such was the rule, and that he could not be allowed to profit from this omission, but must be decreed to be a trustee for the next of kin. See also *Bulkeley v. Wilford*, 2 Cl. & F.

102. S. C. 8 Bligh, 111. It was held by Sir J. Stewart, V.-C. (notwithstanding the case of *Allen v. McPherson*, *post*, p. \*472, *et seq.*) that the court, under its equitable jurisdiction, has authority to declare an attorney a trustee for the heir-at-law and next of kin of real and personal estate given him by a will prepared by himself, where he has improperly taken advantage of the testator's ignorance, or allowed him to remain under a mistaken impression which influenced the gift : *Hindson v. Weatherill*, 1 Sim. & G. 609. But this decision was reversed on appeal, on the facts, the Lords Justices declining to give any opinion on the law of the case : Lord Justice Turner, however, distinguished it from *Segrave v. Kirwan*, observing that in that case the testator had no intention to benefit Kirwan the counsel : 5 De G. M. & G. 301. See also *Walker v. Smith*, 29 Beav. 394.

courts of equity, by declaring a trust, in such cases, infringed upon the jurisdiction of the ecclesiastical courts (t).

Again, although it is now settled that a will cannot, either before or after probate, be set aside in equity, on the ground that *the will* was obtained by *fraud on the testator*, yet where *probate* has been obtained by *fraud on the next of kin*, equity interferes and either converts the wrongdoer into a trustee, in respect of such probate, or obliges him to consent to a repeal or revocation of it in the court in which it was granted (u). Thus in *Barnesly v. Powell* (v), the bill sought to be relieved against a paper writing, purporting to be the \*will of the plaintiff's father, under which the defendant, Mansel Powell, claimed, and which was not without evidence to support it, although there was strong suspicion of forgery: It was also sought to be relieved against several acts of the plaintiff since his father's death; such as the decree of the Court of Exchequer against him and a sentence in the Prerogative Court, wherein the plaintiff's consent to establish that will by a probate was obtained, and a conveyance and assurances made by him: Lord Hardwicke, C., directed an issue, with a special direction on the decretal order, to know on what foundation the jury went, if they found against the will, whether upon forgery, or any particular defect in the execution; and his lordship, after making some observations, with respect to the relief against the decree of the Court of Exchequer, proceeded to remark, "As to the sentence of the Prerogative Court, as at present advised, that will create no difficulty if the Will is found forged; for then the plaintiff's consent appearing to have been obtained by the misrepresentation of that forged Will, that fraud infects the sentence; against which the relief must be here: This is not absolute, but only to show the tendency of my opinion upon the equity reserved after the trial; for I should not scruple decreeing the defendant, who obtained that probate, to stand as a trustee in respect of the probate; which would not overturn the jurisdiction of that Court." After a very long trial by a special jury, a verdict was brought in against the will, with an indorsement that it was grounded on forgery, and not on any defect in the execution. Upon the equity reserved, Lord Hardwicke admitted that undoubtedly the jurisdiction of the wills of personal estate belonged to the Ecclesiastical Court, according to which law it must

(t) 1 Stra. 678. Gilb. Eq. Rep. 209.  
Fonbl. Eq. Bk. 4, Pt. 2, c. 1, s. 1,  
n. (a).

(u) Mitf. Pl. 357, 4th edition.

(v) 1 Ves. Sen. 119, 284, 287. 2 Ro-  
per, Leg. 688, 3rd edition; recognized by  
Lord Cottenham in *Price v. Dewhurst*,  
4 M. & Cr. 85.

be tried, notwithstanding the will is found forged by a jury at law, upon the examination of witnesses ; but there was a material difference between the Court of Chancery taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the Ecclesiastical Court by his fraud, not upon the testator, but the person disinherited thereby : That fraud in obtaining a will infected the whole ; but the case of a will, of which the probate was obtained by fraud on the next of kin, was of another consideration (*x*) : That, in the case before him, the plaintiff had given a covenant to the defendant to do all acts which Powell should require of him ; in consequence of which, a special proxy under hand and seal was obtained from him, confessing the allegations ; upon which sentence was pronounced of probate to the defendants, the executors : The probate depended on that deed : and it was, therefore, proper for the court to inquire, and set it aside for fraud, if proved ; and that was the ground of jurisdiction in the Court of Chancery, distinct from the will itself, and abstracted from the general jurisdiction of the Ecclesiastical Court to determine of a will of personal estate : On the whole circumstances of the case, his lordship decreed, that the defendant should consent (*y*), in the Ecclesiastical Court, the next term, to a revocation of the probate, and that after such revocation, the defendants should have a fortnight's time to propound the paper writing in the Ecclesiastical Court ; on failure of which, his lordship said he would compel the defendants to consent to the granting administration to the plaintiff : and his \*lordship added, "I think I ought to go further ; and although I shall not yet decree a trust, yet even now I

(*x*) The distinction here taken by Lord Hardwicke was recognized by Lord Apsley in *Meadows v. Duchess of Kingston*, Ambl. 764.

(*y*) Even if there had been no such decree and no consent by the defendants, it would seem that in a suit for revocation the defendants would have been estopped from denying that the will was a forgery. Thus in *Priestman v. Thomas*, 9 P. D. 210, in an action in the Probate Division, T. and G. propounded an earlier and P. a later will. The action was compromised, and by consent verdict and judgment

were taken for establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in action in the Chancery Division to which T. and G. were parties obtained the verdict of a jury to that effect and judgment that the compromise should be set aside. In another action in the Probate Division for revocation of the probate of the earlier will it was held, affirming the decision of the president of the Probate Division (9 P. D. 70), that T. and G. were estopped from denying the forgery.

shall be warranted to decree an account of the personal estate, to be paid into the Bank, for the benefit of the parties entitled, which for security was done in *Powis v. Andrews*; and the present case, from all the ill practice that has been, is stronger than that. This is the better method, to avoid any jealousy of infringing on the Ecclesiastical Court." It being insisted for the plaintiff, that the court ought to direct no examination of the said paper writing, but grant a perpetual injunction, from the circumstances of its being produced and found with the forged will, and its reciting a forged deed: his lordship thought this would be a very good defense in the Ecclesiastical Court, as they were circumstances of suspicion; but that it would be going too far to say, that, because of ill practice in one will, he should have no right as to another.

The effect of this decision was considered in the case of *Gingell v. Horne* (z). There, after a will of personalty had been proved *per testes* in the Ecclesiastical Court, a bill was filed by the next of kin, alleging that the testator's signature to the will was obtained when he was not of sound and disposing mind; that his medical attendants were not called as witnesses when the probate was obtained; and that the evidence of the testator's incompetency did not come to the knowledge of the plaintiffs until after the time allowed for appealing from the sentence of the Ecclesiastical Court had expired; and praying that the will might be declared to have been fraudulently obtained, and that the residuary legatee might be declared a trustee for the plaintiffs: A demurrer to the bill was allowed by Sir L. Shadwell, V.-C.: And his honor said, he had long considered the law as settled, that there is no method of escaping from the effect of probate, unless in a case like *Barnesly v. Powell*: That in the present case no fraud was practiced on the plaintiffs in \*obtaining probate; and this bill, therefore, did not afford any such materials for the interference of the court as there were in *Barnesly v. Powell*, in which Lord Hardwicke made a decree which afforded an opportunity of having the matter reconsidered in the Ecclesiastical Court.

The subject was much discussed in the case of *Allen v. Macpherson* (a). There the testator had by his will and subsequent codicils bequeathed considerable property to the plaintiff, and made also other bequests to other relatives: he afterward, by a further codicil, revoked these bequests, and in lieu of them made a small pecuniary provision for the plaintiff: The bill alleged that this codicil was obtained by

(z) 9 Sim. 539.

(a) 5 Beav. 469. 1 Phil. C. C. 133.  
1 H. of L. 191.

false and fraudulent representations, made by an illegitimate son of the testator, acting in confederacy with the defendant, his daughter and residuary legatee, as to the character and conduct of the plaintiff: In the Ecclesiastical Court, the plaintiff had unsuccessfully resisted the admission to probate of the revoking codicil, on the ground that it had been obtained by undue influence: And the bill further stated that the appellant was confined in that court to grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill or into any other case solely relating to the parts of the codicil which affected only the appellant: To this bill the defendant demurred: Lord Langdale, M. R., overruled the demurrer, being of opinion that, by analogy to former decisions, as the bill alleged that the revocation had been procured by the fraud of the defendant, the Court of Chancery had jurisdiction to deprive her of the benefit of it, and to declare her to be a trustee of that to which the law entitled her for the benefit of the person to whose prejudice the fraud was practiced (*b*). But this decision was reversed by Lord Lyndhurst, C., on appeal, and his lordship relied on the distinction taken by Lord \*Hardwicke (as above stated), in *Barnesly v. Powell*, and recognized by Lord Apsley in *Meadows v. The Duchess of Kingston* (*c*), between fraud on the testator and fraud upon the person disinherited thereby: His lordship further relied on *Kerrich v. Bransby* (*d*), as a decision of the House of Lords established not merely that a will cannot be set aside in equity for fraud (*e*), but further, that the Court of Chancery has no jurisdiction to declare the fraudulent legatee a trustee for the party defrauded. And this decision was afterward affirmed on appeal to the House of Lords; their lordships holding that the Ecclesiastical

(*b*) 5 Beav. 469.

(*c*) Ambl. 762. *Ante*, p. \*470, note (*x*).

(*d*) 7 Bro. P. C. 437. *Ante*, p. \*464, note (*c*).

(*e*) But Lord Abinger, C. B., in his judgment in *Middleton v. Sherburne*, 4 Y. & Coll. Exch. C. 358, argued with much pains that in *Kerrich v. Bransby*, the bill was dismissed on the merits, and that the case is, therefore, no authority for the proposition that a will cannot be set aside in equity for fraud.—That, however (observed Lord Lynd-

hurst in *Allen v. Macpherson*, 1 Phil. C. C. 146), has not been the understanding of the profession, and Lord Hardwicke, who probably was acquainted with the history of the case, expressly states in *Barnesly v. Powell*, that it was decided on the question of jurisdiction. And Lord Eldon, in *Ex parte Fearon*, 5 Ves. 633, 647, observed that it was determined in *Kerrich v. Bransby* that the Court of Chancery could not take any cognizance of wills of personal estate as to matter of fraud.

Court had jurisdiction to refuse and ought to have refused probate of that part of the codicil which affected the appellant, because, giving credit to the facts stated by the bill and admitted by the demurrer, that part of the codicil was not the will of the testator, having been obtained by a fraud practiced on him ; but that the proper course would have been to appeal to the Privy Council in order to set the matter right, and not to file a bill in equity, which was, in effect, an attempt to review the decision of a court of probate by the Court of Chancery (*f*).

\*Further, the Court of Construction, may, under particular circumstances, so construe an instrument, of which probate has been obtained, as to render it ineffectual. Thus in *Gawler v. Standerwick* (*g*), a paper was proved in the Spiritual Court as a codicil of the testator, which was signed by the executors and others, and purported to be an acknowledgment of what *they understood* to be the will of the testator, when he was unable to speak, in favor of certain legatees ; and a bill having been filed in equity, a question was raised whether they were entitled to their legacies under this paper proved as a codicil. Sir Lloyd Kenyon, Master of the Rolls, said, that, as it had been proved in the Spiritual Court, he was bound to receive it as a testamentary paper ; but having so done, *the Court of Equity was to construe it*: Now the effect of this codicil was only that the parties *understood* it to be the will of the testator that the asserted legatees should have legacies, and the heir promised to perform this ; but the court could not convert the promise of the heir into the will of the testator ; and his honor, therefore, thought that this paper, though testamentary, yet operated nothing.

Again, in *Walsh v. Gladstone* (*h*), the testator had drawn two

(*f*) 1 H. of L. 191. Lords Lyndhurst, Brougham, and Campbell were of opinion that the decree should be affirmed, *dissentientibus* Lords Cottenham, C., and Langdale, M. R. Lord Lyndhurst, in the course of delivering his opinion, observed as to the case mentioned by Gilbert, C. B., in *Marriot v. Marriot* (*ante*, p. \*468, n. (*s*)), of the drawer of the will fraudulently inserting his own name instead of that of the legatee, that if probate were refused in such a case, on account of the fraud, the real legatee would lose his legacy.

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And his lordship added, that he thought it would be found, on examining the cases in which the House of Lords had declared a legatee or executor to be a trustee for other persons, that they have been either questions of construction, or cases in which the party had been named as trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy. See also *Melhuish v. Milton*, 3 C. D. 27.

(*g*) 2 Cox, 16.

(*h*) 13 Sim. 261



checks on his banker in favor of two of his servants, with a direction that the checks should be presented after his death : about a year afterward he made a formal will, in which, among other bequests, he gave an annuity to each \*of the two servants, and the residue of his personal estate to certain other persons, and revoked all former wills : After his death all the three instruments were admitted to probate as constituting, together, his last will : and it was held by Shadwell, V.-C., that, although he was bound by the decision of the Ecclesiastical Court, to consider the two checks as part of the will, yet that nothing which that court had done in the way of construction, would bind the Court of Chancery ; and his honor proceeded to state that his opinion, sitting in the Court of Construction, was that the bequests made by the checks were revoked by the will ; and he decreed accordingly. This decision was afterward affirmed by Lord Lyndhurst, C. (i), who considered the question as one of construction, which it was within the competence of the Court of Chancery to determine, notwithstanding the probate granted by the Ecclesiastical Court : And his lordship relied on the case above stated, of *Gawler v. Standerwick*, and also that of *Campbell v. Lord Radnor* (k), in which it was declared that the first codicil, which had been admitted to probate, was to be considered as virtually revoked by the second (l).

Accordingly in *Thornton v. Curling* (m), Lord Eldon, C., expressed his opinion that if a British subject domiciled in a foreign country, by his will appoints an executor, but makes a disposition of his personal property, which, though valid by the laws of England, is invalid by the laws of that foreign country, the Court of Chancery is at liberty, notwithstanding probate may have been granted in this country, to hold that the will has no operation beyond appointing the executor : And his lordship observed that although, as the Ecclesiastical Court had granted probate of the will, he must take it to be a will, yet what part of the contents of that will was effectual, and in what way the \*court should determine on the property, was quite a different thing (n).

So in *Campbell v. Beaufoy* (o), a plea by an executor who has proved a will, that “ the testator was at the date of his Will, and also at the time of his death, domiciled in France, and that all the bequests

(i) 1 Phill. C. C. 294.

(k) 1 Bro. C. C. 171.

(l) See *post*, Pt. III. Bk. III. Ch. II.

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(m) 8 Sim. 310.

(n) See *Concha v. Concha*, 11 App. Cas. 541. *Bradford v. Young*, 29 C. D. 617.

(o) Johns. 320.

of the personal estate affected to be made by it are by the law of France null and void," was held by Wood, V.-C., to be a good plea in bar to a suit by a legatee under the will for payment of his legacy and for administration of the personal estate of the testator.

So in *Loffus v. Maw* (*p*), which there has already been occasion to state, a revoking codicil, though it had been admitted to probate, was not allowed under the circumstances to have any revoking effect (*q*).

Under the law before the passing of the Court of Probate Act (1857), the jurisdiction of the Ecclesiastical Court was confined to goods and chattels; it had no power of administration over other property; and therefore its judgments would bind those only who claim an interest in personal property. Hence the probate was not conclusive evidence, or even, it should seem, admissible evidence, that the instrument was a will, so as to pass copyhold or customary estate, or so as to operate as a sufficient execution of a power to charge land (*r*).

Again, it has already appeared (*s*), that to establish in evidence the will of a married woman made in execution of a power, probate of it in the Court of Probate is first necessary, in order to confirm judicially its testamentary nature: But formerly the production of such a probate would not alone have been sufficient to induce a court of equity to act upon it; for there were other special circumstances which might have been required to give the instrument effect as a \*valid appointment, *viz.*, attestation, sealing, &c., with which circumstances the temporal courts did not trust the judgment of the Spiritual Court. The witnesses, therefore, to these facts, must have been examined in chief to prove that the will was the wife's act, &c.; and if an attestation were not required by the power, still her signature must have been proved (*t*). But by the 10th section of the Wills

Stat. 1 Vict. c. 26, s. 10.

Act all such additional varieties in the execution of testamentary appointments have, in effect, been abolished.

Further, as the Court of Probate had no jurisdiction to authenticate a will, as far as it relates to real estate, it was held that the probate was no evidence at all of the validity or contents of a will, as to

(*p*) 3 Giff. 592.

(*q*) *Ante*, p. \*109 n. (*i*).

(*r*) *Hume v. Rundell, Madd. & Geld.* 331.

(*s*) *Ante*, pp. \*50, \*328.

(*t*) *Rich v. Cockell*, 9 Ves. 376. See also *Morgan v. Annis*, 3 De G. & Sm.

461, where Knight Bruce, V.-C., said he had no doubt the Court of Chancery had jurisdiction to decide on the validity of the execution of a testamentary power over personalty, with reference to the donee's state of mind at the time of the alleged execution.

such property (*u*), not even when the original will was lost (*x*), except indeed as a mere copy.

So on an indictment for forging a will, probate of that will unrepealed is not conclusive evidence of its validity so as to be a bar to the prosecution (*y*).

It must also be observed, that although the sentences of the Court of Probate are conclusive evidence of the right directly determined, yet they are not so of any collateral matter, which may possibly be collected or inferred from the sentence by argument (*z*). Therefore letters of administration which have been granted to a person as administrator of the effects of A. B. deceased, are not *prima facie* evidence of A. B.'s death (*a*).

\*Likewise, though no evidence was receivable to impeach the probate or the letters of administration, being the judicial acts of a court having competent authority, yet it might be proved that the court which granted them had no jurisdiction, and that therefore their proceedings were a nullity (*b*). So it may be proved that the supposed testator or intestate is alive: for in such case the Court of Probate can have no jurisdiction, nor their sentence any effect (*c*). And it may be shown that the seal attached to the supposed probate has been forged; for that does not impeach the judgment of the Court of Probate (*d*): or that the letters testamentary have been revoked; for this is in affirmance of its proceedings (*e*).

Very material alterations of some of the doctrines above stated were introduced by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

Alterations in the law as to the effect of probate as to real estate.

By sect. 61 of that statute, "Where proceedings are taken under this Act for proving a Will in solemn form,

Stat. 20 & 21 Vict. c. 71, s. 61. Where a will affecting

(*u*) Bull. N. P. 245.

(*x*) Doe v. Calvert, 2 Campb. 389.

(*y*) Rex v. Buttery, Russ. & Ry. C. C. R. 342. Rex v. Gibson, *ibid.* 343, n. (*a*). It is said in Rex v. Vincent, 1 Stra. 481, that the probate was admitted as conclusive evidence on a similar prosecution: but that case must now be considered as overruled.

(*z*) Blackham's Case, 1 Salk. 290.

(*a*) Thompson v. Donaldson, 3 Esp. N. P. C. 63. Moons v. De Bernales, 1 Russ. Chan. Cas. 301 (but see French v. French, Dick. 268, where Lord Hard-

wicke, under particular circumstances, admitted the probate as proof of the testator's death). However, if the plaintiff sues an executor or administrator, and there is no plea of *ne unques executor* or *administrator*, the plaintiff's right to sue is admitted, and therefore no evidence can be required of the death of the testator or intestate: Lloyd v. Finlayson, 2 Esp. 564.

(*b*) Allen v. Dundas, 3 T. R. 130.

(*c*) *Ibid.*

(*d*) Marriot v. Marriot, 1 Stra. 671.

(*e*) Bull. N. P. 247.

real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

or for revoking a probate of a Will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a Will is disputed, unless in the several cases aforesaid the Will affects only personal estate, the heir at law, devisees and other persons having or pretending interest in the real estate affected by the Will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin, or others having or pretending interest in the \*personal estate affected by a Will, should be cited or summoned and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders, and to the discretion of the Court" (f).

And by sect. 62, "Where probate of such Will is granted, after such proof in solemn form, or where the validity of the Will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall inure for the benefit of all persons interested in the real estate affected by such Will, and the probate copy of such Will, or the letters of administration with such Will annexed, or a copy thereof, respectively, stamped with the seal of her Majesty's Court of Probate, shall in all Courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be

Sect. 62. Where the will is proved in solemn form, or its validity otherwise decided on, the decree of the court to be binding on the persons interested in the real estate.

(f) The affidavit on which an application to cite the persons interested in the real estate affected by a will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England and at a date since the Wills Act came into operation: *Campbell v. Lucy*, L. R. 2 P. & D. 209. Where, in a suit commenced by caveat, the party propounding a will wishes to cite the heir-at-law under this section, before pleas have been filed contesting the validity of the will, he must make an affidavit that he intends to proceed and prove the will in solemn form: *Peacock v. Lowe*, L. R., 1 P. & D. 311. In an action as to the validity of a will the

court refused to order the assignee of the heir-at-law of the testatrix to be cited as a person having or pretending interest in the real estate affected by the will: *Jones v. Jones*, 7 P. D. 66. The provisions of the above section are not altered by the Judicature Acts and the rules therein contained, therefore in order that a decree in a testamentary suit may bind the heir-at-law or devisee of real estate, a citation should be taken out against them under the provisions of the above section, notwithstanding the directions of R. S. C. 1883, Ord. XVI., rule 11 [R. S. C. 1875, Ord. XVI., rule 13]. *Kennaway v. Kennaway*, 1 P. D. 148.

received as conclusive evidence of the validity and contents of such Will, in like manner as a probate is received in evidence in \*matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the Will, or the invalidity of the Will is otherwise declared by decree or order under this Act, such decree or order shall inure for the benefit of the heir at law or other persons against whose interest in real estate such Will might operate, and such Will shall not be received in evidence in any suit or proceedings in relation to real estate, save in any proceeding by way of appeal from such decrees or orders" (g).

And by sect. 63, "Nothing herein contained shall make it necessary to cite the heir at law or other persons having or pre-  
tending interest in the real estate of a deceased person, unless it is shown to the Court and the Court is satisfied that the deceased was, at the time of his decease, seised of or entitled to or had power to appoint by Will some real estate beneficially, or in any case where the Will propounded, or of which the validity is in question, would not in the opinion of the Court, though established as to personalty, affect real estate; but in every such case, and in any other case in which the Court may, with reference to the circumstances of the property of the deceased or otherwise, think fit, the Court may proceed without citing the heir or other persons interested in the real estate: provided, that the probate, decree or order of the Court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party" (h).

\*And by sect. 64, "In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days, at least, before the trial or other proceeding in which the said proof

Sect. 63. Heir in certain cases not to be cited, and where not cited not to be affected by probate.

Sect. 64. Probate or office copy to be evidence of the will in suits concerning real estate, save where the validity of the will is put in issue.

(g) This clause, as likewise the 61st section, *ante*, p. \*478, and sections 63 and 64, *infra*, are not applicable to wills executed before the Wills Act, or which in whole or in part have been executed not in accordance with the requirements

of the Wills Act: *Campbell v. Lucy*, 2 L. R. P. & D. 209.

(h) See *ante*, p. \*284, and the rule 78 (contentious) there stated, as to obtaining the requisite order authorizing the citation of the heir, &c. See also the

[\*480]      [\*481]

shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said Will or the letters of administration with the Will annexed, or a copy thereof, stamped with any seal of the Court of Probate ; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such Will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition" (i).

It will be observed, that unless the will has been proved in solemn form and its validity declared by decree or order, so as to fall within the 62nd section, it will still be necessary to produce the original will, if notice of disputing the \*validity be given under the 64th section. But such notice will be given at the peril of having to pay the costs of the production and proof of the will (k).

For by sect. 65, it is enacted, that "In every case in which, in any such action or suit, the original Will shall be produced and proved, it shall be lawful for the Court or Judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid."

In *L'Fit v. L'Batt* (l), there was a French will, the original whereof was proved in French, and, under it in the same probate, the will was translated into English, but it appeared to be

cases cited, *ibid.*, note (f), as to the construction of the rule.

(i) The true meaning of this provision appears to be that when a notice has been given of the intention to use the probate in evidence, and the other side do not give a counter notice within four days, the probate, without more, will be admissible evidence of a will and its contents as to realty, and will be *prima facie* evidence of the validity of the will and the competence of the testator : in other words the probate alone will be sufficient evidence to go to the jury of a devise of realty, but there is nothing to prevent the other side from showing

by evidence that the will is not valid, or that the testator was not competent : *Barraclough v. Greenhough*, L. R., 2 Q. B. 612 [reversing S. C., L. R., 2 Q. B. 1].

(k) The absence of notice may, it would seem, be waived or the court may adjourn the case to allow of the notice being given, or to allow proof of the will *per testes* : *Hilliard v. Eiffe*, L. R., 7 H. L. 39-49.

(l) 1 P. Wms. 526. It seems from *Re Cliffe's Trusts*, W. N. 1892, p. 66, that the Court of Construction will look at the foreign original even where an English translation only is proved.

falsely translated; upon which it was objected, that the translation being part of the probate, and allowed in the Spiritual Court, it must bind: and the application must be to the Spiritual Court to correct the mistakes in the translation, which until then must be conclusive: but, *by the Master of the Rolls (m)*, nothing but the original is part of the probate, neither hath the Spiritual Court power to make any translation: and supposing the original will was in Latin (as was formerly very usual) and there should happen to be a plain mistake in the translation of the Latin into English, surely the court might determine according to what the translation ought to be: And so it was done in that case.

In *Havergal v. Harrison (n)*, where the words in the probate were "brother and sister," and it was suggested that in the original will the words were "brothers and sister," Lord Langdale, M. R., said, he was bound by the probate, but if, on the production of the original will, a doubt \*existed as to the accuracy of the probate copy, the court would give an opportunity to the parties to apply to the Ecclesiastical Court to set it right. Accordingly, in *Oppenheim v. Henry (o)*, *coram* Wood, V.-C., where the probate copy of a will was in these words: "I release my sons from all claims due to me by bonds *on* moneys advanced to them by me," and his honor was desired to look at the original will, in order to ascertain whether the word written "*on*" in the probate was not "*or*" in the will, the learned judge declined to do so, and said that looking at the will to ascertain the alleged inaccuracy of the probate was quite different from the case of a question arising on the punctuation of the will, or on the introduction of a capital letter, or other mark indicating where a sentence was intended to begin, and which might affect its sense.—The law seems not to be settled on the point last suggested by his honor, *viz.*, whether, and in what cases, the court will look at the will itself in order to derive aid in its construction from the punctuation, or manner of writing, or from other appearances on the face of it. In *Compton v. Bloxham (p)*, *coram* Knight Bruce, V.-C., his honor relied, in construing a will, on the circumstance that certain words began an entirely new sentence; and he begged to have it observed, that although it was a will of personalty, he had sent for and examined the original will, and had been influenced by it in his construction. Again, in *Shea v.*

der to correct inaccuracies in the probate.

(m) Sir Joseph Jekyll.  
(n) 7 Beav. 49.

(o) 9 Hare, 802, note (b) to *Walker v. Tippen*.  
(p) 2 Coll. 201.

Boschetti (*q*), where a *fac-simile* probate of a will, with certain passages of it struck through, had been granted, Sir J. Romilly, M. R., expressed his opinion that, whether the Court of Probate grants a *fac-simile* probate or not, the Court of Chancery is bound to look at anything in the original will itself which may aid and assist it in coming to a correct conclusion as to the construction to be put upon the contents of the will. So in *Manning v. Purcell* (*r*), it appears that the Lords Justices \*in construing a will of personalty, ordered the original will to be produced, and had regard to certain erasures appearing therein, but which had been omitted in the probate, notwithstanding that counsel objected that the probate copy could alone be looked at. And in the case of *Re Harrison* (*s*), where a testatrix in making her will used a law stationer's form, which was partly in print, blanks being left in it, which were to be filled up by the person who made use of it, and after directing that her debts and funeral and testamentary expenses should be paid by her executrix thereinafter named gave all her property both real and personal "unto to and for her own use and benefit absolutely, and I nominate, constitute, and appoint my niece Catherine Hellard to be executrix of this my last will and testament." The Court of Appeal held that there was an effectual gift of the residue to Catherine Hellard, and that for the purpose of construing a will the court is entitled to look at the original will, as well as at the probate copy. In his judgment, Lord Esher, M. R., says, "The main argument in this case is founded on there being a blank in the Will, and how can you tell that there is a blank without looking at the Will. I know of no rule that for the purpose of construing a Will you may not look at the original Will itself." In this judgment Baggallay, L. J., concurred, who said, "I fully agree that, for many purposes, the first thing to be looked at is the probate copy of the Will. But when I look at the probate copy in this case, I find that there is a blank space in it. This is consistent either with an accidental omission to fill up the blank or with an intention not to fill it up. Then it becomes material to look at the original Will." But in *Gann v. Gregory* (*t*), *coram* Lord Cranworth, C., where the Ecclesiastical Court had granted a *fac-simile* probate of a will, made after the Wills Act came into operation, with cross lines drawn in ink over the bequests of certain legacies (the decree in the Prerogative Court \*having been pronounced for the will as contained in the document, "with the several alterations, interlineations, and erasures, appearing there-

(*q*) 18 Beav. 321.(*s*) 30 C. D. 390.(*r*) 7 De G. M. & G. 55.(*t*) 3 De G. M. & G. 777.

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in"); and it was suggested to his lordship, that if the original will were looked at, it would be seen that the pencil alterations made in the legacies contained under the cross lines must have been made after those lines were drawn, and it might thence be inferred that the testator meant the legacies to remain part of the will; his lordship said that he was not of those who thought it was competent for the Court of Chancery on every occasion to look at the original will, though he was aware Lord Eldon did it in some instances, but in each there were particular circumstances: And his lordship proceeded to express his opinion, that as probate had been granted of the will, with the alterations in it, it must be taken as conclusively settled by the Ecclesiastical Court that the will was at its execution in its present state; that is, that the testator executed the instrument with the lines drawn over it, meaning thereby, that the legacies were not to stand part of the will. Again, in *Taylor v. Richardson (u)*, *coram* Kindersley, V.-C., where the probate had been delivered out with blanks in the course of the will, and it was suggested that it might be construed as if the words ran continuously, his honor observed, that the Ecclesiastical Court said that the will was an instrument in such and such words, and in certain places, such and such blanks, and that the Court of Chancery was bound to look at them as part of the will.

In the earlier editions of this work Sir Edward Vaughan Williams wrote as follows:—"On the whole, it may, perhaps, be doubted whether, in strictness, the Court of Chancery has not gone beyond its legitimate means for construing Wills of personalty even in the instances above mentioned, where it has sought aid from appearances in the Will itself not to be found in the probate, and whether the more proper course is not to apply to the Probate Court for a corrected *\*fac-simile* probate, if it be desired to rely on stops or capital letters, or any marks which, in truth, are apparent in the Will, though not in the probate. For until the Court of Probate has sanctioned them as legal parts of the Will, *non constat*, that they have not been introduced by a stranger, or by the testator himself after the Will was executed, or otherwise, so as not properly to form a part of it: And this can only be decided in the Ecclesiastical Court, which is bound to exclude from its probate, whether a *fac-simile* probate or not, all such appearances on the face of the Will as do not legitimately belong to it as a testamentary instrument." But the present practice would seem to be to look at the original Will (x).

(u) Drewr. 16.

(x) See *Re Harrison*, 30 C. D. 389.

† *American statutes as to probate.* In many of the United States the probate is made conclusive evidence of the due execution of the will until it is set aside. This is so, in *Iowa* (1888 R. C. § 3554), *Maine* (1883 R. S. p. 609, § 15), *Massachusetts* (1882 P. S. p. 748, § 7), *Michigan* (1882 An. Stats. § 5804), *Minnesota* (1891 G. S. § 5641), *Nebraska* (1893 C. S. p. 417, § 143), *New Hampshire* (1891 P. S. p. 524, § 1), *Rhode Island* (1882 P. S. p. 473, § 1), *Vermont* (1880 R. L. § 2049), *Wisconsin* (1889 An. Stats. § 2294), *Wyoming* (1887 R. S. § 2247); and, except as to jurisdiction, in *Kentucky* (1887 G. S. p. 292, § 28). These statutes, although framed in general terms, must be understood to refer to personal property only. This is so expressed in the statutes of *New York* (2 R. S. 61, § 29) and *Florida* (1892 R. S. § 1810), which make the probate conclusive as to the validity of the will. In other states the probate is made conclusive, except against persons under disability, within a limited time, and as against such persons within a like limit after the removal of the disability, *e. g.*, after five years, in *Alabama* (1886 Code, § 2002), as to the validity of the will; *Arkansas* (1884 Dig. Stats. § 6526), *Missouri* (1889 R. S. § 8890); after one year, in *Arizona* (1887 R. S. § 996), *California* (Code C. P. § 1333), *Dakota* (1887 C. L. § 5686), *Idaho* (1887 R. S. § 5324), *Montana* (1887 C. S. p. 283, § 36), *Nevada* (1885 G. S. § 2703), *Utah* (1888 C. L. § 4016); after two years, in *Colorado* (1891 An. Stats. § 4679), *Mississippi* (1892 An. Code, § 1822), *Ohio* (1890 R. S. § 5933), *Virginia* (1887 Code, § 2543), or in one year after disability removed; *West Virginia* (1891 Code, p. 664), as in *Virginia*; after three years, in *Illinois* (1891 R. S. p. 1536, § 7), *Indiana* (1888 R. S. § 2596), or in two years after disability removed; and after twenty years without excep-

tion of disability, in *Alabama*. In *Georgia* (1882 Code, § 2424), probate in solemn form is conclusive on all parties notified, and probate in common form is conclusive after seven years except against minor heirs, and against them in four years after they attain majority. Id. § 2425. Probate is made conclusive as to the right to contest it after two years, in *Kansas* (1889 G. S. § 7224), and in *Kentucky* (1887 G. S. p. 1294, § 37), except against infants and against them in twelve months after disability; after seven years, in *Delaware* (1874 R. S. p. 539, § 3). In *Mississippi*, a contest on the ground of concealed fraud is allowed within two years after its discovery.

In some of the states already cited probate is made essential to pass any title by will to either real or personal property. This is so, in *Maine*, *Massachusetts*, *Michigan*, *Minnesota*, *Nebraska*, *New Hampshire*, *Ohio* (1890 R. S. § 5942), *Rhode Island*, *Vermont*, *Wisconsin*, and *Wyoming*. In others it is necessary to the admissibility of the will in evidence. This is so, in *Arkansas* (Id. § 6510), *Kentucky* (Id. p. 292, § 28), *South Carolina* (1882 G. S. § 1874), to prove devises. In others the probate has the same effect as to both real and personal property: *North Carolina* (1883 Code, § 2174), *South Carolina* (1882 G. S. § 1887). It is made conclusive as to real property devised in the will after five years, in *Pennsylvania* (1883 Purd. Dig. p. 509, § 12), and after seven years in *New Jersey* (1877 Rev. p. 1250, § 38). In *Florida* (1892 R. S. § 1810), probate is *prima facie* evidence of the validity of a devise of real property. And in *Tennessee*, it is sufficient evidence of such devise (1884 Code, § 3037). Probate is presumptive evidence as to real property of all facts determined by the surrogate as against parties cited, and those claiming under them, in *New York* (Code C. P. § 2627), and probate

by one or more witnesses is presumptive evidence of due execution (Code C. P. § 2629); but whether the will is or is not the last will of the testator may be determined in an action in the Supreme Court, brought by any person interested, the verdict being conclusive as to real and personal property, unless a new trial be granted or the judgment thereon be reversed or vacated (Code C. P. § 2653a; act of 1892, c. 591).

*As to presumption of death.* In most of the United States seven years absence from home without intelligence received raises the presumption of death. This is so in the states enumerated where no period is stated, a different period being fixed in the other states below mentioned: *Arkansas* (1884 Dig. Stats. § 4597), *California* (Code C. P. § 1963), *Connecticut* (1888 G. S. § 566), *Dakota* (1887 C. L. § 5312), *Delaware* (1874 R. C. p. 496, § 6), *Indiana* (1888 R. S. §§ 2232-35), in urgent cases five years; *Kentucky* (1887 G. S. p. 546, § 16), *Mississippi* (1892 An. Code, § 1737), *Missouri* (1889 R. S. § 4890), *New Jersey* (1877 Rev. p. 294, § 4), *New York* (Code C. P. § 841), *Oregon* (1892 An. Laws, p. 587, § 26), *Texas* (1888 R. S. Art. 3221), *Vermont* (1880 R. L. § 2077), fifteen years; *Virginia* (1887 Code, § 3373), *West Virginia* (1891 Code, p. 831, § 44). Express provision is made for administration or probate and distribution of the estate on such presumption, in *Connecticut* (1888 G. S. § 566), distribution on proper security; *Indiana* (1888 R. S. § 2236), *Michigan* (1882 An. Stats. § 5867), temporary administration after three months; *Missouri* (1889 R. S. § 272), *New Hampshire* (1891 P. S. p. 528, § 17), administration after one year and distribution after five years; *New Jersey* (1877 Rev. p. 216, § 1), distribution of personal property on refunding bond, and (Id. p. 294, § 5) of proceeds of real property by judi-

cial proceedings; *New York* (Code C. P. §§ 2670-74), temporary administration or probate with power to hold and rent real property (Id. § 2676); *Pennsylvania* (1883 Purd. Dig. p. 1658, § 66), by trustee after one year and distribution after seven years; *Rhode Island* (1882 P. S. p. 476, § 8), administration or probate after three years; *Vermont* (1880 R. L. § 2077). In most of these statutes provision is made for reinstating parties injured on the return of the supposed decedent or other disproof of the presumption.

*Necessity for probate.* In some of the United States the probate of a will is absolutely essential to its admissibility in evidence, Schouler on Executors, § 58; Woerner on Admn. § 228; *Pitts v. Melser*, 72 Ind. 469; *Totheree v. Lawrence*, 30 Miss. 416; *Williamette Co. v. Gordon*, 6 Or. 175; see too, p. 354, n., *supra*; *Ochoa v. Miller*, 59 Tex. 460; or to the creation of any title or right under it, see above cases; also *Aubert v. Aubert*, 6 La. An. 104; *Louisiana Civil Code*, Art. 1637; *Trawick v. Davis*, 85 Ala. 342; *Heard v. Palmer*, 72 Ga. 178; *Gaines v. Chew*, 2 How. 619 (La.); although it may have been duly probated in another state, *Kerr v. Moon*, 9 Wheat. 565 (Ohio); *Wood v. Matthews*, 53 Ala. 1; *Turner v. McDonald*, 76 Cal. 177. But a domestic will duly probated in one county vests in the devisee property devised to him in another county. *Carpenter v. Denoon*, 29 O. St. 379. On the other hand, in Nebraska, probate is said to be a means of proving the legatee's title, which vests in him and may be transferred by him without probate. *Walton v. Ambler*, 29 Neb. 643. Under the laws of Rhode Island, a will of lands cannot be admitted as evidence of a devise, until it has been duly probated by the order of a court having jurisdiction to admit it to probate. *Moore v. Greene*, 2 Cur. tis, 202; *Wilkinson v. Leland*, 2 Peters

627. The probate of a will in the proper probate court is an indispensable preliminary, in Rhode Island, to establish the right of the devisee, and an act of the legislature to confirm a conveyance made by the executor of a will probated in another state is void. *Wilkinson v. Leland*, *ubi supra*. But where it is not required by statute, an ejectment suit may be sustained without probate of the will. *Richards v. Pierce*, 44 Mich. 444. It is said, however, in Mississippi, that if it be certified according to the act of congress of May 26, 1790, title may be made thereunder, although it be not admitted to probate in a proper court, in Mississippi, *Ratcliff v. Ratcliff*, *ubi supra*; so also, in Tennessee, as between the parties without any record or registration. *Smith v. Neilson*, 13 Lea 461. In general, the effect of probate is not to establish the validity of the will, *Bent's Appeal*, 35 Conn. 523; *Jaliffe v. Fanning*, 10 Rich. 186; *Prather v. Whittle*, 16 S. C. 40; *Cox v. Cox*, 101 Mo. 168; nor its construction, *Woerner on Admn.* § 228. But the surrogate may examine the original will and determine its construction on a point material to the matter before him (distribution). *Arcularius v. Sweet*, 25 Barb. 406. The Probate Court cannot, however, construe a subsequent deed by the testator as an implied revocation of the will and deny its probate on that account. *Prather v. Whittle*, 16 S. C. 40.

*How far conclusive.* The judgment of the Probate Court upon an application for probate of a will is binding upon all the world until revoked or set aside. *Steele v. Renn*, 50 Tex. 467, 481; *Hodges v. Bauchman*, 8 Yerg. 186; *Scott v. Calvit*, 4 Miss. 158; *State v. McGlynn*, 20 Cal. 271; *Will of Storey*, 20 Ill. Ap. 183; *Sullivan v. Rabb*, 86 Ala. 433; *Nicrosi v. Ginly*, 85 Ala. 365; *Leatherwood v. Sullivan*, 81 Ala. 458; *Tucker v. Whitehead*, 58

Miss. 762; *Estate of Whitaker*, 14 Phila. 275; *Simmons v. Saul*, 138 U. S. 439; *Thompson v. Beadles*, 14 Bush. 47; *Hubbard v. Hubbard*, 7 Or. 42; *Langston v. Marks*, 68 Ga. 435. So, *Story Eq.* § 440; *Woerner on Admn.* § 227; *Croswell on Exrs.* §§ 13 *et seq.* So, a refusal to admit to probate is binding even on unborn devisees in remainder. *McCay v. Clayton*, 119 Pa. St. 133. But a revocation of the probate in favor of a minor heir will not inure to the benefit of other heirs who are barred by the Statute of Limitations. *Samson v. Samson*, 64 Cal. 327. The probate is conclusive as to the execution of a will of personal property, *Jackson v. LaGrange*, 19 Johns. 386; and in New York as to its validity, *Hoyt v. Hoyt*, 112 N. Y. 493; *Burger v. Hill*, 1 Bradf. 360; after the lapse of one year, *Post v. Mason*, 26 Hun 187; *Code C. P.* § 2647; although this was formerly not so. *Booth v. Kitchen*, 7 Hun 265. In some other states it is conclusive as to the validity of the will in a collateral suit, *Robinson v. Allen*, 11 Gratt. 785; *Ward v. Glenn*, 9 Rich. 127; and as to the capacity of the testator, *Cassels v. Vernon*, 5 Mason 332; *Baptist Convention v. Ladd*, 59 Vt. 5; *Parker v. Parker*, 11 Cush. 519; *Mutual Benefit Insurance Co. v. Tisdale*, 91 U. S. 238; *Collins v. Ross*, 2 Paige 396. But this conclusiveness does not control in a suit afterward brought to test the validity of a devise. *Bogardus v. Clark*, 4 Paige 623. In many states the probate of a will is conclusive only as to its due execution. *Chicago &c. Railroad Co. v. Wasserman*, 22 Fed. Rep. 872 (Neb.); *Hegarty's Appeal*, 75 Pa. St. 503; *Fortune v. Buck*, 23 Conn. 1; *Fallow v. Chidester*, 46 Iowa 588; *Estate of Carey*, 49 Vt. 236. In Alabama, it is conclusive as to the capacity of the testator, and the due execution and validity of the will. *Goodman v. Winter*, 64 Ala. 410.

*As to real property.* At common law the probate of a will had no conclusive effect as to the real property devised by it, but it might be questioned collaterally in an ejectment suit. Hoyt v. Hoyt, 50 N. Y. 278; Wilkinson v. Methodist Episcopal Church, 9 Stew. (N. J.) 514. So, the refusal to admit to probate did not conclude in an ejectment suit. Smith v. Bonsall, 5 Rawle 80; and the probate was not even competent evidence to prove the will in such suit. Darby v. Mayer, 10 Wheat. 465; Greenwood v. Murray, 26 Minn. 259. A decree probating a will of personalty only, although alluding to realty, is conclusive only of the *factum*, and as a will of personal property. Banks v. Sherrod, 52 Ala. 267. The probate may, however, be conclusive as to personal property, although the will relates to both realty and personalty. Post v. Mason, 26 Hun 187.

In many states this has now been changed by statute, and probate in such states is conclusive (generally after the lapse of a certain statutory period) as to real property and in any collateral action, such as an ejectment suit. Wilson v. Gaston, 92 Pa. St. 207; Leedom v. Lombaert, 80 Pa. St. 381; Lovett v. Matthews, 24 Pa. St. 330; Taylor v. Tibbatts, 13 B. Mon. 177; Tompkins v. Tompkins, 1 Story 547 (R. I.); Tarver v. Tarver, 9 Pet. 174 (Ala.); Hardy v. Hardy, 26 Ala. 524; Lyon v. Gleason, 40 Minn. 434; Broe v. Boyle, 108 Pa. St. 76; Cochran v. Young, 104 Pa. St. 333. And this has been held to be so, even to the extent of sustaining the execution of a will which was insufficient as to the land devised. Parker v. Brown, 6 Gratt. 554. And in some states the probate of a will is conclusive of its validity both as to real and personal property. Norvell v. Lessueur, 33 Gratt. 222; Brock v. Frank, 51 Ala. 85. But this is not so if the will has been treated by the court as a will of

personalty only, and acted on for forty years as such, Norvell v. Lessueur, *supra*; and is so after forty years' possession under it as a will of realty, Jackson v. Thompson, 6 Cow. 178; if the Probate Court had jurisdiction, Patten v. Tallman, 27 Me. 17. And in Pennsylvania, the probate is so far conclusive that the title of the devisee cannot be impeached on the ground that the will had been revoked by the testator's marriage. Broe v. Boyle, 108 Pa. St. 76. So, a trust of real property created by a will cannot be attacked thirty years after the probate of the will, where no appeal had been taken. Wells v. Stearns, 35 Hun 323. Formerly the probate was only *prima facie* evidence of due execution of the will as to real property, Barker v. McFerran, 26 Pa. St. 211; Norris v. Norris, 63 How. Pr. 319; and this is still the case, in Florida, as to its validity as a will of real property. Belton v. Summer, 31 Fla. 139.

*Collateral attack.* Where the Probate Court has jurisdiction, its action, however erroneous it may be, must be regarded as valid and binding in every collateral proceeding until reversed. Hobson v. Evans, 62 Ill. 146; Spofford v. Smith, 59 N. H. 366; Quidort v. Pergeaux, 3 C. E. Gr. 472; Tucker v. Whitehead, 58 Miss. 762; Banks v. Banks, 65 Mo. 432; Estate of Whitaker, 14 Phila. 275; Loudon v. Wilmington &c. Railroad, 88 N. C. 584; Johnson v. Beazley, 65 Mo. 250; Cooper v. Duncan, 20 Mo. Ap. 355; Ludlow v. Flournoy, 34 Ark. 451; Trimble v. James, 40 Id. 393; Hubbard v. Hubbard, 7 Or. 42; Goldtree v. McAlister, 86 Cal. 93; Whitman v. Heywood, 77 Tex. 557; Dennis v. Winter, 63 Cal. 16; Succession of Harris, 39 La. An. 443; Wilson v. Edmonds, 24 N. H. 517; Hall v. Woodman, 49 N. H. 295; Harrison v. Clark, 87 N. Y. 576; Boulton v. Scott, 2 Gr. Ch. 231; Nathan v. Lehman, 39

Ark. 256; Gillette v. Needham, 39 Mich. 143; Martin v. Robinson, 67 Tex. 388. Thus, in a collateral suit no question will be considered as to the regularity of the probate, Woodward v. James, 16 Abb. N. C. 246; Dickey v. Vann, 81 Ala. 425; Vanderpool v. Van Valkenburg, 6 N. Y. 190; King v. Bullock, 9 Dana 41; or the sufficiency of the evidence received by the Probate Court, Woodward v. James, *supra*; or the appointment of an executor, Sullivan v. Rabb, 86 Ala. 433; Broughton v. Bradley, 34 Id. 694; Nicrosi v. Ginly, 85 Id. 365; Mobberly v. Johnson, 78 Ky. 273; or of a trustee under a will, Bradstreet v. Butterfield, 129 Mass. 39. The letters testamentary are conclusive as to the authority of the executor. Belden v. Meeker, 47 N. Y. 307; Farley v. McConnell, 52 Id. 630. So, in general, as to letters of administration. Plume v. Howard Savings Institution, 17 Vr. 211; Brown v. Landon, 30 Hun 57; Duson v. Dupie, 32 La. An. 896; Illinois Central Railroad v. Cragin, 71 Ill. 177; Sullivan v. Fosdick, 10 Hun 173; Mobberly v. Johnson, 78 Ky. 273; Johnson v. Johnson, 66 Mich. 525; Farrand v. Caton, 69 Id. 235; Bennett v. Camp, 54 Vt. 36; Rogers v. Kennard, 54 Tex. 30; Reynolds v. McMullen, 55 Mich. 568; Corrigan v. Jones, 14 Col. 311; Maybin v. Knighton, 67 Ga. 103; Pick v. Strong, 26 Minn. 303. Their regularity cannot be questioned collaterally. Wescott v. Cady, 5 Johns. Ch. 334; Barclay v. Kimsey, 72 Ga. 725. Notwithstanding any irregularity in the appointment of the administrator, his letters are conclusive as to his authority until revoked. N. Y. Code C. P. § 2591; Abbott v. Curran, 98 N. Y. 665; Estate of Altemus, 32 La. An. 364; Moreland v. Lawrence, 23 Minn. 84; Munford v. Hall, 25 Id. 347. And where he has recovered a judgment after due service of all defendants, the judgment and sale under

it cannot be attacked by any of them for irregularity, or even for want of jurisdiction, in granting the letters of administration. Abbott v. Curran, *ubi supra*. So, the letters are conclusive in a collateral action as to the correct person having been appointed. Kelly v. West, 80 N. Y. 144. This is so *prima facie* in Alabama, unless the record shows the contrary. Wheat v. Fuller, 82 Ala. 572. Every order of the Probate Court is presumed to be correct as in courts of general jurisdiction. Brodrigg v. Tibbitts, 63 Cal. 80. And no irregularity can be set up collaterally, unless it appears on the record itself. New England Mutual Life Insurance Co. v. Woodworth, 111 U. S. 138 (Ill.). If the court has jurisdiction, the regularity and sufficiency of letters of administration cannot be questioned collaterally. Woerner on Admn. § 266; Plume v. Howard, 17 Vr. 211; Flinn v. Chase, 4 Denio 85; James v. Adams, 22 How. Pr. 409; Emery v. Hildreth, 2 Gray 228; Wright v. Wallbaum, 39 Ill. 554; Riley v. McCord, 24 Mo. 265. Even if they were issued without knowing of the existence of a will, though in such case voidable in a direct proceeding, but not void. Shephard v. Rhodes, 60 Ill. 301. The appointment of administrators and the allowance of claims against the estate are questions for the Probate Court; and its determination thereon, unappealed from, is binding on other courts. Bennett v. Camp, 54 Vt. 36. If the Probate Court has jurisdiction, all its proceedings are, in general, conclusive against any collateral attack. Merrill v. Harris, 26 N. H. 142; Tebbetts v. Tilton, 31 N. H. 273; White v. Weatherbee, 126 Mass. 450. This applies to an order settling accounts, Clement v. Brainard, 46 Conn. 184; Bulkley v. Andrews, 39 Conn. 523; or a decree of sale, Clarkson v. Beardley, 45 Conn. 197; or an order of distribution, Kellogg v. Johnson, 38 Conn. 269;

Wales v. Willard, 2 Mass. 120; Pierce v. Prescott, 128 Mass. 144; or for the removal of the executor and appointment of an administrator, Buchler v. Buffington, 43 Pa. St. 278; or an adjudication as to next of kin (except for want of jurisdiction or fraud in obtaining the order). Blackburn v. Crawford, 22 Md. 466.

This rule against the attack of probate in any collateral proceeding has become a rule of property, and is now universally and strictly adhered to. *Apel v. Kelsey*, 52 Ark. 341. Probate cannot be set aside on a mere motion, but should be reviewed by appeal or original action. *Will of Middleton*, 72 Iowa 424. While it remains in force, it cannot be held inoperative in a proceeding to sell land. *Matter of Williams*, 1 Lea 529. And this rule against questioning it collaterally extends to an action of ejectment, as we have seen. *Johnson v. Johnson*, 70 Mich. 65.

*Equity jurisdiction.* A court of equity has no jurisdiction, in general, to review and set aside a probate decree, even for fraud, *Rogers v. Rogers*, 3 Wend. 514; *Dublin v. Chadbourne*, 16 Mass. 441; *State v. McGlynn*, 20 Cal. 233; *Will of Broderick*, 21 Wall 503 (Cal.); *Gaines v. Chew*, 2 How. 619 (La.); much less on account of the alleged incompetency of the testator, *Mutual Benefit Insurance v. Tisdale*, 91 U. S. 238; *Collins v. Ross*, 2 Paige 396. It may, however, charge the next of kin as trustees on their promises inducing the deceased not to make a will. *Williams v. Fitch*, 18 N. Y. 547. As to the jurisdiction of the Court of Chancery in probate proceedings, see American note, p. \*499, *infra*.

*Jurisdictional facts.* For a full enumeration of these facts, see American note, p. \*481, *supra*. As to such facts, the rule of conclusiveness of probate and letters in any collateral attack is somewhat modified. In general, it

may be said that the presumption is in favor of the jurisdiction of the Probate Court, and the jurisdiction cannot be questioned collaterally. *Abbott v. Coburn*, 28 Vt. 663. This is so, *first*, as to the residence of the deceased, *O'Connor v. Huggins*, 113 N. Y. 511; *Woodward v. James*, 16 Abb. N. C. 246; *Holyoke v. Haskins*, 5 Pick. 20; *First National Bank v. Balcom*, 35 Conn. 358; *Irwin v. Scriber*, 18 Cal. 499; *Coltart v. Allen*, 40 Ala. 155; *Andrews v. Avery*, 14 Gratt. 229; *Tant v. Wigfall*, 65 Ga. 412; especially where the fact is affirmatively recited in the letters. *O'Connor v. Huggins*, 113 N. Y. 511. *Secondly*, as to assets within the county. *Murphy v. Creighton*, 45 Iowa 179; *Weir v. Monahan*, 67 Miss. 434; *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48. *Thirdly*, as to intestacy of deceased. *Schluter v. Bowery Savings Bank*, 117 N. Y. 125. In Alabama, letters of administration are *prima facie* evidence of intestacy. *Sims v. Boynton*, 32 Ala. 353. If the want of jurisdiction appears on the record, the administration may be questioned collaterally, but it is otherwise conclusive. *Moore v. Phillbrick*, 32 Me. 102; *Record v. Howard*, 58 Me. 225. And this is now the rule in Massachusetts also, *McFeely v. Scott*, 128 Mass. 16; Mass. P. S. c. 156, § 4; although it was formerly otherwise. *Cutts v. Haskins*, 9 Mass. 543; *Crosby v. Leavitt*, 4 Allen 410. In Florida, the jurisdiction of the county court of probate is special and must appear on the record. *Epping v. Robinson*, 21 Fla. 36; *Werskopf v. Dibble*, 18 Fla. 24.

But where the probate or administration proceedings are not merely voidable, but void for want of jurisdiction, the proceedings may be questioned collaterally. *Griffith v. Frazier*, 8 Cranch 9; *Pleasants v. Dunkin*, 47 Tex. 343. This is so, where the office

is already filled by a prior valid appointment. *Griffith v. Frazier*, 8 Cranch 9; *Flinn v. Chase*, 4 Denio 85; *Matthews v. Douthitt*, 27 Ala. 273. But a surety cannot set up such want of jurisdiction in the administrator's appointment in defense to a suit for his failure to pay over moneys ordered paid to his successor. *Power v. Speckman*, 126 N. Y. 354.

*Jurisdiction—presumption of death.* It is also true where the supposed decedent is not dead. It must be presumed that the court did not act without being satisfied of the fact of death. *Pleasants v. Dunkin*, 47 Tex. 343; *Williams v. Kernan*, 25 Hun 355; *Donaldson v. Lewis*, 7 Mo. Ap. 403; *Plume v. Howard Savings Institution*, 17 Vr. 211; *Beam v. Copeland*, 54 Ark. 70; *Martin v. Robinson*, 67 Tex. 378. The death is proved *prima facie* by the probate of a will, *Lyon v. Gleason*, 40 Minn. 434; *Hendrix v. Boggs*, 15 Neb. 469; or the issue of letters of administration, *Sims v. Boynton*, 32 Ala. 353; although the decedent had been seen alive three years before the letters were issued. *Tisdale v. Connecticut Life Insurance Co.*, 28 Iowa 12. And in a collateral action where no plea in abatement is filed, the letters are conclusive evidence of the death. *Newman v. Jenkins*, 10 Pick. 515. But in an action for dower, where the gist of the action is the death of the husband, the letters are not competent evidence of that fact. *Carroll v. Carroll*, 60 N. Y. 123.

But where "the decedent" is not dead, the Probate Court has no jurisdiction, and its action is said to be void *ab initio*. *Devlin v. Commonwealth*, 101 Pa. St. 273; *Stevenson v. Superior Court*, 62 Cal. 60; *Thompson v. People*, 107 Ill. 523; *D'Arusment v. Jones*, 4 Lea 251; *Shown v. McMackin*, 9 Lea 601. And that a person is sentenced to imprisonment for life, and is therefore *civilit*

*mortuus*, is of course no ground for the appointment of an administrator on his estate. *Matter of Zeph*, 50 Hun 523. It has been held that where the presumption of death is disproved, the administrator's sale of personal property by order of court is a trespass. *Duncan v. Stewart*, 25 Ala. 408. And the living "intestate" may recover the property sold by the administrator, *Moore v. Smith*, 11 Rich. 569; and may recover from the heir, his distributive share of certain real property taken by the heir on a recognizance for distribution of the price, although the payment had been made to his administrator. *Devlin v. Commonwealth*, 101 Pa. St. 273. So, he may even recover from a bank money deposited by him in the bank and paid by it to the administrator. *Jochumsen v. Suffolk Savings Bank*, 3 Allen 87; *Lavin v. Emigrant Savings Bank*, 18 Blatch. 1. Although the contrary has been held, with apparent reason, in *Roderigas v. East River Savings Institution*, 63 N. Y. 460, distinguished in *S. C.* 76 N. Y. 316; and seems to be necessary as a protection to persons acting in good faith in an everyday business. In the well-considered case of *Plume v. Howard Savings Institution*, 17 Vr. 211, it was held that a savings bank was liable at the suit of the administrator of an absentee who was legally presumed to be dead, without other affirmative proof of his death. In this case *Brasley, C. J.*, says, on p. 230, of *Roderigas v. East River Savings Institution*, *supra*: "As we are dealing in the present case with the decree of a court of general jurisdiction, it is not necessary to affirm the doctrine of this reported case, though in passing it may not be out of place to remark that its reasoning, notwithstanding the adverse criticism to which it has been subjected, appears to be of great weight. That a conclusive efficacy should be given to letters of



administration, by whatever tribunal issued, so far as merely collateral impeachment is concerned, is a plain dictate of sound public policy, for few things can be more oppressive than to require the debtors of a person who chooses so to absent himself as to give rise to a judicial conclusion that he is dead to bear the burden of paying the debts they owe to such absentee to his representative duly appointed according to legal forms, and at the same time to assume the risk of such payment being declared invalid on the ground that such absentee was still alive." In New Jersey, the statute now provides for giving a refunding bond in such case, to be assigned to and prosecuted by the supposed intestate on his return. Act of 1885, Rev. Supp. 777. See too, *Pennsylvania* (Purd. Dig. 1885 Supp. 2184), *Rhode Island* (G. S. c. 173, § 8). In the absence of such local statute, or of positive local decisions, the statutory presumption of death must be followed with extreme reluctance and caution in probate matters. Where the duly appointed "administrator" of a living person (presumed to be dead) has received moneys as such and applied them to debts of the "deceased," he is entitled to subrogation to the rights of the creditor, but is liable to the "deceased" for moneys still in his hands. *Beam v. Copeland*, 54 Ark. 70.

*Foreign probate.* A foreign probate is conclusive as to due exercise of testamentary capacity in an application for probate of the will, in Massachusetts. *Crippen v. Dexter*, 13 Gray 331. The admissibility of foreign wills and probate proceedings in evidence, and the manner of proving them, and the right to sue under authority of letters issued in another state or country, are considered in a later part of this work. The validity of bequests of personal property depends on the law of the testator's domicile, and the validity of devises

of real property depends upon the law of the place where the land lies. A will executed according to the law of the testator's domicile will pass personal property wherever situated, but with respect to devises of lands, the will must be executed according to the formalities of the law of the state where the land is situate. *Nelson v. Potter*, 21 Vr. 324; *Jones v. Habershaw*, 107 U. S. 174; *Robertson v. Pickrell*, 109 Id. 608; *Pratt v. Douglas*, 11 Stew. (N. J.) 516; 1 Jarman on Wills (5th Am. ed.) 1 and note b; 4 Kent 513; Story Conf. Laws, § 474; Whart. Conf. Laws, § 585. Therefore probate of a will in the testator's domicile, though conclusive as to the title to personal property, is of no force in establishing the efficiency or validity of a devise of land in another state. Such force can be given to it only by the law of the state where the land is located. *Nelson v. Potter*, *ubi supra*; *McCormick v. Sullivan*, 10 Wheat. 192; *Darby v. Mayer*, Id. 465; *Watts v. Waddle*, 6 Pet. 389; *Robertson v. Pickrell*, 109 U. S. 608; *Brine v. Insurance Co.*, 96 U. S. 627. But where a will executed and probated in Georgia, but not effectual to pass real estate in Alabama, is subsequently probated in Alabama, without further proof, the deficiencies of execution may, on presentation of a copy of the will and foreign probate in Alabama, be supplied by proof taken before the Alabama court, and the will thereupon become effectual to pass real estate in Alabama. *Pope v. Pickett*, 51 Ala. 584. A purchaser of land is not, however, charged with constructive notice of a foreign will, until it is proved in the state where the land lies, or until the will and the foreign probate are recorded in that state in accordance with its statutes. *Graves v. Ewart*, 99 Mo. 13; *Slayton v. Singleton*, 72 Tex. 209; *Keith v. Keith*, 97 Mo. 223.

In many of the United States pro-

vision is made by statute for recording a copy of the foreign will and probate as evidence of title to lands. *Alabama* (1886 Code, § 1985), *Arkansas* (1884 Dig. Stats. § 6513), *California* (Code C. P. § 1324), *Colorado* (1891 An. Stats. § 4678), *Connecticut* (1888 G. S. § 550), *Dakota* (1887 C. L. § 5677), *Delaware* (1874 R. C. c. 89, § 46), *Florida* (1892 R. S. § 1811), *Georgia* (1892 Code, § 2435), *Idaho* (1887 R. S. § 5315) *Illinois* (1891 R. S. c. 148, § 10), *Indiana* (1888 R. S. § 2091), *Iowa* (1888 R. C. § 2351), *Kansas* (1889 G. S. § 7228), *Kentucky* (1887 G. S. c. 113, § 30), *Maine* (1883 R. S. p. 538, § 13), *Massachusetts* (1882 P. S. p. 749, § 15), *Michigan* (1882 An. Stats. § 5805), *Minnesota* (1891 G. S. § 5658), *Mississippi* (1892 An. C. § 1829), *Missouri* (1889 R. S. § 8901), *Montana* (1887 C. S. p. 281, § 27), *Nebraska* (1893 C. S. c. 23, § 144), *Nevada* (1885 G. S. § 2693), *New Hampshire* (1891 P. S. c. 187, § 13), *New Jersey* (1877 Rev. p. 757, § 23), *New York* (Code C. P. §§ 2703-05), *North Carolina* (1883 Code, § 2156), *Ohio* (1890 R. S. § 5937), *Oregon* (1892 An. Laws, § 3083), *Pennsylvania* (1883 Purd. Dig. p. 507, § 7), *Rhode Island* (1882 P. S. c. 183, § 6), *South Carolina* (1882 G. S. § 1875), *Tennessee* (1884 Code, § 3022), *Texas* (1888 R. S. Art. 1856), *Vermont* (1880 R. L. § 2057), *Virginia* (1887 Code, § 2536), *Washington* (1891 Code Proc. § 882), *Wisconsin* (1889 An. Stats. § 3789), *Wyoming* (1887 R. S. § 2246). In Florida, Georgia, and Illinois, the statute provides for the admission in evidence of the certified or exemplified copy of the foreign probate. By such record of the foreign probate the title to lands devised vests conclusively. *Dublin v. Chadbourne*, 16 Mass. 433; *Spring v. Parkman*, 12 Me. 127. Even an exemplified copy of the foreign will and probate from the records of such state is no evidence of title in the

devisee in lieu of such record. *Budd v. Brooke*, 3 Gill 198; *Graham v. Whitely*, 2 Dutch. 234.

The provisions of the statute of Missouri apply as well to a will probated in a foreign country as to one probated in another state. *Gaven v. Allen*, 100 Mo. 293. The New Jersey statute for recording a foreign will with a copy of the original probate is only intended to make such will and probate evidence in that jurisdiction; and a will so proved and recorded will not therefore operate as a sufficient devise of lands in New Jersey unless executed in conformity with its laws. *Nelson v. Potter*, 21 Vr. 324. And the statutory record, in New Jersey, of the foreign will (executed so as to pass lands in that state) is *prima facie* evidence only of the validity and due execution of such devise, but its force as such will outlive the revocation of the foreign probate. *Allaire v. Allaire*, 8 Vr. 317. See too, *Crippen v. Dexter*, 13 Gray 330; *Dublin v. Chadbourne*, 16 Mass. 434. But the original foreign probate, as evidence of the *factum* of the will, is a condition precedent to its being made a record in New Jersey, and that jurisdictional fact must appear by the certificate transmitted with the copy of the will. *Lindley v. O'Reilly*, 21 Vr. 636. So too, in Missouri, *Keith v. Keith*, 97 Mo. 223. The record of original probate must contain the full proofs taken on the original probate. *Lindley v. O'Reilly*, *ubi supra*; *Williams v. Jones*, 14 Bush 418. And the mere certificate of the clerk of the foreign probate court to the oath of the attesting witnesses is insufficient, *Hunter v. Kelly*, 92 N. C. 285; although it seems to have been held otherwise in *Gaines v. Fender*, 82 Mo. 497. And in Texas, a will probated in another state and recorded in Texas, is admissible as evidence of title, on the ground that the question of its validity is *res adjudicata*,

although the proceedings for the probate have not been recorded in the minutes of the court. *Poole v. Jackson*, 66 Tex. 380. The Wisconsin statute, making the record of a foreign probate evidence of title to real property and of the executor's power to sell, does not avail as evidence of authority and title to foreclose a mort-

gage belonging to the testator. *Hayes v. Lienloken*, 48 Wis. 509. As to the conclusive effect of such probate and record on questions passed upon by the original probate court, see too, *Shannon v. Shannon*, 111 Mass. 331 ; *Brock v. Frank*, 51 Ala. 85 ; *Thomas v. Morriett*, 76 Ga. 384 ; *Vance v. Anderson*, 39 Ia. 426 ; *Harris v. Harris*, 61 Ind. 117.

## \*CHAPTER THE SECOND.

### OF THE REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.†

By the Court of Probate Act, 21 & 22 Vict. c. 77, s. 75, "After any grant of administration, no person shall have power to sue or prosecute any suit or otherwise act (a) as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked."

Court of Probate Act, s. 75. After grant of administration no one to have power to sue, &c., as executor until the grant is recalled or revoked.

A probate or a grant of letters of administration may be revoked in two ways: 1. On a suit by citation. 2. On an appeal to a higher tribunal to reverse the sentence by which they are granted.

A revocation by citation usually is, when the executor or administrator is cited before the judge by whom the probate or letters of administration were originally granted, to bring in the same, and to show cause why they should not be revoked (b).

\*An appeal under the old law was to be effected by demanding letters missive, called *Apostoli*, from the judge *a quo*, to the judge *ad quem* (c).

Revocation upon citation.  
Revocation on appeal:

The manner and form of appeals were regulated by several statutes.

† See American note at end of this Chapter.

(a) When administration has been granted, and another person intermeddles with the goods, this shall not make him executor *de son tort*, by construction of law. *Ante*, pp. \*211, \*212.

(b) It was said in the judgment both of Sir James Hannen and Cotton, L. J., in the case of *Priestman v. Thomas*, 9 P. D. 70, 210, that the Chancery Division has no jurisdiction to revoke a will, but that the exclusive jurisdiction so to do is vested in the Probate Division. Although, it is submitted, this proposition is too wide, inasmuch as all divi-

sions have now equal and concurrent jurisdiction in matters testamentary, still the question does not appear to be of great practical importance, inasmuch as in the event of a person commencing proceedings for revocation in any division but the Probate Division, such proceedings would, upon application to the judge, be transferred into the Probate Division, as the division which can more conveniently and appropriately deal with such matters. See *Pinney v. Hunt*, 6 C. D. 98, and *Bradford v. Young*, 26 C. D. 656.

(c) *Gibs. Cod.* 1035.

By stat. 24 H. VIII. c. 12, s. 5 (repealed by 1 & 2 Ph. & M. c. 8, and revived by stat. 1 Eliz. c. 1), the appeal, where the cause was commenced before the archdeacon, lay to the bishop; and by sect. 6, where the cause was commenced before the bishop, to the archbishop of the province;—and by sect. 7, where the cause was commenced before the archdeacon of the archbishop to the Court of Arches (*d*), and from the Court of Arches to the archbishop. By statute 25 Hen. VIII. c. 19, an appeal was given from the archbishop to certain commissioners.

Manner and form of appeals, stat. 24 H. 8.

Stat. 25 H. 8, c. 19. Appeal to the delegates.

These commissioners were commonly called delegates (according to the language of the civil and canon law), on account of the special commission or delegation they received from the king (*e*).

(*d*) Com. Dig. tit. Prerogative (D. 13), citing Heath *v.* Atworth, 2 Dyer, 240, *b*. The person who administers justice in the Court of Arches, is the Official Principal of the archbishop: who was called *officialis de arcubus*, and the court itself *curia de arcubus*, from its being anciently held in the *Ecclesia B. Mariæ de Arcubus*, or Bowchurch, by reason of the archbishop's having Ordinary jurisdiction in that place, as the chief of his peculiars in London, and being the church where the dean of those peculiars (commonly called the Dean of the Arches) held his court. And because these two courts were held in the same place, and the Dean of the Arches was usually substituted in the absence of the Official while the offices remained in two persons, and the offices themselves have in many instances been united in one and the same person, as they now remain; by these means a wrong notion hath obtained, that it is the Dean of the Arches, as such, who hath jurisdiction throughout the province of Canterbury: whereas the jurisdiction of that office is limited to the thirteen peculiars of the archbishop in the city of London; and the jurisdiction throughout the province, for receiving of appeals, from the sentences of

inferior ecclesiastical courts and the like, belonged to him only as Official Principal: Gibs. Cod. 1004.

(*e*) The king might appoint whom he pleased as delegates: Com. Dig. Prerogative (D. 14). And in the exercise of its discretion the Court of Chancery would either grant a full commission of delegates, *i. e.* to lords spiritual and temporal, judges of the common law and civilians, or one to judges and civilians only. When the jurisdiction of bishops was in controversy, or a question depending that concerned the canon and ecclesiastical law, a full commission was granted: Where it was altogether a matter of law, as a question on a will, a commission issued to judges and civilians only: *Ex parte Hellier*, 3 Atk. 798. If any of the judges were in the commission, the place of assembly was usually appointed by one of them at Serjeants' Inn: Com. Dig. Prerogative (D. 14). If the delegates were equally divided in opinion, a commission of adjuncts might issue to add others to the judges delegate: *Emerton v. Emerton*, T. Raym. 475. 4 Burr. 2254. The proceedings of the delegates were according to the rules of the civil and ecclesiastical law: *Vanbrough v. Cock*, 1 Chan. Cas. 201, by the Lord Keeper.

\*No appeal lay from a sentence in a court of delegates ; not even to the lords in Parliament (*f*). But on a petition to the king in council, a commission of review might be granted under the great seal, appointing new judges, or adding more to the former judges, to revise, review, and rehear the cause (*g*) : for the king was not restrained by the statutes 24 & 25 Hen. VIII., and the Pope, as supreme head, whose authority is now annexed to the crown by \*stat. 26 Hen. VIII. c. 1, and 1 Eliz. c. 1, had power to do it (*h*).

But by stat. 3 & 4 Will. IV. c. 92, the statute of 25 Hen. VIII. was repealed, and the power of the Court of Delegates transferred to the Judicial Committee of the Privy Council.

Commission of review.

Appeal to the Judicial Committee.

Court of Probate Act, s. 39.

Appeal from the Court of Probate to the House of Lords.

By Judicature Acts appeal from Probate Division to Court of Appeal.

And by the 39th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), the appellate jurisdiction in matters and causes testamentary was transferred from the Privy Council to the House of Lords.

But now that by the Judicature Acts the jurisdiction of the Court of Probate has been transferred to the Probate Division of the High Court of Justice [see *ante*, p. \*238], the appeal from that division is to the Court of Appeal as constituted by those acts (*i*).

And on that account it had been particularly adjudged, that a suit there did not abate by the death of the parties ; this being the course of the ecclesiastical courts : 1 Burn. Ecc. L. 61, 62. Com. Dig. Prerogative (D. 14). The delegates could not fine or imprison : 4 Inst. 334 : and whether they had power to excommunicate has been doubted : *Stevenson v. Wood*, 2 Bulst. 4 ; though it seems to have been exercised in practice : 2 Roll. Abr. 223, Prerogative (G.), pl. 3. *Wood's Inst.* 505. The Court of Delegates, it should seem, had no original jurisdiction, but was only to review, and to reverse or affirm, the sentence appealed from. Therefore, the better opinion appears to be, that they could not grant letters of administration or probate : *Stevenson v. Wood*, 2 Bulst. 4. *Reeve v. Denny*,

*Latch.* 85. *Contra*, 2 Roll. Abr. 223, Prerogative (G.), pl. 4 : and see Com. Dig. Administrator (B. 2). It is said in Toller, p. 75, that where probate granted by the special court is affirmed on appeal to the arches or delegates, the usage is to send the cause back : But when the first sentence is reversed, the court below shall be ousted of its jurisdiction, and the court which reverses it shall grant probate *de novo*.

(*f*) *Saul v. Wilson*, 2 Vern. 118.

(*g*) 1 Oughton, tit. 302, sect. 2, note (*e*), pl. 5.

(*h*) 4 Inst. 341. *Gervis v. Hallewell*, Cro. Eliz. 571.

(*i*) See Judicature Act, 1873, s. 19. When a cause in the Probate Division has been heard before a judge without a jury, the evidence being given *viva voce*, the parties may, if they please,

The time within which an appeal must be brought is twenty-one days from an interlocutory order, and a year from a final judgment, unless the time be enlarged by the Court of Appeal (*k*).

The notice of appeal must, in the case of a judgment final or interlocutory, be a fourteen days' notice, and in the case of an interlocutory order, a four days' notice (*l*).

Some authorities maintain that if the Ordinary committed administration to the wrong party, and then committed it to the right, the second grant was a repeal of the first, without any sentence of revocation (*m*); but in other cases, it has been held, that the first is not avoided except by judicial \*sentence (*n*). And the practice was, to call in and revoke the first administration before the second was granted (*o*). So, before revocation of a probate, the court will not grant a new one (*p*).

It remains to consider what are sufficient grounds for the revocation of a probate or letters of administration.

Second grant of administration or probate without revoking the first.

What are sufficient grounds for the revocation or reversal:

It has already appeared, that where an executor obtains probate of a will in common form, he may be afterward cited by a next of kin, to prove it *per testes*, or in solemn form (*q*). And upon this citation, if the executor does not sufficiently prove the will, the probate will be revoked.

of probates:

If the will has been proved in solemn form, either by the executor himself in the first instance, or upon citation as above stated, and the next of kin have been cited to see proceedings, they cannot afterward, by a fresh citation, again put the executor on proof of the will (*r*). But if fraud can be shown, or if a later distinct will be set up, then

apply for a rehearing under rule 60 of the Probate Orders, July, 1862, or they may appeal from the decision of the judge, on the facts as well as the law, to the Court of Appeal. Sugden *v.* Lord St. Leonards, 1 P. D. 154.

(*k*) See R. S. C. 1883, Ord. 58, r. 15.

(*l*) See R. S. C. 1883, Ord. 58, r. 3.

(*m*) Newman *v.* Beaumont, Owen, 50. 4 Burn. E. L. 293. Godolph. Pt. 2, c. 31, s. 4.

(*n*) Pratt *v.* Stocke, Cro. Eliz. 315. Toller, 126.

(*o*) Toller, 126. But see In the Goods

of Langley, 2 Robert, 407, where an administration granted to a woman, falsely swearing herself to be the wife of the deceased, was, after the necessary decrees had been taken out, and attempts made to serve her, but without success, declared to be null and void and administration decreed to the lawful widow, notwithstanding the prior administration was outstanding.

(*p*) Toller, 75. Rains *v.* Commissary of Canterbury, 7 Mod. 146, 147.

(*q*) *Ante*, p. \*275.

(*r*) *Ante*, pp. \*275, *et seq.*

the parties having an interest under such later will may again cite the executor, who has succeeded in proving in solemn form, and obtain a revocation of the probate (*s*).

It was held in *Nicol v. Askew* (*t*), that probate of a testamentary paper, in the nature of a codicil, having been granted by consent in common form, could not afterward be revoked on the allegation that the conditions on which such consent was given had not been complied with, there being no proof of fraud or circumvention practiced either upon the court or the parties.

\* With respect to the question as to what shall be a just ground for the revocation of letters of administration : it has been said, that at common law the Ordinary might repeal an administration at his pleasure (*u*) : but now since the statute 21 Hen. VIII. c. 5, when it is granted, it cannot be repealed, unless for a just cause (*v*). So where administration is granted without the obligation of the statute, as administration *durante minore ætate*, it was held that when the Ordinary had once exercised his power by granting the administration, he should not repeal it without due cause (*w*). Again, though the court has power to revoke a limited administration, it is very unwilling to do so, unless there was some misrepresentation in the first instance in obtaining the grant (*x*).

It was at one time doubted whether the Ordinary could revoke or repeal administration on any ground, but it is now agreed that the administration, though granted to a next of kin, may be repealed by the court, not arbitrarily, yet where there shall be just cause for so doing ; of which the temporal courts are to judge (*y*).

Therefore the administration may be revoked where it was granted in an irregular manner, as where a next of kin comes too hastily to take out the administration within the fourteen days (*z*) : or where it has been granted *non vocatis jure vocandis*, without citing the necessary parties (*a*) : in which cases, the administration, though not void, is voidable.

(*s*) Wentw. Off. Ex. 111, 112, 14th edition.

(*t*) 2 Moore, P. C. C. 88.

(*u*) *Brown v. Wood*, Aleyn, 36. Godolph. Pt. 2, c. 31, s. 4.

(*v*) Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 5.

(*w*) *Grandison v. Dover*, Skinn. 155.

(*x*) *Lopes v. Hartley*, 7 Notes of Cas. Supplement, p. xxxi.

(*y*) Burn. E. L. 293. 3 Bac. Abr. 50 tit. Executors (E. 3) 12. See *Koster v. Sapte*, 1 Curt. 691.

(*z*) 3 Bac. Abr. *ubi supra*.

(*a*) Com. Dig. Administrator (B. 8). *Ravenscroft v. Ravenscroft*, 1 Lev. 305.



Again, the administration may be revoked, if a next of kin, to whom it has been committed, becomes *non compos*, \*or otherwise incapable (b), or, it has been said, if he goes beyond sea (c). next of kin *non compos* : or beyond sea :

*A fortiori*, the court may repeal its grant of administration, when made to other than the next of kin, as if it be granted to a next of kin, together with one not of kin, as to a sister and her husband (d) : or to one of kin, but not next of kin (e) : or to a creditor before the renunciation of the next of kin (f). In these cases, the administration is not void, but voidable only (g). when granted to one not next of kin :

In the case of *In the Goods of Ferrier* (h), the tenant for life of certain property having assigned over his interest to the remainderman, an administration with the will annexed, which had been granted to the tenant for life, limited to that interest, was revoked, and a new administration, limited to that property, decreed to the remainderman, then possessed of the sole interest therein. when granted *cum testamento annexo* :

In another case a creditor, having obtained an administration *cum testamento annexo*, and completely settled his own debt, went away : Sir John Nicholl said, he saw no other remedy, than that the administration should be revoked, and the executor should retract his renunciation, and be allowed to take probate of the will ; otherwise great loss might accrue, and injustice be done ; and the learned judge observed, that the court has greater authority over an administrator with the will annexed, granted to a creditor, than over an administration under the statute (i).

\*Administration *cum testamento annexo*, whether granted to a next

(b) Agreed by all the justices in *Offley v. Best*, 1 Sid. 373. Bac. Abr. *ubi supra*. 4 Burn. E. L. 292. Com. Dig. Administrator (B. 8). See *ante*, pp. \*441, \*442.

(c) Bac. Abr. *ubi supra*.

(d) *Brown v. Wood*, Ayleyn, 36. Com. Dig. Administrator (B. 8). *Ante*, p. \*441. .

(e) *Blackborough v. Davis*, 1 Salk. 38. Anon. Hetley, 48.

(f) *Ibid.* Com. Dig. Administrator (B. 6).

(g) *Ibid.*

(h) 1 Hagg. 241. See *In the Goods of Reid*, 11 P. D. 70.

(i) In the *Goods of Jenkins*, 3 Philim. 33. And where a grant of administration of the estate of an intestate was made to a creditor who, after his debt had been fully satisfied, absconded, and could not be found, the court revoked the grant to the creditor, without citing him, and made a new grant to the sole next of kin of the deceased. In the *Goods of Bradshaw*, 13 P. D. 18. These cases have been followed in the late case of *In the Goods of Covell*, 15 P. D. 8.

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of kin, or one not next of kin, is voidable, and may be repealed, if there be a residuary legatee (*k*).

Although it has always been the law that upon an executor's renunciation, whereupon administration was committed to another, the executor could not go back again and assume the executorship, yet questions used to arise as to the revocation of administration granted in the case of an executor who would not renounce, or take any step. Such cases, however, cannot now arise since the passing of statutes 20 & 21 Vict. c. 77, s. 79, and 21 & 22 Vict. c. 95, s. 16, except perhaps in a case where the court grants administration without knowing that the executor has acted and the court thinks fit to compel such executor to act (*l*).

In the case of *Trimlestown v. Trimlestown* (*m*), an administration with a will annexed, obtained after a *caveat* entered had expired, but without notice to the adverse party, and while the will was in suit in Ireland—the *forum domicilii*—was revoked, as surreptitiously obtained, and the party condemned in costs of a petition in support of it.

If administration be repealed *quia improvide*, that is, where on a false suggestion in respect to the time of the intestate's death, it issued before the expiration of a fortnight from that event, or where the court in committing it took security inadequate to the value of the property, it shall be granted to the same person (*n*).

The following grounds for revocation have also been held to be sufficient (*nn*).

\*Where a woman claiming to be the widow of the intestate, but who had not been legally married, obtained administration to the deceased as her husband the grant was revoked (*o*): and so in a case where persons who claimed to be next of kin to the intestate but who were in reality only illegitimate relatives had obtained administration (*oo*). The fact that the person of whose estate administration has been granted is still living is a sufficient ground for revocation.

(*k*) Godolph. Pt. 2, c. 31, s. 3. *Ante*, p. \*400.

(*l*) See *ante*, pp. \*226, \*227.

(*m*) 3 Hag. 243.

(*n*) Toller, 125. Com. Dig. Administrator (B. 8). *Offley v. Best*, 1 Sid. 293.

(*nn*) See *Tristram & Coote's Probate* [\*495]

Practice, 10th ed., pp. 198–204, where the following instances will be found set forth.

(*o*) In the Goods of Moore, 3 Not. of Cas. 601.

(*oo*) In the Goods of Bergman, 2 Not. of Cas. 22.

Where the Court of Chancery after grant made has differed from the Prerogative Court in its construction of the will (*p*). As in a case where the Prerogative Court had granted letters of administration to the next of kin *cum testamento annexo*, and refused it to the residuary legatee, on the ground that the residuary bequest was void, and the Court of Chancery subsequently held that the bequest was good, and that the residuary legatee took a beneficiary interest under it.

Where administration has been granted to the elected guardian of the intestate's children, there being a testamentary guardian who had not renounced (*q*).

Where one of two or more administrators becomes incapable and of unsound mind (*r*), or it has been said if he goes beyond sea.

A creditor having been paid his debt was desirous *bona fide* of retiring from the administration of the estate (*s*).

If administration (with a will only annexed) has been granted and a codicil afterward found a separate grant cannot be made of the latter, as in the case of a probate, but the administration with the will annexed must be revoked and a \*new administration taken with both the will and codicil annexed (*t*).

The court requires the revoked grant to be produced and delivered to the registrar at the time of its revocation, so that it may be canceled. If, however, owing to the grantee having left the country, it is impossible to compel the production of the grant, the court will revoke it though it cannot cancel it (*u*).

It is usual, where there is a question about a will, or when the right of administration comes in dispute, to enter what Caveat. is called a *caveat* (which is a caution entered in the Court of Probate to stop probates, administrations, faculties, and such like from being granted without the knowledge of the party that enters) (*x*). A *caveat* remains in force for six months, and may be renewed (*a*).

(*p*) Warren *v.* Kelson, 28 L. J., P. & M. 122. 1 Sw. & Tr. 290.

(*q*) In the Goods of Morris, 2 Sw. & Tr. 360.

(*r*) In the Goods of Newton, 3 Curt. 428.

(*s*) In the Goods of Hoare, 2 Sw. & Tr. 361, n.

(*t*) Tristram & Coote's Probate Practice, 10th ed., p. 202.

(*u*) Baker *v.* Russell, 1 Cas. temp. Lee, 167.

(*x*) 3 Burn. E. L. 244, Phillimore's edition.

(*a*) See P. R. 1862, non-contentious, rule 60. The practice as to caveats is now regulated by the stat. 20 & 21 Vict. c. 77, s. 53, and the rules of 1862, P. R. Nos. 59, 60, 61, 62, 63, 64, 65, 66, 67. It is not thought requisite to do more

If administration be granted to a younger brother, the elder cannot have it repealed, unless it has been granted by surprise (b). So if administration be granted to a creditor and afterward a creditor to a larger amount appear, it shall not be revoked for him (c). So also administration *de bonis non*, with the will annexed, granted to one where two had equal right, is good and shall not be revoked (d). Nor can the court revoke the grant on account of abuse; for it ought to take sufficient caution in the first instance to prevent maladministration (e). Nor can the court revoke it \*on account of the administrator's omission to bring an inventory and account (f).

And if an administration has been properly granted, it cannot be revoked, even on the application of the administrator himself, and although he has not intermeddled with the effects; at all events, unless some strong ground for the revocation be shown. Therefore, where a party entitled in distribution to an intestate's effects, took out administration under a belief that she and her brother were the only next of kin, but, finding there were other parties equally entitled, and that the estate must be administered by the Court of Chancery, and not having intermeddled with the effects, she applied for a revocation of her grant and a new one to one of the other parties who was willing to take it, the rest consenting; the court refused the application, on the ground that an administration, properly granted, could not be revoked on a mere suggestion that it would be for the benefit of the estate (g). Administration with the will annexed was granted to a woman who intermeddled with the estate, and subsequently married. Her husband deserted her, and could not be found. Upon an application for a revocation of the grant, and a fresh grant to another person, it was held by the Court of Appeal that where there has been a general grant of administration, and the administratrix has intermeddled with the general estate, the grant cannot be revoked (h).

As to revoking a grant limited to a particular property on the application of the administrator, see *In the Goods of Ferrier*, *ante*, p. \*493.

The court cannot revoke at the application of a creditor, whatever than refer to this enactment and these rules, as the subject is not, it is considered, properly within the scope of this treatise.

(b) *Ayliff v. Ayliff*, 2 Keb. 812. So where a niece obtained administration, a nephew could not get it repealed: *Hill v. Bird*, Sty. 102. *Ante*, p. \*364.

(c) *Dubois v. Trant*, 12 Mod. 438.

(d) *Taylor v. Shore*, T. Jones, 161.

(e) *Thomas v. Butler*, 1 Vent. 219, by Hale.

(f) *Hill v. Bird*, Sty. 102.

(g) *In the Goods of Heslop*, 1 Robert. 457.

(h) *In the Goods of Reid*, 11 P. D. 70.

may be the merits of the case, because such creditor cannot demand a grant to be made to himself of immediate right (*i*).

Nor will the court revoke a grant limited to attending pro<sup>\*</sup>ceedings in the Court of Chancery before the suit is ended in order to enable the next of kin to take a general grant (*k*).

In the case of *Trower v. Cox* (*l*), the attorneys of an executrix had withdrawn from the suit, after propounding an alleged will, and suffered a next of kin to take administration; and it was held, *under the particular circumstances* of the transaction, that the executrix was not barred from calling upon the next of kin to bring in the administration, and re-propounding the alleged will. But in ordinary cases, where the parties, being present, declare they proceed no further, or duly authorize a practitioner to take that step for them, the court, as far as it legally can, will hold them bound (*m*).

How far a party who has once propounded a will and withdrawn is barred.

An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will. He has no right, therefore, to cite the persons interested under it, to propound it in solemn form, or show cause why the probate in common form should not be revoked. The executor of an executor is in the same position in this respect as the original executor (*n*).

Where a next of kin is cited by an executor to see a will propounded, and contends for an intestacy, he may take out a decree, citing all persons interested under the will, "to see proceedings"; for although it is true, that the act of the executor, being the appointee of the deceased, would, to a certain extent, bind all persons interested under the will (*o*), yet some party might, perhaps, at a future time, allege collusion (*p*). The decree in such a case should be framed in the largest terms "against all persons in general," and if any of the legatees happen to be dead, care should be taken to cite their representatives (*q*).

Citation by next of kin contesting a will, of all persons interested "to see proceedings."

\*The parties thus cited need not appear at all; and in ordinary

(*i*) In the Goods of Bergman, 2 Notes of Cases, 23.

(*k*) In the Goods of Brown, L. R., 2 P. & D. 455.

(*l*) 1 Add. 19.

(*m*) 1 Add. 225.

(*n*) In the Goods of Chamberlain, L. R., 1 P. & D. 316.

(*o*) See *Wood v. Medley*, 1 Hagg. 657, 658, 667, 668.

(*p*) *Colvin v. Fraser*, 1 Hagg. 107. *Ante*, p. \*280.

(*q*) *Ib.* 107, 109. See *ante*, p. \*278.

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cases, if they intervene, when an executor, the person intrusted by the executor to see his will executed, is before the court, they will not be allowed their costs out of the estate (r).

Where two parties appear *before* any administration has been granted, both are to propound their interests, and proceed *pari passu* (s). But where an administration has been regularly obtained, the person in possession of it is not bound to propound his interest, till the party calling it in question has established his own (t).

When probate has been granted of the will of an officer in the army on the affidavit of his brother and executor, that he had received intelligence that the testator had been killed in battle, which he believed to be true, but which was in fact unfounded, the proctor for the executor brought and left in the registry the probate, and the court, on motion of counsel, by an interlocutory decree, revoked the same, and declared it to be null and void to all intents and purposes: At the same time the supposed deceased appeared personally, and the judge, at his petition, decreed the original will, together with the probate first canceled, to be delivered out of the registry to him (u).

(r) Colvin v. Fraser, 2 Hagg. 368.

(s) *Ante*, p. \*361.

(t) Dabbs v. Chisman, 1 Phillim.

155. Hibben v. Calemberg, 1 Phillim. 166.

(u) In the Goods of Napier, 1 Phillim. 83.

† *Jurisdiction to revoke probate or letters.* It has been already shown that the probate of a will, letters testamentary, and letters of administration once granted by a court having jurisdiction of the subject matter remain in force until formally revoked or set aside by a competent court. See American note, p. \*486, *ubi supra*.

In general, the jurisdiction to revoke belongs exclusively to the probate courts, and cannot be exercised by the Court of Chancery in the United States without express statutory authority, even for fraud. Story Eq. Jur. § 440; Wolcott v. Wolcott, 140 Mass. 194; see also, p. 677, *ubi supra*. This is said to be the only instance in which courts of equity have no concur-

rent jurisdiction by reason of fraud. Gaines v. Chew, 2 How. 619; Tarver v. Tarver, 9 Pet. 174, 180; Ewell v. Tidwell, 20 Ark. 137; Townsend v. Townsend, 4 Coldw. 70; Slade v. Street, 27 Ga. 17; Booth v. Kitchen, 7 Hun 255; Walters v. Ratcliffe, 5 Bush 575. Outside of the statute, the Court of Chancery cannot entertain a contest as to the validity of the will, nor set aside the probate, even as to a devise of land. Bailey v. Bailey, 8 Ohio, 246. So, the Supreme Court cannot revise a probate by certiorari, in the exercise of chancery powers. Peters v. Peters, 8 Cush. 529. A court of equity will not entertain jurisdiction to set aside a will or its probate, this being a matter exclusively of pro-

bate jurisdiction, *Will of Broderick*, 21 Wall. 503; except so far as the statute confers express chancery jurisdiction. *Luther v. Luther*, 122 Ill. 558. Nor is a court of equity a proper court in which to establish a will. Such jurisdiction belongs only to a court of ordinary. *Slade v. Street*, 27 Ga. 17.

But in other states the Court of Chancery has probate jurisdiction. Thus, in Tennessee, a court of equity has jurisdiction to reinstate a probate set aside by means of fraud, *e. g.* on a fraudulent combination between the proponent and contestant to procure that result. *Smith v. Harrison*, 2 Heisk. 230. In Kentucky, original proceedings in chancery to set aside or vacate wills are allowed in two classes of cases, one in which the final decision of the circuit court affirming the probate is impeached on any ground which would give equity jurisdiction over a judgment at law as provided by R. S. c. 106, § 36, p. 700; the other in behalf of non-residents and other persons interested in the probate who were not parties to the proceeding by actual appearance or personal service of process. *Id.* § 38; *Hughey v. Sidwell*, 18 B. Mon. 259. But an unsuccessful appeal precludes an appellant from filing a bill to impeach a will. *Dale v. Hays*, 14 B. Mon. 315. In Virginia, one who was not a party to the original proceeding is not concluded by it, but may impeach the will in equity within five years. *Dillard v. Dillard*, 78 Va. 208; 1873 Code, c. 118, § 34. As to appellate proceedings, see page 711 *infra*. In Georgia, a court of equity has jurisdiction to set aside a judgment granting letters of administration, where such judgment was obtained by fraud. *McArthur v. Matthewson*, 67 Ga. 134.

The Court of Chancery has no power to remove an executor. That power belongs exclusively to the Probate Court. *Leddel v. Starr*, 4 C. E.

Gr. 159; *Newman v. Warner*, 7 Stew. (N. J.) 359; *Bolles v. Bolles*, 17 Id. 385; *Estate of Greentree*, 12 Phila. 10; *Simpson v. Jones*, 82 N. C. 323; *Holbrook v. Campau*, 22 Mich. 288. But this is questioned in Alabama. *Randle v. Carter*, 62 Ala. 95. And in proper cases the Court of Chancery may enjoin an executor from further performance of duties as executor, and may appoint a receiver for the estate. *Leddel v. Starr*, 4 C. E. Gr. 159; *Bolles v. Bolles*, 17 Stew. (N. J.) 385.

The original and exclusive jurisdiction, in matters of revocation of probate and removal of executors, is in the probate judge. *Schouler on Exrs.* § 152; *Woerner on Admn.* § 267; *Murrill v. Sandlin*, 86 N. C. 54; *Gaines v. Chew*, 2 How. 619. So, the Probate Court has inherent power to revoke letters of administration. *McCabe v. Lewis*, 76 Mo. 296. And in North Carolina, the power of a probate court to remove an executor is now vested in the clerk of the superior court. *Edwards v. Cobb*, 95 N. C. 4. A surrogate or probate judge has incidental power to vacate or modify his decree admitting a will to probate, and this is so even in cases of wills of real estate. He has also express power in New York by the statute giving him the same power over his decrees which is possessed by courts of record of general jurisdiction. *Bailey v. Stewart*, 2 Redf. 212, affirmed in *Bailey v. Hilton*, 14 Hun 3; 1870 P. L. c. 359. He has exclusive jurisdiction to set aside a probate, *Booth v. Kitchen*, 7 Hun 255; or remove an executor. *Hosack v. Rogers*, 11 Paige 603. But the original jurisdiction of the Court of Chancery to remove a testamentary trustee is now vested in the Supreme Court, in New York, *Deraismes v. Dunham*, 22 Hun 86, affirmed 89 N. Y. 603; and in Massachusetts, *Attorney-General v. Barbour*, 121 Mass. 568.

Where an executor is cited to show cause why he should not be removed and his letters revoked, the fact that on that hearing the court ordered him to file a new account and give additional security does not oust the court of its jurisdiction to revoke the probate and remove the executor. *Shreve v. Wampole*, 11 Stew. (N. J.) 490. But to give to a local probate court jurisdiction of an action to set aside the probate or contest the validity of a will, the complaint should aver the necessary jurisdictional facts, such as that the testator died in the county or that some part of his estate is there. *Sutherland v. Hankins*, 56 Ind. 343. On the other hand, the removal of an administrator, unless required by the terms of the statute, is a matter of discretion, and not of right, and is therefore not subject to appeal. *Holmes v. Holmes*, 27 Vt. 536. The statutory power of removal can only be exercised for the causes designated in the statute. *Levering v. Levering*, 64 Md. 399.

*Statutory causes—original procedure.* In most of the United States the grounds for revocation of letters and removal of the executor or administrator are enumerated in the statute. Thus, letters obtained on false and fraudulent representations must be revoked. *Colorado* (1891 An. Stats. § 4725), *Illinois* (1891 R. S. p. 55, § 26), *New York* (Code C. P. § 2685), *North Carolina* (1883 Code, § 2171). Letters granted to a person other than the one entitled may be revoked on application of the person entitled. *Arizona* (1887 R. S. § 1033), *California* (Code C. P. § 1386), *Dakota* (1887 C. L. § 5723), *Idaho* (1887 R. S. § 5369), *Montana* (1889 C. S. p. 292, § 73), *Nevada* (1885 G. S. § 2737), *Utah* (1888 C. L. § 4053).

*Statutes—character and condition of appointee.* The marriage of an executrix or administratrix extinguishes her

power and her letters must be revoked, in *Arkansas* (1884 Dig. Stats. § 32), *California* (Code C. P. §§ 1352, 1370), *Dakota* (1887 C. L. §§ 5697, 5710), *Idaho* (1887 R. S. §§ 5343, 5356), *Montana* (1887 C. S. p. 288, § 47), *Maine* (1883 R. S. p. 541, § 22), *Missouri* (1889 R. S. § 41), *Nebraska* (1893 C. S. p. 421, §§ 170, 188), *Nevada* (1885 G. S. §§ 2711, 2722), *Ohio* (1890 R. S. § 6022), *Rhode Island* (1882 P. S. p. 478, §§ 19, 20), *Utah* (1888 C. L. §§ 4027, 4040), *Vermont* (1880 R. L. § 2075), *Virginia* (1887 Code, § 2644), *Washington* (1891 Code C. P. § 889), *Wisconsin* (1889 An. Stats. § 3802), *Wyoming* (1887 R. S. § 2011); unless her husband files his consent to her continuance, in *Indiana* (1888 R. S. § 2245); or unless she and her husband give bond, in *New Jersey* (1877 p. Rev. 779, § 122).

Other causes for the removal of an executor or administrator are :

*Incompetence to act*, in *Arizona* (1887 R. S. § 1073), *California* (Code C. P. § 1430), *Dakota* (1887 C. L. § 5758), *Idaho* (1887 R. S. § 5408), *Maine* (1883 R. S. p. 540, § 21), *Mississippi* (1892 An. C. § 1860), *Montana* (1887 C. S. p. 299, § 113), *Nevada* (1885 G. S. § 2950), *New York* (Code C. P. § 2685), *North Carolina* (1883 Code, § 2171), *Ohio* (1890 R. S. § 6017), *Pennsylvania* (1883 Purd. Dig. p. 561, § 288).

*Incapacity to execute the trust*, in *Connecticut* (1888 G. S. § 611), *Indiana* (1888 R. S. § 2245), *Iowa* 1888 R. C. § 2496), *Kansas* (1889 G. S. § 2807), *Kentucky* (1887 G. S. p. 594, § 19), *Massachusetts* (1882 P. S. p. 764, § 14), *Michigan* (1882 An. Stats. §§ 5842, 5858), *Minnesota* (1891 G. S. § 5914), *Missouri* (1889 R. S. § 42), *Nebraska* (1893 C. S. p. 424, § 187), *North Carolina* (1883 Code, § 2171), *Rhode Island* (1882 P. S. p. 463, § 24), *Texas* (1888 R. S. Art. 1974), *Vermont* (1880 R. L. § 2074), *Washington* (1891 Code C. P. § 890),



*Wisconsin* (1889 An. Stats. § 3803), *Wyoming* (1887 R. S. § 2012).

*Insanity* or imbecility of mind, in *Alabama* (1886 Code, § 2045), *Arkansas* (1884 Dig. Stats. § 33), *Colorado* (1891 An. Stats. § 4719), *Florida* (1892 R. S. § 1881), *Illinois* (1891 R. S. p. 56, § 30), *Indiana* (1888 R. S. § 2245), *Iowa* (1888 R. C. § 2496), *Kansas* (1889 G. S. § 2807), *Kentucky* (1887 G. S. p. 594, § 19), *Maine* (1883 R. S. p. 540, § 21), *Massachusetts* (1882 P. S. p. 764, § 14), *Michigan* (1882 An. Stats. §§ 5842, 5858), *Minnesota* (1891 G. S. § 5914), *Missouri* (1889 R. S. § 42), *Nebraska* (1893 C. S. p. 424, § 187), *New Hampshire* (1891 P. S. p. 527, § 10), *New York* (Code C. P. § 2685), *Oregon* (1892 An. Laws, § 1094), *Rhode Island* (1882 P. S. p. 463, § 24, p. 479, § 24), *Texas* (1888 R. S. Art. 1974), *Vermont* (1880 R. L. § 2074), *Washington* (1891 Code C. P. § 890), *Wisconsin* (1889 An. Stats. § 3803), *Wyoming* (1887 R. S. § 2012).

*Continued illness*, in *Alabama* (1886 Code, § 2045), *Florida* (1892 R. S. § 1881), *Indiana* (1888 R. S. § 2245), *Iowa* (1888 R. C. § 2496), *New Hampshire* (1891 P. S. p. 527, § 10), *Rhode Island* (1882 P. S. p. 463, § 24); if sole executor or administrator, in *Pennsylvania* (1883 Purd. Dig. p. 561, § 258).

*Intemperance*, in *Alabama* (1886 Code, § 2045), *Colorado* (1891 An. Stats. § 4719), *Florida* (1892 R. S. § 1881), *Illinois* (1891 R. S. p. 56, § 20), *Indiana* (1888 R. S. § 2245), *Missouri* (1889 R. S. § 42), *New York* (Code C. P. § 2685), *Ohio* (1890 R. S. § 6017), *Washington* (1891 Code C. P. § 890), *Wyoming* (1887 R. S. § 2012).

*Conviction of an infamous crime*, in *Colorado* (1891 An. Stats. § 4719), *Illinois* (1891 R. S. p. 56, § 30), *Missouri* (1889 R. S. § 42), *Oregon* (1892 An. Laws, § 1094), *Tennessee* (1884 Code, § 6069), *Washington* (1891 Code C. P. § 890), *Wyoming* (1887 R. S. § 2012).

*Dishonesty*, in *New York* (Code C. P. § 2685).

*Improvvidence*, in *New York* (Code C. P. § 2685).

*Insolvency* or bankruptcy, in *Kentucky* (1887 G. S. p. 594, § 19); or likelihood of becoming insolvent, in *Indiana* (1888 R. S. § 2245), *Iowa* (1888 R. C. § 2496), *Pennsylvania* (1883 Purd. Dig. p. 558, § 249, p. 560, § 257). So, the existence of unsettled claims between an executor or administrator and the estate, which in the opinion of the court may be the subject of controversy between him and the estate or the persons interested, is a ground for removal, in *Ohio* (1890 R. S. § 6017). And in the case of an executor whose office is to cease on a contingency, his letters will be revoked on the happening of the contingency, in *New York* (Code C. P. § 2685).

*Statutes—removal from state.* The removal of the executor or administrator from the state is a cause for his removal from office, in *Arizona* (1887 R. S. § 1073), *California* (Code C. P. § 1436), *Dakota* (1887 C. L. § 5758), *Idaho* (1887 R. S. § 5408), *Kansas* (1889 G. S. § 2812), *Kentucky* (1887 G. S. p. 594, § 19), *Michigan* (1882 An. Stats. §§ 5842, 5858), *Missouri* (1889 R. S. § 10), *Nebraska* 1893 C. S. p. 424, § 187), *Nevada* (1885 G. S. § 2950), *Ohio* (1890 R. S. § 6017), *Oregon* (1892 An. Laws, § 1095), *Pennsylvania* (1883 Purd. Dig. p. 560, § 254), *Utah* (1888 C. L. § 4093), *Vermont* (1880 R. L. § 2074), *Wisconsin* (1889 An. Stats. § 3803). This applies only to administrators, in *Alabama* (1886 Code, § 2045); and to an executor only in the case where a non-resident executor would be entitled if he gave a bond, in *New York* (Code C. P. § 2185). In other states it is cause for removal of executor or administrator, if he neglects or refuses to perform the duties of his office, in *New Jersey* (1877 Rev. p. 780, § 128); if he neglects to settle his accounts

annually, in *Mississippi* (1892 An. C. § 1861); or does not account pursuant to citation, in *South Carolina* (1882 G. S. § 1892); if he fail to appoint a resident agent, in *Massachusetts* (1882 P. S. p. 764, § 12), *New Hampshire* (1891 P. S. p. 529, § 26); or if absence renders him unfit for the discharge of his duty (*Id.* p. 527, § 10). Removal results from an absence from the state for three months without permission, in *Texas* (1888 R. S. Art. 1973); from a change of residence, in *Iowa* (1888 R. C. § 2496); or removal from the county, in *Indiana* (1888 R. S. § 2245).

*Statutes—negligence and failure in duties.* A failure to give bond, when required by the court or when the sureties on the former bond are discharged, is a cause for removal, in *Alabama* (1886 Code, § 2044), *California* (Code C. P. § 1405), *Colorado* (1891 An. Stats. § 4723), *Florida* (1892 R. S. § 1881), *Idaho* (1887 R. S. § 5388), *Illinois* (1891 R. S. p. 56, § 33), *Indiana* (1888 R. S. § 2252), *Kentucky* (1887 G. S. p. 599, § 13), *Michigan* (1882 An. Stats. § 6008), *Mississippi* (1892 An. C. § 1863), *Montana* (1887 C. S. p. 295 § 92), *Nebraska* (1893 C. S. p. 392, § 6), *Nevada* (1885 G. S. § 2755), *New Hampshire* (1891 P. S. p. 554, § 2), *New Jersey* (1877 Rev. p. 770, § 80, p. 780, § 126), *New York* (Code C. P. §§ 2599, 2601), *North Carolina* (1883 Code, § 1520), *Ohio* (1890 R. S. §§ 6204, 7, 8), *Oregon* (1892 An. Laws, § 1097), *Texas* (1888 R. S. Art. 1973), *Utah* (1888 C. L. § 4072), *Virginia* (1887 Code, § 2687), *West Virginia* (1891 Code, p. 692, § 10), *Wyoming* (1887 R. S. § 2017). So is a failure to give an additional bond when required, in *Alabama* (1886 Code, § 2046), *Arkansas* (1884 Dig. Stats. § 36), *California* (Code C. P. § 1400), *Colorado* (1891 An. Stats. § 4721), *Dakota* (1887 C. L. § 5737), *Delaware* (1874 R. C. p. 543, § 14), *Idaho* (1887 R. S. § 5388),

*Illinois* (1891 R. S. p. 56, § 32), *Indiana* (1888 R. S. § 2245), *Kentucky* (1887 G. S. p. 599, § 12), *Maine* (1883 R. S. p. 545, § 49), *Michigan* (1882 An. Stats. § 6008), *Missouri* (1889 R. S. § 30), *Montana* (1887 C. S. p. 295, § 87), *Nevada* (1885 G. S. § 2750), *New Jersey* (1877 Rev. p. 780, § 25), *Utah* (1888 C. L. § 4067), *Washington* (1891 Code C. P. § 919), *Wyoming* (1887 R. S. § 2018).

A failure to make and return the necessary inventory is a cause for the removal of an executor or administrator, in *Alabama* (1886 Code, § 2045), *Delaware* (1874 R. C. p. 545, § 20), *Florida* (1892 R. S. § 1881), *Georgia* (1882 Code, § 2523), *Idaho* (1887 R. S. § 5427), *Indiana* (1888 R. S. § 2245), *Iowa* (1888 R. C. § 2496), *Kansas* (1889 G. S. § 2841), *Maryland* (1888 P. G. L. p. 384, § 215), *Minnesota* (1891 G. S. § 5914), *Mississippi* (1892 An. C. § 1870), *Montana* (1887 C. S. p. 303, § 125), *Nevada* (1885 G. S. § 2781), *New Jersey* (1877 Rev. p. 762, § 50, p. 780, § 126), *North Carolina* (1883 Code, § 1397), *Ohio* (1890 R. S. § 6049), *Pennsylvania* (1883 Purd. Dig. p. 558, § 249, p. 560, § 257), *Texas* (1888 R. S. Art. 1973), *Utah* (1888 C. L. § 4105), *Washington* (1891 Code C. P. § 964).

So is a failure to render account or make settlements as required by law, in *Alabama* (1886 Code, § 2045), *Arkansas* (1884 Dig. Stats. § 141), *Florida* (1892 R. S. § 1881), *Idaho* (1887 R. S. § 5592), *Illinois* (1891 R. S. p. 78, § 113), *Indiana* (1888 R. S. § 2245), *Kansas* (1889 G. S. § 2807), *Louisiana* (1876 R. S. §§ 8, 9, 1464), *Maryland* (1888 P. G. L. p. 1315, § 3), *Michigan* (1882 An. Stats. §§ 5842, 5858), *Missouri* (1889 R. S. § 221), *Nebraska* (1893 C. S. p. 424, § 187), *Nevada* (1885 G. S. § 2896), *New Jersey* (1877 Rev. p. 774, § 99, p. 780, § 126), *New York* (Code C. P. 2727), *Ohio* (1890 R. S. § 6178), *Pennsylvania* (1883 Purd. Dig. p. 558, § 249, p. 560, § 257), *Rhode Island* (1882 P. S. p. 479, § 24), *Texas* (1888 R. S. Art. 1974),

*Utah* (1888 C. L. § 4231), *Vermont* (1880 R. L. § 2074), *Washington* (1891 Code C. P. § 1065), *Wisconsin* (1889 An. Stats. § 3803), *Wyoming* (1887 R. S. § 2025). So of failure to make lawful "returns," *Georgia* (1882 Code, § 2511); "exhibits," *Texas* (1888 R. S. Art. 1974), *Washington* (1891 Code C. P. § 1062); or reports of the condition of the estate, in *Iowa* (1888 R. C. § 2496); or the failure of a non-resident executor or administrator to account after being cited, in *Maine* (1883 R. S. p. 540, § 21), *Massachusetts* (1882 P. S. p. 764, § 14).

So also, the failure to render account of sales of land, in *Alabama* (1886 Code, § 2045), *Florida* (1892 R. S. § 1881), *Idaho* (1887 R. S. § 5542), *Iowa* (1888 R. C. § 2496), *Kansas* (1889 G. S. § 2862), *Montana* (1887 C. S. p. 331, § 223), *Ohio* (1890 R. S. § 6087), *Utah* (1888 C. L. § 4195).

The neglect of the executor or administrator to give notice to creditors to exhibit their claims is a cause for his removal, in *Idaho* (1887 R. S. § 5481), *Montana* (1887 C. S. p. 315, § 168), *Nevada* (1885 G. S. § 2815), *Utah* (1888 C. L. § 414), *Washington* (1891 Code C. P. § 995).

So, any wrongful neglect of the estate, in *Arizona* (1887 R. S. § 1073), *California* (Code C. P. § 1436), *Dakota* (1887 C. L. § 5758), *Idaho* (1887 R. S. § 5408), *Montana* (1887 C. S. p. 299, § 113), *Nevada* (1885 G. S. § 2950), *Utah* (1888 C. L. § 4093). And so, of long neglect, failure, or refusal to perform any act as executor or administrator, in *Arizona* (1887 R. S. § 1073), *California* (Code C. P. § 1436), *Connecticut* (1888 G. S. § 611), *Dakota* (1887 C. L. § 5758), *Delaware* (1874 R. C. p. 741, § 12), *Idaho* (1887 R. S. § 5408), *Iowa* (1888 R. C. § 2496), *Maine* (1883 R. S. p. 540, § 21), *Missouri* (1889 R. S. § 42), *Montana* (1887 C. S. p. 299, § 113), *Nevada* (1885 G. S. § 2950), *New Jersey* (1877 Rev. p. 780, § 127), *Ohio* (1890 R. S.

§ 6017), *Oregon* (1892 An. Laws, § 1094), *Rhode Island* (1882 P. S. p. 463, § 24), *Texas* (1888 R. S. Art. 1974), *Utah* (1888 C. L. § 4093), *Washington* (1891 Code C. P. § 890), *Wyoming* (1887 R. S. § 2012).

*Statutes — misconduct.* Maladministration, such as wasting, embezzlement, or fraudulent conduct of the estate, is cause for removal of the executor or administrator, in *Alabama* (1886 Code, § 2045), *Arizona* (1887 R. S. § 1073), *Arkansas* (1884 Dig. Stats. § 33), *California* (Code C. P. § 1436), *Connecticut* (1888 G. S. § 611), *Dakota* (1887 C. L. § 5758), *Florida* (1892 R. S. § 1881), *Georgia* (1882 Code, § 2511), *Idaho* (1887 R. S. § 5408), *Illinois* (1891 R. S. p. 56, § 30), *Indiana* (1888 R. S. § 2245), *Iowa* (1888 R. C. § 2496), *Kansas* (1889 G. S. § 2807), *Louisiana* (1876 R. S. §§ 17, 3717), *Maine* (1883 R. S. p. 540, § 21), *Minnesota* (1891 R. S. § 5914), *Mississippi* (1892 An. C. § 1860), *Missouri* (1889 R. S. § 42), *Montana* (1887 C. S. p. 299, § 113), *Nevada* (1885 G. S. § 2950), *New Hampshire* (1891 P. S. p. 527, § 10), *New Jersey* (1877 Rev. p. 780, § 126), *New York* (Code C. P. § 2685), *North Carolina* (1883 Code, § 2171), *Ohio* (1890 R. S. § 6017), *Pennsylvania* (1883 Purd. Dig. p. 558, § 249, p. 560, § 257), *Rhode Island* (1882 P. S. p. 463, § 24), *Texas* (1888 R. S. Art. 1974), *Utah* (1888 C. L. § 4093), *Washington* (1891 Code C. P. §§ 890, 926), *Wyoming* (1887 R. S. § 2012). So, where the probate judge has reason to believe that the executor or administrator is about to commit some wrongful act with respect to the estate, in *Arizona* (1887 R. S. § 1073), *California* (Code C. P. § 1436), *Dakota* (1887 C. L. § 5758) *Idaho* (1887 R. S. § 5408), *Montana* (1887 C. S. p. 299, § 113), *Nevada* (1888 G. S. § 2950), *Pennsylvania* (1883 Purd. Dig. p. 560, § 25), *Texas* (1888 R. S. Art. 1974), *Utah* (1888 C. L. § 4093), *Washington* (1891 Code C. P. § 926). If an

administrator act so as to endanger his co-executor or co-administrator, it is ground for his removal, in *Arkansas* (1884 Dig. Stats. § 33), *Colorado* (1891 An. Stats. § 4719), *Illinois* (1891 R. S. p. 56, § 30), *Maryland* (1888 P. G. L. p. 1393, § 241), *Missouri* (1889 R. S. § 42), *Washington* (1891 Code C. P. § 890), *Wyoming* (1887 R. S. § 2012). So, it is cause for removal where circumstances are such that they do not furnish adequate security for due administration by the executor, in *New York* (Code C. P. § 2685).

A failure to comply with a lawful order of the court or judge of probate, is a sufficient cause for the removal of the executor or administrator, in *Alabama* (1886 Code, § 2045), *Iowa* (1888 R. C. § 2496), *Maryland* (1888 P. G. L. p. 1391, § 237), *Michigan* (1882 An. Stats. §§ 5842, 5858), *Minnesota* (1891 G. S. § 5914), *Montana* (1887 C. S. p. 356, § 331), *Nebraska* (1893 C. S. p. 424, § 18), *New Jersey* (1877 Rev. p. 780, § 126), *New York* (Code C. P. § 2685), *Texas* (1880 R. S. Art. 1974), *Vermont* (1880 R. L. § 2074), *Wisconsin* (1889 An. Stats. § 3803). So is a failure to seasonably apply for the payment of debts or claims against the estate, in *Iowa* (1888 R. C. § 2496).

*Statutes—procedure.* The executor or administrator is entitled to notice to show cause why his letters should not be revoked, in *Alabama* (1886 Code, § 2048), *Arizona* (1887 R. S. § 1074), *Arkansas* (1884 Dig. Stats. § 33), *California* (Code C. P. § 1437), *Colorado* (1891 An. Stats. § 4719), *Connecticut* (1888 G. S. § 611), *Dakota* (1887 C. L. § 5759), *Idaho* (1887 R. S. § 5409), *Illinois* (1891 R. S. p. 56, § 30), *Iowa* (1888 R. C. § 2499), *Kansas* (1889 G. S. § 2807), *Kentucky* (1887 G. S. p. 594, § 19), *Minnesota* (1891 G. S. § 5915), *Mississippi* (1892 An. C. § 1860), *Missouri* (1889 R. S. § 42), *Montana* (1887 C. S. p. 300, § 114), *Nevada* (1885

G. S. § 2952), *New York* (Code C. P. § 2686), *North Carolina* (1883 Code, § 2171), *Ohio* (1890 R. S. § 6017), *Pennsylvania* (1883 Purd. Dig. p. 559, § 249, p. 560, § 267), *Rhode Island* (1882 P. S. p. 466, § 2), *Texas* (1888 R. S. Art. 1974), *Utah* (1888 C. L. § 4094), *Washington* (1891 Code C. P. § 890), *Wyoming* (1887 R. S. § 2012).

*Statutes—effect of revocation.* Letters of administration must be revoked on the subsequent probate of a will. *Alabama* (1886 Code, § 2066), *Arizona* (1887 R. S. § 1062), *Arkansas* (1884 Dig. Stats. § 30), *California* (Code C. P. § 1423), *Colorado* (1891 An. Stats. § 4717), *Dakota* (1887 C. L. § 5751), *Delaware* (1874 R. C. p. 541, § 12), *Idaho* (1887 R. S. § 5397), *Illinois* (1891 R. S. p. 55, § 28), *Kansas* (1889 G. S. § 2809), *Maryland* (1888 P. G. L. p. 1324, § 36), *Massachusetts* (1882 P. S. p. 757, § 5), *Michigan* (1882 An. Stats. § 5862), *Minnesota* (1891 G. S. § 5668), *Mississippi* (1891 G. S. § 1853), *Missouri* (1889 R. S. § 39), *Montana* (1887 R. S. p. 297, § 102), *Nebraska* (1893 C. S. p. 424, § 191), *New York* (Code C. P. § 2684), *North Carolina* (1883 Code, § 2170), *Ohio* (1890 R. S. § 6017), *Oregon* (1892 An. Laws § 1093), *Texas* (1888 R. S. § 1868), *Utah* (1888 C. L. § 4082), *Vermont* (1880 R. L. § 2078), *Washington* (1891 Code C. P. § 887), *West Virginia* (1891 Code, p. 682, § 5), *Wisconsin* (1889 An. Stats. § 3815), *Wyoming* (1887 R. S. § 2009). And letters testamentary granted on probate must be revoked if the will is afterward set aside. *Arkansas* (1884 Dig. Stats. § 31), *California* (Code C. P. § 1331), *Colorado* (1891 An. Stats. § 4718), *Illinois* (1891 R. S. p. 56, § 29), *Missouri* (1889 R. S. § 40), *North Carolina* (1883 Code, § 2170), *Oregon* (1892 An. Laws, § 1093), *Washington* (1891 Code C. P. § 888), *Wyoming* (1887 R. S. § 2010). On revocation of probate the powers of an executor or administrator *cum testa-*

*mento annexo* cease, in *Idaho* (1887 R. S. § 5322), *Nevada* (1885 R. S. § 2701), *New York* (Code C. P. § 2684), *Washington* (1891 Code C. P. § 877).

*Statutes—resignation.* An executor or administrator may resign, generally, for good cause, on settling his accounts, or if no injury will result to the estate. *Alabama* (1886 Code, § 2060), *Arizona* (1887 R. S. § 1066), *California* (Code C. P. § 1427), *Colorado* (1891 An. Stats. § 4728), *Connecticut* (1888 G. S. § 611), *Dakota* (1887 C. L. § 5755), *Georgia* (1882 Code, § 2610), *Idaho* (1887 R. S. § 5401), *Illinois* (1891 R. S. p. 58, § 40), *Kansas* (1889 G. S. § 2805), *Maine* (1883 R. S. p. 540, § 21), *Maryland* (1888 P. G. L. p. 132, § 38), *Massachusetts* (1882 P. S. p. 764, § 14), *Minnesota* (1891 G. S. § 5913), *Mississippi* (1892 An. C. § 1860), *Missouri* (1889 R. S. § 43), *Montana* (1887 C. S. p. 298, § 106), *Nevada* (1885 G. S. § 2769), *New Hampshire* (1891 P. S. p. 527, § 11), *New Jersey* (1877 Rev. p. 780, § 125), *New York* (Code C. P. § 2689), *Ohio* (1870 R. S. § 6015), *Pennsylvania* (1883 Purd. Dig. p. 558, § 24), *Rhode Island* (1882 P. S. p. 463, § 26, p. 479, § 25), *Tennessee* (1884 Code, § 3078), *Texas* (1888 R. S. Art. 1977), *Utah* (1888 C. L. § 4086), *Virginia* (1887 Code, § 2689), *Washington* (1891 Code C. P. § 937), *Wyoming* (1887 R. S. § 2019). Notice of the application to resign is required, in *Colorado*, *Tennessee*, *Washington*, and *Wyoming*.

*Cause of revocation—invalidity of the will.* The probate of a will may be revoked on the ground of the invalidity of the will itself, but such ground of attack is, in general, disposed of in the original contest of probate or by appeal from the probate. Questions affecting the validity of the will, and the capacity and testamentary freedom of the testator, are more properly and fully considered elsewhere. In some states, however, an original proceeding

for revocation of probate seems to lie on the ground of the invalidity of the will, *Lynch v. Miller*, 54 Iowa 516; or of the infancy of the testator, *Matter of Page*, 62 Barb. 476; or of the execution of the will under undue influence, *Hubbard v. Hubbard*, 7 Or. 42.

*Cause of revocation—no jurisdiction.* A more frequent cause for the revocation of probate or of the letters testamentary or letters of administration is the want of jurisdiction of the court which granted them. *Schouler on Exrs.* 153; *Woerner on Admn.* § 268; *Townsend v. Pell*, 3 Dem. 367. If the court had no jurisdiction, it has been held that its action may be ignored without formal revocation, and new letters granted by a court of competent jurisdiction. *Wallace v. Walker*, 37 Ga. 265. In *Illinois*, the jurisdictional facts must appear on the record of the public administrator's appointment. *Langworthy v. Baker*, 23 Ill. 484. In general, however, the presumption is in favor of the jurisdiction, and the want of it must be shown in the petition for revocation. *Estate of Griffith*, 84 Cal. 107. So, in the record of an administrator's resignation and the appointment of his successor, the jurisdictional requirements of the statute as to accounting and transfer of assets will be presumed to have been complied with. *Jennings v. Le Breton*, 80 Cal. 8.

The most fatal defect of this character is where the supposed decedent is still living and letters so granted are void. *Stevenson v. Superior Court*, 62 Cal. 60; *Duncan v. Stewart*, 25 Ala. 408; *Moore v. Smith*, 11 Rich. 56. And see p. 678, *ubi supra*; also *Schouler on Exrs.* § 153; *Woerner on Admn.* § 268.

The production and probate of a will is cause for revocation of letters of administration already granted, *Shepard v. Rhoades*, 60 Ill. 301; *Watson*

*v. Glover*, 77 Ala. 323; *Croswell on Exrs.* § 302; *Schouler on Exrs.* § 153; *Woerner on Admn.* § 268; although not produced until thirteen years after administration granted, *Rebhan v. Miller*, 114 Ill. 343; or although the will is a nuncupative will. *Jennings v. Moses*, 38 Ala. 402. But the fact that a will has been probated in another state since the issue of the letters of administration will not render the letters void, although it is a ground for their revocation. *Schluter v. Bowery Savings Bank*, 117 N. Y. 125. Letters of administration granted in one state are not *ipso facto* revoked by a grant of administration in another country under a later will. *Burnley v. Duke*, 1 Rand. 108. The subsequent production of a will does not render a grant of administration void. *Kittredge v. Folsom*, 8 N. H. 98.

But under the Maryland Code, Art. 93, § 230, letters of administration are *ipso facto* revoked by grant of ancillary letters on a will proved in another state. *Dalrymple v. Gamble*, 66 Md. 290. As to the raising of this and other objections to the jurisdiction in a collateral action, see p. 677, *ubi supra*. But in such an action the letters of administration are not conclusive evidence of the fact of intestacy. *Emmert v. Stouffer*, 64 Md. 543.

Outstanding letters, granted to another person, prevent all new appointment until the office is vacated by death, resignation, or removal of the first appointee. *Cogburn v. McQueen*, 46 Ala. 551. Until then another appointment is void, *Creath v. Brent*, 3 Dana 129; *Grande v. Chaves*, 15 Tex. 550; *Pettigru v. Ferguson*, 6 Rich. Eq. 378; or voidable, *White v. Brown*, 7 T. B. Mon. 446. So, letters of administration *cum testamento annexo* before renunciation of the executor named in the will. *Springs v. Irwin*, 6 Ired. 27. But in a collateral proceeding

revocation of former letters will be presumed in favor of the new appointment. *Bailey v. Scott*, 13 Wis. 692. And in some states, letters granted to the public administrator give way without formal revocation to letters subsequently granted to a private person. *Macey v. Stark* (Mo.), 21 S. W. Rep. 1088.

Want of jurisdiction on account of the non-residence of the deceased can only be questioned, in the absence of fraud, by a direct appeal from the Probate Court, unless the want of jurisdiction appears on the record itself. *McFeely v. Scott*, 128 Mass. 16; *Record v. Howard*, 58 Me. 225. In California, the question cannot be raised even in a direct proceeding for the revocation of letters. *Estate of Griffith*, 84 Cal. 107. In some states, it is ground for revocation of the letters. *Will of Zerega*, 20 N. Y. Supp. 407; *Bailey v. Osborn*, 33 Miss. 128. In others, the letters are said to be void. *Wilson v. Frazier*, 2 Humph. 30; *Johnson v. Crepenning*, 4 Ired. Eq. 216. But see, *contra*, *Johnson v. Beazley*, 65 Mo. 250. But in Kentucky, the letters are said to be void if the deceased had neither residence nor property in the county assuming jurisdiction. *McCord v. Fisher*, 13 B. Mon. 193. See also, *Cutter v. Haskins*, 9 Mass. 542; *Ex parte Barker*, 2 Leigh 719. In Texas absence from the state for three months without leave of court is ground for revocation of letters. *Hall v. Monroe*, 27 Tex. 700.

So, letters granted on the estate of a deceased Indian are void in New York from want of jurisdiction. *Doll v. Irish*, 2 Barb. 639.

*Cause of revocation—irregular procedure.* Other objections may be made to the original procedure for probate or grant of letters as sufficient ground for revocation. Such are, that the judge was disqualified by his interest in the matter. *Gay v. Minot*, 3 Cush.

352; *Sigourney v. Sibley*, 21 Pick. 101; S. C. 22 Id. 507; *Matter of Cottle*, 5 Pick. 483; *Koger v. Franklin*, 79 Ala. 505. As to the judge's interest in or relation to the person appointed, see p. 537, *ubi supra*. His appointment of himself as administrator is void, *Echols v. Barrett*, 6 Ga. 443; but not his appointment of his son, *Curtis v. Williams*, 33 Ala. 570; *Plowman v. Henderson*, 59 Ala. 559.

So, if one whose debt is barred has obtained administration by fraudulently representing himself to be a creditor, it is sufficient ground for revocation. *Wernse v. Hall*, 101 Ill. 423. "The false suggestion of a material fact" under the New York Code of Civil Procedure, § 2685, means such a suggestion made to the court. *Corn v. Corn*, 4 Dem. 394; S. C. *Estate of Corn*, 9 Civ. Pro. 243. As to revoking letters obtained by a false suggestion, and without due notice to the party entitled, see *Proctor v. Wanmaker*, 1 Barb. Ch. 302; *Kerr v. Kerr*, 41 N. Y. 272; *Wallace v. Walker*, 37 Ga. 265. So, want of due notice to those entitled is ground for revocation of probate, *Will of Lawrence*, 3 Halst. Ch. 215; N. J. Rev. 203; *Stebbins v. Lathrop*, 4 Pick. 33; *Gregg v. Myatt*, 78 Iowa 703; *Lees v. Browning*, 15 Ala. 810; *Roy v. Segrist*, 19 Ala. 810; *Williams' Appeal*, 7 Pa. St. 259; *Sowell v. Sowell*, 40 Ala. 243; or in New York, for opening the decree, *Matter of Odell*, 23 N. Y. Supp. 143. In New York, revocation is in such case matter of right as to personal property, and of discretion as to real property. *Matter of Odell*, 23 N. Y. Supp. 143. So, a failure to cite the public administrator on the issuance of letters to a stranger is ground for revocation. *Public Administrator v. Peters*, 1 Bradf. 100; *Proctor v. Wanmaker*, 1 Barb. Ch. 302. But letters of administration will not be revoked for want of the statutory

notice of appointment on the application of a creditor who had actual notice and sought by the application to evade the Statute of Limitations. *Davis v. Smith*, 58 N. H. 16. But notice is not necessary to one who has renounced his right. *Barber v. Converse*, 1 Redf. 330; *Estate of McCaffrey*, 38 Pa. St. 331; *Cole v. Dial*, 12 Tex. 100. But a probate without sufficient proof is not therefore without jurisdiction, and it can only be corrected by the same court or on appeal. *Caulfield v. Sullivan*, 85 N. Y. 153.

*Objections to person appointed.* Letters may be revoked because the person appointed by the court was not legally entitled to the appointment. *Croswell on Exrs.* § 294; *Schouler on Exrs.* § 153; *Woerner on Admn.* § 268; *Rollin v. Whipper*, 17 S. C. 32. But if a person otherwise entitled to preference was then disqualified by non-residence, his subsequent removal into the state will not be a ground for revoking the appointment of another person already made. *Sharpe's Appeal*, 87 Pa. St. 163. And a wrong appointment is, in general, only voidable, and not void. *Garrison v. Cox*, 95 N. C. 353. Administration must be revoked in California at any time in favor of one having a prior right, unless he has waived it. *Estate of Wooten*, 56 Cal. 322. But where one has waived his right to administration, the court will not subsequently revoke the letters on his application. *Estate of Keane*, 56 Cal. 407; *Ehlen v. Ehlen*, 64 Md. 362. And his original assent to the appointment of another is of course a waiver of his own right. *McColgan v. Kenny*, 68 Md. 258. So, his acquiescence in it for two years, *Mayer v. Houston*, 61 Tex. 690; or his own failure to apply for appointment within the time fixed by statute, *Jenkins v. Sapp*, 3 Jones 510; or to appeal in due time from the grant of letters to another, after due

notice to himself. *Ex parte* White, 16 S. E. Rep. 286 (S. C.).

So, a false representation, honestly made, that the applicant is the decedent's wife, is ground for revocation at the instance of the true wife. *Kerr v. Kerr*, 41 N. Y. 272. But the invalidity of her marriage with the decedent must in such case be clearly proved. *Myatt v. Myatt*, 44 Ill. 473. If the person entitled renounce his right by mistake, the appointment of a stranger may be revoked, *Thomas v. Knighton*, 23 Md. 318; so, where the husband of the youngest sister of the decedent obtained administration without the knowledge of the older unmarried sister, who had the prior right, the letters were revoked. *Owings v. Bates*, 9 Gill 463. The appointment of a stranger other than husband or wife within thirty days after the death of either is revocable in some states, *Mills v. Carter*, 8 Blackf. 203; *Munzey v. Webster*, 24 N. H. 126; *Skelly v. Veerkamp*, 30 Mo. Ap. 49; in other states, forty days, *Markland v. Albes*, 81 Ala. 433; *Ward v. Cameron*, 37 Ala. 691; *Curtis v. Burt*, 34 Ala. 729.

So, an appointment may be revoked because of the known animosity between the executor and the testator's widow, which prevented the efficient and prudent management of the estate. *Estate of Pike*, 45 Wis. 397. This is true also as to a testamentary trustee. *Deraismes v. Dunham*, 22 Hun 86, *affd.* 89 N. Y. 603. An executor or administrator may be removed because he is adversely interested in the estate, *Simpson v. Jones*, 82 N. C. 323; *Kellberg's Appeal*, 86 Pa. St. 129; and stands in unfriendly relations to the legatees, *Gartside v. Gartside* (Mo.), 20 S. W. Rep. 669; or is the representative of an estate having an adverse interest, *State v. Remhardt*, 31 Mo. 95; *State v. Bidlingmaier*, 26 Mo. 483; or is under the undue influence of an im-

portant debtor of the estate. *Stearns v. Fiske*, 18 Pick. 24.

Where the appointee has become insane or is otherwise mentally incapacitated, it is sufficient ground for his removal. *Croswell on Exrs.* 297; *Woerner on Admn.* § 269. And see American note, p. 277, *ubi supra*. But in California, the fact that the administrator is insane and committed to an asylum is not *per se* sufficient cause for his removal. *Estate of Moore*, 68 Cal. 281. The California Political Code, § 996, does not apply except to a case where there is a formal finding of his insanity.

*Objections to condition and character.*

Letters may be revoked for other circumstances in the condition or character of the administrator, which would have disqualified him if the objection had been made at the time of appointment. The surrogate may remove a testamentary trustee for his *non-residence*. *Estate of Brick*, 9 Civ. Pro. 397, S. C.; *Matter of Gilbert*, 4 Dem. 468. But letters once issued to a non-resident will not be revoked for his continued non-residence. *Postley v. Cheyne*, 4 Dem. 492. So, non-residence of executors at the time of grant of letters is no ground for revocation at the instance of a debtor whom they have sued. *Wiley v. Brainerd*, 11 Vt. 107; *Walker v. Torrance*, 12 Ga. 604; *Brown v. Strickland*, 28 Ga. 387. A husband, though a non-resident, is entitled to administer on the estate of his deceased wife. *Weaver v. Chace*, 5 R. I. 356. So, the non-residence of an ancillary administrator (who is also the administrator-in-chief in the place of the domicile of the deceased) is not sufficient ground for his removal without proof of prejudice arising from that fact. *White v. Spaulding*, 50 Mich. 22.

An administrator's removal from the state is generally a sufficient cause for revocation of his letters. *Croswell on*



Exrs. § 298; Woerner on Admin. § 270; Sarkie's Appeal, 2 Pa. St. 157; Frick's Appeal, 114 Pa. St. 29; Crawford v. Tyson, 40 Ala. 299; Hardaway v. Parham, 27 Miss. 103; Harris v. Dillard, 31 Ala. 191. But see, *contra*, Brown v. Strickland, 28 Ga. 387. And removal from the village where he resided at the time of his appointment is not sufficient. Flinn v. Chase, 4 Denio 85. But the enlistment of an administrator in the army, and abandonment of his home and business, was held to be sufficient ground for revocation in the discretion of the Probate Court. Berry v. Bellows, 30 Ark. 198. Removal from the state does not, however, revoke the administrator's letters *ipso facto*. Brown v. Strickland, *ubi supra*; Walker v. Torrance, 12 Ga. 604; McCreary v. Taylor, 38 Ark. 393; Bradley v. Harden, 73 Ala. 70. An order of revocation will, however, be implied in a collateral proceeding from final settlement of one administrator during his co-administrator's non-residence, and the order of the court approving the same and entirely ignoring the absentee. State v. Rucker, 59 Mo. 17. See further as to the effect of removal from the state, Hardaway v. Parham, 27 Miss. 103; Harris v. Dillard, 31 Ala. 191; Succession of McDonogh, 7 La. An. 472; Yerkes v. Brown, 10 La. An. 94.

In some states, the marriage of an executrix disqualifies her from acting further in such administrative capacity. But her powers do not cease *eo instanti*, but only on decree made removing her. Schroeder v. Superior Court, 70 Cal. 343; Buckley v. Buckley, 16 Nev. 180; Woerner on Admin. § 269. Although if she is thereby rendered incompetent the letters granted to her must be revoked. Schroeder v. Superior Court, 70 Cal. 343; Whittaker v. Wright, 35 Ark. 511. And even if not disqualified, an administratrix may be removed

for such cause. Newhouse v. Gale, 1 Redf. 217. And the court may, in its discretion, appoint her husband as administrator. Long v. Higgins, 72 Ga. 776. In Mississippi, one who marries an executrix is required by statute to furnish bonds, and his failure to do so is cause for her removal. Gates v. Clark, 56 Miss. 212. In California, the authority of an executrix ceases upon her marriage. Teschmacher v. Thompson, 18 Cal. 11. But the remarriage of a widow, who is executrix of her deceased husband, is no cause for her removal. Schroeder v. Superior Court, 70 Cal. 343. In Georgia, the letters abate on the marriage of an administratrix, and a subsequent sale by her to pay debts is invalid, although approved by the court. Rumpf v. True-love, 66 Ga. 480.

*Revocation for insolvency—intemperance.* It is sufficient cause for the removal of an administrator, if he is insolvent and a non-resident, Shreve v. Wampole, 11 Stew. (N. J.) 490; or if his circumstances are so precarious as to endanger the estate, Senior v. Ackerman, 2 Redf. 302; or if he or his sureties are likely to become insolvent, Cramp v. Williams, 56 Ga. 590.

In New York, "improvidence" is a ground for revocation of letters. Harrison v. Clark, 87 N. Y. 572; Emerson v. Bowers, 14 Barb. 658. The word "improvidence" as used in the statute of New York refers to habits of mind and conduct which become a part of the man, and render him generally unfit for the trust. Freeman v. Kellogg, 4 Redf. 218, 224; Emerson v. Bowers, 14 N. Y. 449, 454.

And, in general, an administrator may be removed because of any facts that render him unsuitable, although they existed at the time of his appointment. Drake v. Greene, 10 Allen 124. But the insolvency of an executor, if known to the testator, is not a suffi-

cient ground for his removal. *Neighbors v. Hamlin*, 78 N. C. 42. And in some states insolvency alone, or apprehension that the executor will misapply the funds of the estate, is not sufficient ground for revocation. *Neighbors v. Hamlin*, 78 N. C. 42; *Schanck v. Schanck*, 3 Halst. Ch. 140. In Pennsylvania, however, under the act of 1861, it is enough if he is insolvent, or likely to become so. *Estate of Edmonds*, 11 Phila. 85. An executor may be removed when his circumstances are so precarious as not to afford adequate security for the administration of the estate. *Shields v. Shields*, 60 Barb. 56. So, where one of two executors was utterly insolvent and the conduct of the other endangered the estate, both were removed, in *Estate of Greentree*, 12 Phila. 10.

So, an administrator may be removed for habitual intemperance, *Gurley v. Butler*, 83 Ind. 501; or a testamentary trustee for habitual intemperance and insolvency, *Matter of Cady*, 36 Hun 122; or for incompetency and dishonesty, *Savage v. Gould*, 60 How. Pr. 234.

*Revocation for negligence.* Letters of administration may be revoked for the failure or neglect to perform official duties. *Taylor v. Biddle*, 71 N. C. 1. But an executor or administrator should be held only to the degree of diligence usual among prudent men. *McFadgen v. Council*, 81 N. C. 195. Gross negligence or bad faith upon the part of the executor in failing to make sale of real estate, when directed by the will to sell, is sufficient ground for revocation. *Haight v. Brisbin*, 100 N. Y. 219; *Wright v. McNatt*, 49 Tex. 425. So, neglect to withdraw the assets from the testator's business, as directed by the will, is ground for the removal of a testamentary trustee. *Hooley v. Gieve*, 9 Abb. N. C. 8; S. C. 9 Daly 104.

So, an administrator's failure to file an *inventory* is ground for his removal. *Williams v. Tobin*, 37 Ind. 345; *Oglesby v. Howard*, 43 Ala. 144; and so is his failure for an entire year to file an inventory of the personal property, coupled with its continued exposure to the weather and its entire loss. *Estate of Rice*, 14 Phila. 327. So, the failure to inventory certain personal property claimed adversely by himself. *Mills v. Mills*, (Or.), 29 Pac. Rep. 443. But the failure to file, or join others in filing, an inventory is not *per se* cause for removal, *Estate of Patten*, 7 Mackey 392; nor his failure to inventory a note due from himself, *Dowley v. Graham*, 42 Miss. 451; since the time for filing it may be extended, *Estate of Patten*, *ubi supra*.

Failure to file *accounts* as required by statute may be a proper ground for removal. *Scott v. Crews*, 72 Mo. 261. And if he has omitted for twenty years to file his account, it seems that such laches are sufficient ground for his removal. *Armstrong v. Stowe*, 77 N. C. 360. So, *a fortiori*, his neglecting to account for seven years, and then only under citation, together with failure to keep proper accounts, mixing trust funds with his own, withholding moneys which should have been paid over to the *cestui que trust*, and making improper investments, furnish ground for removal. *Estate of Simmons*, 155 Pa. St. 215. But, in general, the court will not remove an executor or administrator, in the first instance, for mere failure to file his account. *Estate of Moore*, 83 Cal. 583; *Estate of Stow*, *Myrick's Prob.* 97. And even his neglect to do so for sixteen years will not throw on him the burden of disproving his alleged negligence. *Estate of Moore*, *ubi supra*. Nor will a testamentary trustee necessarily be removed for failure to keep proper accounts and make prompt col-

lection of claims, *Waterman v. Alden* (Ill.), 32 N. E. Rep. 972; nor an executor for mistake in his accounts or in his construction of the will, unless made willfully, *Witherspoon v. Watts*, 18 S. C. 396; or for refusal to account for moneys received by him from his testator twenty years before his death, *Hussey v. Coffin*, 83 Mass. 354. Nor will administrators *cum testamento annexo* who have been ordered to settle final accounts and deliver over to the executor certain securities and moneys be removed because they have done nothing owing to disagreements, but, they will be compelled to account in the Probate Court. *Newman v. Warner*, 7 Stew. (N. J.) 359.

Nor is the failure to *litigate* a doubtful claim a ground for revocation, *Estate of Stow*, Myrick's Prob. 97; or to sue a former partner of the testator or force a partnership accounting (not alleged as a failure of duty in the petition). *Carpenter v. Gray*, 5 Stew. (N. J.) 692; S. C. 7 Id. 282. But an executor may be removed for his neglect to defend a suit against a relative under suspicious circumstances indicating a fraudulent intent. *Reynolds v. Zink*, 27 Gratt. 29.

*Revocation for failure to give bond.* Failure to give the required bond is ground for removal after an order of the Probate Court has been made requiring the same, *National Bank of Troy v. Stanton*, 116 Mass. 435; *Aldridge v. McClelland*, 7 Stew. (N. J.) 237; or requiring a new bond. *Bills v. Scott*, 49 Tex. 430. And this is true of a testamentary trustee, where he has been ordered to give bond, although it was expressly dispensed with in the will. *Foss v. Sowles*, 62 Vt. 221. An executor who is squandering assets may be restrained from managing the estate until he gives security, and if he fail to do so, may be removed. *Chappell v. Akin*, 39 Ga. 177. And the

public administrator also may be removed for failure to renew his bond as required. *Matter of Brinson*, 73 N. C. 278. But letters should be revoked for such negligence only after a formal order requiring the bond. *Cohen's Appeal*, 2 Watts 175. The administrator's appointment is not rendered void by his failure to give bond. *Harris v. Chipman* (Utah), 33 Pac. Rep. 242. And after fifteen years such failure is not shown by the absence of the bond from the files and the erasure in the order of appointment of the clause requiring bond. *Id.* And if the bond is defective, he should have an opportunity to perfect it, *Wingate v. Wooten*, 13 Miss. 245; or to prove its sufficiency. *Ross v. Mims*, 15 Miss. 121. But a prior right to the appointment as administrator, once lost by inability to give sufficient bond, will not be restored on offer of a sufficient bond after the appointment of another person. *Williams' Case*, 18 Abb. Pr. 350.

The office of an administrator or of an executor required to give bond cannot be considered as filled until the bond is given. *Woerner on Admn.* § 253; *Feltz v. Clark*, 4 Humph. 79; *O'Neil v. Tisdale*, 12 Tex. 40; *Commonwealth v. Forney*, 3 Watts & S. 353; *Ex parte Brown*, 2 Bradf. 22; *Gardner v. Gantt*, 19 Ala. 666; *Drane v. Baylis*, 1 Humph. 174; *Succession of Bodenheimer*, 35 La. An. 1034. In Oregon, the office of administrator is vacated *ipso facto* by failure to furnish new security when required. *Levy v. Riley*, 4 Or. 392. In Louisiana, failure to give the required security vacates an executor's appointment and makes room for the appointment of an administrator *cum testamento annexo* (datative executor) without further proceeding for revocation. *Succession of Guidry*, 40 La. An. 671. And in New Hampshire, an executor's powers are suspended until he

gives the required bond. *Morgan v. Dodge*, 44 N. H. 261. And if three executors, of whom one is residuary legatee, give a bond which is sufficient only as to the latter, the appointment of the others is rendered void. *Heydock v. Duncan*, 43 N. H. 95.

*Revocation for misconduct.* It is sufficient ground for the revocation of letters that the executor has abused the trust and confidence reposed in him. This is so where an executor, taking advantage of the poverty of the residuary legatee, seeks by false representations and suggestions to induce her to sell to him the residuary estate for a very inadequate price. *Lett v. Emmett*, 10 Stew. (N. J.) 535. For any wasting or misapplying of the estate, or abuse of confidence, an executor may be removed. *Gray v. Gray*, 12 Stew. (N. J.) 332. So, neglect to inventory the assets of the estate coupled with false representations as to proceeds of sale of business and with delivery of the estate to the widow, knowing her intention to misapply it, is improvidence and misconduct sufficient for removal. *Matter of Fernbacher*, 17 Abb. N. C. 391. So, it is misconduct and cause for removal to fraudulently concoct a claim against the estate in his own favor, *Owens v. Link*, 48 Mo. Ap. 534; or to mingle the funds of the estate with his private funds so that he cannot render distinct accounts. *Hake v. Stott*, 5 Col. 141. So, a trustee may be removed for delegating his trust duties to another and investing the trust funds on second mortgage, *Savage v. Gould*, 60 How. Pr. 234; or an administrator *cum testamento annexo*, who is also testamentary trustee, for failing to invest the fund as required by the testator, and to render an account of his trust, using the fund in his own business, and giving evasive and unsatisfactory answers when asked to account, *Clemens v. Caldwell*, 7 B. Mon. 171;

or an executor for any acts of a doubtful character jeopardizing the estate in his hands. *Estate of Greentree*, 12 Phila. 10. And, *a fortiori* for a conversion of the estate. *Shreve v. Wampole*, 11 Stew. (N. J.) 490. So, it is the duty of an administrator to contest doubtful claims against the decedent's estate, and he will be removed for delay in the administration caused by such a contest. *Andrews v. Carr*, 2 R. I. 117.

But it is no ground for removing an executor, or for requiring him to give security for assets in his hands, that he paid a premium in investing certain funds in government bonds, all the interest collected having been paid over to the legatee; nor that he and his co-executor made an unjustifiable investment of other funds, such transaction not being alleged in the petition as a ground of complaint; nor that a mortgage belonging to the estate had been assigned by him to a third person in order to facilitate its collection, no bad faith appearing, and such assignment not being alleged in the petition; nor that he has sold his farm and the personal property thereon, there being no proof that the assets are insecure in his hands, or in any danger of being wasted. *Carpenter v. Gray*, 5 Stew. (N. J.) 692; S. C. 7 Id. 282.

The payment by an administrator of his own debt out of the funds of the estate is a breach of trust for which he may be removed, *Killam v. Costley*, 52 Ala. 85; but if the debt be small in comparison with the funds, and there appear to be no improper motive, and the interests of those concerned have not been imperiled, the payment should not cause his removal. Id. So, the transfer of the assets of the estate to his sureties for their indemnity against loss on his bond is misconduct within the meaning of the New York statute. *Fleet v. Simmons*, 3 Dem 542; N. Y. Code, § 2685. So,

an unauthorized preference of creditors is ground for the revocation of letters of administration. *Foltz v. Prouse*, 17 Ill. 487. But not, *ipso facto*, that the administratrix has paid all the debts of the estate except one due to the petitioner, the estate being solvent. *Munroe v. People*, 102 Ill. 406.

Under the Maryland Code (Art. 93, § 275) making sale or removal of property without order of the court a cause for removal, an executor may be removed for an unnecessary sale of testator's bank stock without asking leave of the court. *Levering v. Levering*, 64 Md. 399. So, the sale of part of decedent's land at private sale by a non-resident executrix who has not given a power of attorney to some resident as required by law, will be sufficient causes for removal. *Succession of Winn*, 27 La. An. 687. And where, in a suit on an executor's bond, maladministration is discovered showing him to be an unsuitable person for the trust, it is the duty of the probate judge to remove him. *Newcomb v. Williams*, 9 Met. 525. So, an executor may be removed for disobeying an order of the court which required him to transfer certain assets to himself as life tenant and furnish proper security for the protection of the rents in remainder. *Van Dusen's Appeal*, 102 Pa. St. 224. But it has been held that a sale of real estate by executors to themselves is no ground for revocation of their letters, not being one of the grounds enumerated by the act of March 29, 1832. *Wells v. Dietrich*, 7 Watts & S. 401. And failure to sell as commanded by the will in the exercise of a *bona fide* discretion as to the time of sale is not ground for removal. *Haight v. Brisbin*, 96 N. Y. 132. Especially where the executor had made efforts to make a private sale and was then under contract for one, although he had for 20 years failed to make a public sale under the direction

of the will, which, however, left the time of sale in his discretion. *Wilcox v. Quimby*, 20 N. Y. Supp. 5. Where there is proper cause for removal, it will not be prevented by the fact that the acts complained of actually resulted in benefit to the estate, *Cramp v. Williams*, 56 Ga. 590; or that the acts benefited the estate and were without fraud, and that the legatees complaining have a complete remedy on the bond. *Hake v. Stott*, 5 Col. 141. But removal was refused in a case where the administrator was the victim of a forgery, made payments to the attorney of a minor on a forged order, and mingled money of the estate with his own in bank. *Estate of Welch*, 86 Cal. 179.

*Formal revocation necessary.* It may be laid down as the general rule that unless the action of the Probate Court is absolutely void (which can only occur when the court has clearly no jurisdiction whatever), a formal revocation is necessary to put an end to the powers conferred by the letters granted. A grant of administration, by a court having jurisdiction of the subject matter, on the estate of one who died testate, is voidable, not void. *Broughton v. Bradley*, 34 Ala. 694. The distinction, however, is often very arbitrary between void and voidable acts. Thus, it has been held that the administration granted on the estate of a non-resident who left no assets in the state, and none of whose assets afterward came into the state, is void for lack of jurisdiction, *Jeffersonville Railroad Co. v. Swayne*, 26 Ind. 477; and that a grant of letters to a person not entitled is not void, but voidable. *Jones v. Bittinger*, 110 Ind. 476. Where, as in Georgia, the Probate Court is one of general jurisdiction, its appointment of administrator is not void because it does not show the necessary jurisdictional facts. *Barnes v. Underwood*, 54 Ga. 87. Even an order

directing him to turn over the estate to a successor in office will not, until his formal removal, prevent an administrator from acting as such, *e. g.*, from executing a deed as administrator. *Warren v. Carter*, 92 Mo. 288. But where the letters of an administratrix have abated *per se* by her marriage, she cannot sell land for the payment of debts of the estate, and such sale, although approved by the court, will not be binding upon the heirs. *Rumpf v. Truelove*, 66 Ga. 480. But in some states, it is held that where administration has been granted to the wrong person, and afterward granted to the right person, the former appointment is revoked by the later, *Ex parte Barker*, 2 Leigh 719; *Burnley v. Duke*, 1 Rand. 108; *Ragland v. King*, *ubi supra*; *Haynes v. Meeks*, 20 Cal. 288; *Grande v. Chaves*, 15 Tex. 550; *Pettigru v. Ferguson*, 6 Rich. Eq. 378; *People v. White*, 11 Ill. 341; *McLuarin v. Thompson*, Dudley 335; or by the appointment of a successor, in general. *Berry v. Bellows*, 30 Ark. 198. And it has been held that the acceptance by the court of the administrator's resignation is a revocation of the letters. *Balch v. Hooker*, 32 Minn. 158; *Marsh v. People*, 15 Ill. 284. So, the removal of an administrator *cum testamento annexo* is effected by the appointment of a trustee in chancery on a bill for construction and administration. *Love-man v. Taylor*, 85 Tenn. 1.

*Proceedings, instituted by whom.* The Probate Court may, in some states at least, institute proceedings of its own motion for the revocation of letters irregularly or improvidently granted. *Koger v. Franklin*, 79 Ala. 505; *County Court v. Bissell*, 2 Jones 387. In general, however, the application for revocation of letters must be by a party interested in some manner in the estate. *Schouler on Exrs.* § 151; *Woerner on Admn.* § 272. It may be made by a

creditor whose right to administer was superior at the time a stranger was appointed. *Ward v. Cameron*, 37 Ala. 691. So, by a legatee under a will where an appeal has been taken from a decision declaring the will void, *Newhouse v. Gale*, 1 Redf. 217; by the widow of the decedent, *Evans v. Buchanan*, 15 Ind. 438; by the assignee of the legatee or devisee, *Yeaw v. Searle*, 2 R. I. 164; *Susz v. Forst*, 4 Dem. 346; by sureties conceiving themselves endangered by the conduct of the administrator, *De-Lane's Case*, 2 Brev. 167; *Hardaway v. Parham*, 27 Miss. 103; or by any party interested. *Estate of Pike*, 45 Wis. 391. In Iowa, the party interested must not have had notice or appeared in the original probate proceeding. *Gregg v. Myatt*, 78 Ia. 703. But in Illinois an interested party is not estopped by his appearing and examining witnesses at the probate. *Shaw v. Moderwell*, 104 Ill. 64. The power to revoke letters testamentary in New York is derived exclusively from § 2685, Code Civ. Pro., and must be upon the application of "a creditor or person interested in the estate." *Drexel v. Berney*, 1 Dem. 163. The Probate Court may determine whether the applicant is a creditor upon issue taken by the administrator. *Matter of Wheeler*, 46 Hun 64, citing *Hurlburt v. Durant*, 88 N. Y. 121.

But a debtor is not a "person interested," *Drexel v. Berney*, 1 Dem. 163; *Estate of Berney*, 2 Civ. Pro. 455; S. C. 3 Id. 122; nor a railroad company against which suit has been brought for causing the death of the intestate, if the appointment is voidable only, *Chicago &c. Railroad Co. v. Gould*, 64 Ind. 343; R. S. § 2497; although if the appointment is void and payment to the administrator would be no bar to a new action, it is otherwise. *Jeffersonville Railroad Co. v. Swayne*, 26 Ind. 477; *Donaldson v. Lewis*, 7 Mo. Ap. 403. An attorney for distributees is not a

"party interested," *Biddison v. Mosely*, 57 Md. 89; nor even, in Texas, the donee of an heir. *Ransome v. Bearden*, 50 Tex. 119. And in New York, even a creditor, who was not himself a proper party to the probate proceeding, cannot apply for its revocation on the ground of an objection to jurisdiction already passed on by the Probate Court. *Heilman v. Jones*, 5 Redf. 398. So, the public administrator of one county may not apply for the revocation of letters granted to the public administrator of another county. *Estate of Griffith*, 84 Cal. 107; Code C. P. § 1383. And in some states, it is said that the appointment of the public administrator can only be questioned by the next of kin. *Succession of Burnside*, 34 La. An. 728; *Tittman v. Edwards*, 27 Mo. Ap. 492.

An executrix is not estopped by her mere acceptance of letters testamentary from applying for revocation of the probate. *Gaither v. Gaither*, 23 Cal. 521. On the other hand, next of kin who have renounced their right to appointment as administrators cannot afterward apply on the ground of their prior right for revocation of letters granted to a stranger. *Cole v. Dial*, 12 Tex. 100. So, the next of kin disqualified by non-residence, *Frick's Appeal*, 114 Pa. St. 29; or an illegitimate child who has no right to the appointment. *Myatt v. Myatt*, 44 Ill. 473.

*Time for proceeding.* In New York, the next of kin may, within one year after probate of a will of real or personal property, contest the probate, *Matter of Kellum*, 50 N. Y. 298; or within one year after attaining their majority in the case of infant next of kin, *Matter of Becker*, 28 Hun 207. But this does not apply to proceedings to prove an alleged later will and to revoke probate of one already admitted to probate, and such proceedings need not be begun within one year. *Will of Merchant*,

*Tuck*, 151. Application for revocation of probate should be made within three years, in Georgia. *Speer v. Speer*, 74 Ga. 179. And within one year, in California, *Estate of Cunningham*, 54 Cal. 556; even as to parties then under disability. *Estate of Maxwell*, 74 Cal. 384. And in Illinois, the three-year limit of time is a jurisdictional fact, which cannot be waived even by failure to plead it. *Brown v. Miner*, 128 Ill. 148. During the term in which the appointment was made the court may of its own pleasure revoke its appointment and appoint another person. *Lingle v. Cook*, 32 Gratt. 262. In Texas, the two years allowed for proceedings for revocation after discovery of forgery or fraud are not to be added to the four years allowed for contesting a will, where the heir remained ignorant of the alleged fraud through his own laches. *Ransome v. Bearden*, 50 Tex. 119. But in South Carolina, although four years' acquiescence in a probate in common form precludes dispute as to the testamentary character of the will, the validity of its provisions may still be questioned. *Craig v. Beatty*, 11 S. C. 375. In Missouri, within the time for revocation of probate, conveyances by devisees under the will pass no title. *Hughes v. Burriss*, 85 Mo. 660.

The date of filing the petition is reckoned as the commencement of the proceeding. *Estate of Sbarboro*, *Myrick's Prob.* 255; *Floyd v. Floyd*, 90 Ind. 130. The date of the issuing of the citation cannot control. *Estate of Sbarboro*, *ubi supra*. But in New York, the filing of the petition is of no avail without the issuing of the citations. *Matter of Gouraud*, 28 Hun 560; *Matter of Phalen*, 16 Civ. Pro. 292.

*Manner of procedure.* The probate of a will and the letters testamentary granted to an executor or administrator may be revoked or set aside in a

direct proceeding for that purpose in the Probate Court, or revoked on appeal to an Appellate Court. The consideration is confined for the present to the former proceeding. This proceeding is in the court which exercised the original jurisdiction. In New Jersey, the Orphans' Court has no such power over the surrogate's probate, but they are regarded as distinct jurisdictions. *Will of Straub*, 4 Dick. (N. J.) 264; *Matter of Evans*, 2 Stew. (N. J.) 571. In Massachusetts, when revocation of probate is sought on the ground of fraud, the proper form of proceeding is by petition to vacate the former decree as having been obtained by fraud upon the party and imposition upon the court. *Walters v. Stickney*, 12 Allen 1; *Edson v. Edson*, 108 Mass. 597; *Cleveland v. Quilty*, 128 Id. 578. In New York, the Code of Civil Procedure, § 2481, sub-d. 6, gives surrogates power "to open, vacate, modify, or set aside, or to enter as of a former term a decree or order of his court, or to give a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause." A "person interested" may also proceed (3 R. S. 5th ed. 142, § 24) by filing "allegations against the validity of the will or the competency of the proof thereof," within one year after such probate. And see, Code Civ. Pro. § 2647. On a motion to vacate the order of probate by one who is next of kin, the surrogate will require the contestant to proceed by filing allegations as provided in the revised statutes, and will therefore deny the motion. *Will of Fay*, Tuck. 405. And it seems that a surrogate's court has power to construe a will, where it is necessary to do so, in order to determine an application for the removal of executors. *Estate of Fernbacher*, 8 Civ. Pro. 308.

On application for the removal of executors, made pending proceedings

on an account, it is the general practice to defer its determination until the conclusion of those proceedings. However, where no injustice will be done by the immediate removal of the executors, as disclosed by the undisputed facts and the papers in the case, such removal will be made. *Estate of Fernbacher*, 8 Civ. Pro. 308, 325; S. C. 17 Abb. N. C. 339. In Pennsylvania, in a contest as to the validity of the will in the Orphans' Court, that court has no power to revoke letters testamentary without notice, citation, or hearing; until the invalidity of the will is established, the letters remain in full force, and can only be revoked in the manner prescribed by law. *Schwilke's Appeal*, 106 Pa. St. 628. But in Louisiana, an administrator may be removed in a proceeding on his accounting, in which the issues were tried with those of a direct action for removal for maladministration. *Gray v. Waddell*, 33 La. An. 1021. And in North Carolina, where a will has been proved without citation or notice to interested parties, the probate will be revoked upon the granting of an order to re-propound the will. *Randolph v. Hughes*, 89 N. C. 428.

In general, an appeal may be taken or an original action brought to set aside the probate. *Leighton v. Orr*, 44 Iowa 679; *Gilruth v. Gilruth*, 40 Id. 346; *Havelick v. Havelick*, 18 Id. 418. And the court has power to reopen the proceedings. *Robinson v. Ring*, 72 Me. 140. But should not set aside the probate on motion. *Matter of Middleton*, 72 Iowa 424. In Tennessee, the proper practice is by petition to set aside the probate and re-propound the will. *Miller v. Miller*, 5 Heisk. 723. If an appointment is voidable only, steps should be taken in direct proceedings to remove the person so appointed. *Lyle v. Siler*, 103 N. C. 261. But an executor or administrator can be re-



moved only for legal and specific reasons, and after citation and an opportunity to be heard. *Estate of Pat-ten*, 7 Mackey 392. In Illinois, the power of the court to revoke is strictly statutory, and can be exercised only as provided in the statute. *Munroe v. People*, 102 Ill. 406. And it cannot revoke the letters of an executor or administrator until he is first cited to appear and show cause why his letters should not be revoked. *Hanifan v. Needles*, 108 Ill. 403; *Munroe v. People*, 102 Ill. 406.

In all cases the proceedings for revocation provided by the statute must be followed. Thus, in Indiana, an order that an administrator account and pay a certain judgment or be removed and the appointment of a successor on default is irregular. *Vail v. Givan*, 55 Ind. 59. If the statute prescribes a rule to show cause, removal on mere citation is irregular and the court acquires no jurisdiction of the proceeding. *Hanifan v. Needles*, 108 Ill. 403. It is error to remove an administrator on a rule to show cause, if the statute provides for removal only on petition and citation. *Succession of Calhoun*, 28 La. An. 323.

Letters of administration cannot be revoked without notice to the administrator. *Hostetter's Appeal*, 6 Watts 244; *Bieber's Appeal*, 11 Pa. St. 157. Even in the case of a non-resident ancillary administrator. *White v. Spaulding*, 50 Mich. 22. But a party who appears and applies for an adjournment waives any objection to the want of due notice. *Ferris v. Ferris*, 89 Ill. 452. And the removal of an executor without notice may be affirmed on appeal, where the Appellate Court is required to try the case on its merits. *Van Dusen's Appeal*, 102 Pa. St. 224.

The petition for removal of an executor or administrator should specifically state the interest of the petitioner,

*White v. Spaulding*, 50 Mich. 22; as well as the reasons on which the removal is asked. *Id.* Where the statute requires the petition to be verified, the verification may be by the next friend of an infant petitioner, *Hubbard v. Smith*, 45 Ala. 516; or even, in Indiana, by a third person. *McFadden v. Ross*, 93 Ind. 134.

In Rhode Island, the probate of a former will may be revoked in an application to prove a later will; an independent proceeding to revoke the former will is not necessary. *Bowen v. Johnson*, 5 R. I. 112. An unrevoked probate of a former will does not preclude the probate of a later will, *Vance v. Upson*, 64 Tex. 266; although propounded by a legatee under the first will. *Campbell v. Logan*, 2 Bradf. 90. It is not necessary that the probate of the first will should be first set aside, *Schultz v. Schultz*, 10 Gratt. 358; especially when it is doubtful whether the later will revokes the former one. *Besancon v. Brownson*, 39 Mich. 388.

Where the time for contesting a will has expired except as to an infant heir, it may be set aside as to him only, and remains in force as to other parties. *Samson v. Samson*, 64 Cal. 327. But, in general, a contested will cannot be set aside by stipulation of the parties as to the interest of the contestant only. *Matter of Frend*, 73 Cal. 555.

A decree revoking the probate of a will will not affect the rights of unborn grandchildren maintained under the will. *McArthur v. Scott*, 113 U. S. 340. So, probate may be revoked as to the personalty and allowed to stand as to the realty. *Matter of Kellum*, 50 N. Y. 298.

*Appeal.* Appellate proceedings and the time for taking them are regulated by the statutes of the several states. Where an order is merely irregular, the proper course to take is a motion to set

it aside, not an appeal. *Skidmore v. Davis*, 10 Paige 316. Where the statute enumerates the judgments and orders that are the subject of appeal, the right to appeal will be confined to them, *Estate of Moore*, 86 Cal. 58; and will not extend to an order denying new trial of the probate, *Estate of Doyle*, 68 Cal. 132; or directing the use of an administrator's name in a suit by a creditor to set aside a fraudulent conveyance. *Estate of Ohm*, 82 Cal. 160. The Appellate Court may establish a will by its reversal of the Probate Court on a question of law. *Sheridan v. Houghton*, 84 N. Y. 643.

The decree of the Probate Court revoking letters is not subject to appeal, *Tenbrook v. McColm*, 5 Halst. 333; S. C. 7 Id. 97; nor its refusal to dismiss a petition for revocation of probate. *Matter of Phalen*, 51 Hun 208. And where, after a contest, under the Maryland Code, for the revocation of a will, the will has been sustained, the Orphans' Court has no power to allow a second contest. *Worthington v. Gittings*, 56 Md. 542. Especially where it has revoked the letters testamentary and the petitioner had full knowledge of the proceeding and failed to contest it, and is not interested under the will. *Munnikhuysen v. Magraw*, 58 Md. 557. But in other states, an appeal will lie from such an order revoking letters of administration. *Murrill v. Sandlin*, 86 N. C. 54; *Succession of Bedford*, 38 La. An. 244; *Forney v. Shriner*, 60 Md. 421. But in California, no appeal lies from an order refusing to revoke letters of administration, *Estate of Keane*, 56 Cal. 407; *Estate of Moore*, 68 Cal. 394; or probate, *Estate of Sbarboro*, 70 Cal. 147; or appointing a special administrator. *Estate of Carpenter*, 73 Cal. 202.

As in other proceedings for revocation, the appellant must be a party interested, *Norton's Appeal*, 46 Cal.

527; his interest being a question for the Appellate Court to determine, *Morey v. Sohler*, 63 N. H. 507; but he need not have been a party to the proceeding below. *Estate of Borland*, 55 Cal. 310. An executor may appeal from a decree disallowing the will, *Pryor v. Mizner*, 79 Ky. 232; *Cheever v. Washenaw* Circuit Judge, 45 Mich. 6; but an executor who has formally renounced need not join in defending the will against an appeal taken from probate. *Embley v. Hunt*, 1 Stew. (N. J.) 421. The testator's widow may appeal, *Dexter v. Cadman*, 148 Mass. 421; or his heirs, the appeal not being invalidated by their being described in the petition as sisters instead of heirs. *Taylor v. Gillette*, 52 Conn. 216.

In Louisiana, the Appellate Court is confined to the matters considered by the Probate Court. *Succession of St. Hubert*, 36 La. An. 388. In New Jersey, the Appellate Court may review the whole matter, *Smith v. Smith*, 3 Dick. (N. J.) 566; and in New York, on direct appeal, *Matter of Gouraud*, 95 N. Y. 256; and may take additional evidence. *White v. Starr*, 2 Dick. (N. J.) 244. In New York, the Court of Appeals cannot review facts established by conflicting evidence, *Matter of Ross*, 87 N. Y. 514; *Davis v. Clark*, 87 N. Y. 623; unless the intermediate court has reversed the Probate Court on questions of fact. *Matter of Cottrell*, 5 Civ. Pro. 340.

Pending the appeal, the powers of the Probate Court are suspended. *Allen v. Allen*, 80 Ala. 154. Thus, the surrogate cannot revoke letters for non-compliance with an order, pending an appeal from such order. *Vredenburg v. Calf*, 9 Paige 128.

The effect of an appeal from an order appointing an administrator is to suspend his authority until the determination of the appeal. *Fletcher v. Fletcher*, 29 Vt. 98. And in California, an appeal

from revocation of the probate does not revive the letters testamentary pending the appeal, and the court may appoint an administrator *pendente lite*, *Estate of Crozier*, 65 Cal. 332; and in the meantime the acts of the executor are void. *Thompson v. Knight*, 23 Cal. 399. But in New York, the reversal on appeal of the probate decree does not terminate the authority of the executor until his letters have been formally revoked on due notice. *Thomson v. Tracy*, 60 N. Y. 174. In Maryland, an appeal from an order of revocation of letters suspends the order of revocation, *State v. Williams*, 9 Gill 172; and leaves the powers of the administrator undisturbed. *Biddison v. Story*, 57 Md. 96. In Pennsylvania, pending an appeal from a decree of revocation, the letters are in force. *Shauffer v. Stoeber*, 8 Serg. & R. 202. And on an appeal from probate, a decree establishing the will works, *ipso facto*, a reversal of the order of revocation of the letters testamentary pending the appeal. *Estate of Neal*, 17 Phila. 527.

*Resignation of office.* The right to resign depends on statutory provisions. *Croswell on Exrs.* § 307; *Woerner on Admn.* § 273. The resignation of an administrator who has never acted may be accepted by the court and another appointed. *Comstock v. Crawford*, 3 Wall. 396. And a testamentary trustee who has never accepted may be removed. *Estate of Brick*, 9 Civ. Pro. 397; S. C. 4 Dem. 468. So, the Probate Court may accept an administrator's resignation after he has settled his accounts. *Haynes v. Meeks*, 10 Cal. 110. In Georgia, the discharge of an executor made on his own application is a nullity unless the application shows on its face that notice was given of it. *Head v. Bridges*, 67 Ga. 227. But in Mississippi, it is sufficient if notice be given when the discharged executor's accounts are passed. *Sivley v. Summers*, 57 Miss.

712. And in New Jersey, an administrator need not give notice to creditors of his application for discharge. *Union National Bank v. Paulison*, 4 Stew. (N. J.) 239. In Minnesota, an administrator cannot resign his trust after accepting it, and his resignation is a nullity even if accepted by the Probate Court and filed. The Probate Court can only order his removal or revoke his letters. *Rumrill v. First National Bank*, 28 Minn. 202. Joining the Confederate Army has been held to be equivalent to a vacation of office by an executor; and a judgment subsequently entered by his confession was enjoined. *Hebert v. Jackson*, 28 La. An. 377. In Iowa, his failure to qualify is a renunciation on which a successor may be appointed. *Cable v. Cable*, 76 Ia. 163. Resignation once made after acceptance of the office cannot be revoked. *Matter of Suarez*, 3 Dem. 164. But an executor will not be discharged on his own application on the ground that the surrogate has no jurisdiction to pass on his liability to the estate as surviving partner, as the surrogate has ample power to determine such liability. *Becker v. Lawton*, 4 Dem. 341.

In a suit on an administrator's bond, the regularity of his removal or the revocation of his letters cannot be questioned. *Harrison v. Clark*, 87 N. Y. 572, affg. 20 Hun 404; *Kelly v. West*, 80 N. Y. 139; N. Y. laws of 1870, c. 359. On collateral attack, a due resignation will be presumed from a settlement of accounts purporting to be made on resignation, followed by a transfer of assets to a successor, although the required notice of intention to resign was not given, nor any order made permitting the resignation. *Macey v. Stark* (Mo.), 21 S. W. Rep. 1088.

The absence of a sole executor or administrator from the state does not

*ipso facto* work a renunciation or revocation of his authority, although it may be made the ground of an application for his removal. *Hooper v. Scarborough*, 57 Ala. 510. But he may resign and be discharged in contemplation of his removal from the state. *Trumble v. Williams*, 18 Neb. 144. And where he removes from the state and the court afterward treats his co-executor as sole executor, it will amount to a discharge of the non-resident executor without formal order. *Vosler v. Brock*, 84 Mo. 574. The petition of an executrix for the appointment of a successor on account of her marriage is a resignation of her office, and it will be presumed that her accounts have been settled as required by law. *Estate of Allen*, 78 Cal. 581. So, where there is a record of the resignation of an administrator and the appointment of his successor, the presumption is that the statutory requirements as to an

account and transfer of assets have been complied with. *Jennings v. Le Breton*, 80 Cal. 8. An executor or administrator may be cited to account at the instance of his successor after his resignation. *Matter of Radovich*, 74 Cal. 536.

An executor of an executor may renounce the executorship of the original testator and retain that of his own testator. *Hart v. Smith*, 20 Fla. 58. So, an executor may renounce as executor and retain a testamentary trust and a power of sale as trustee. *Mordecai v. Schirmer* (S. C.), 16 S. E. Rep. 889. And in Pennsylvania, an executor may decline the trust and retain the executorship, but not conversely. *Estate of Strobel*, 11 Phila. 122. So, in California, an executrix (widow) remarrying and resigning the executorship cannot retain the right to nominate her successor. *Estate of Allen*, 78 Cal. 581; Code C. P. § 1365.

### \*CHAPTER THE THIRD.

OF THE EFFECT OF REVOCATION OF PROBATE, OR LETTERS OF ADMINISTRATION, ON THE MESNE ACTS OF THE EXECUTOR OR ADMINISTRATOR.†

It remains to consider what effect the revocation of probate or letters of administration has on the intermediate acts of the former executor or administrator.

Before dealing with the principles governing the effect of revocation, and the cases decided thereon, it seems desirable to call attention to the statutory enactments which have, to a large extent, rendered inapplicable the old principles and cases.

By sect. 77 of the Court of Probate Act, 1856 (20 & 21 Vict. c. 77), it is expressly enacted that “where any probate or administration is revoked under this Act, all payments *bona fide* made to any executor or administrator under such probate or administration before the revocation thereof shall be a legal discharge to the person making the same, and the executor or administrator, who shall have acted under any such revoked probate or administration, may retain, and reimburse himself in respect of, any payments made by him, which the person, to whom probate or administration shall be afterward granted, might have lawfully made.”

Stat. 20 & 21 Vict. c. 77, s. 77.  
Payments under revoked probates or administration to be valid.

And by sect. 78 it is enacted that “all persons and corporations, making, or permitting to be made, any payment or transfer *bona fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration.”

Sect. 78.  
Persons making payments upon probates or administration to be indemnified.

\*The first important distinction on this subject is, between grants which are void, and such as are merely voidable. If the grant be of the former description, the mesne acts of the executor or administrator, done between the grant and its revocation,

Where the grant is void:

†See American note at end of this Chapter.

except in so far as they are protected by the above mentioned statutes, shall be of no validity : As if administration be granted on the concealment of a will, appointing executors, and afterward a will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void ; nor can they, although the executor should refuse to act, be made good by relation (a) : So in *Graysbrook v. Fox* (b), an action of *detinue* was brought by an executor against the defendant who had purchased goods belonging to the testator, from one to whom the Ordinary had, immediately after the testator's death, and before the executor had proved the will, granted administration ; and it was holden that the executor who sued after probate might recover. So, if administration be granted before the refusal of the executor, a sale by the administrator of the testator's effects shall be void, although the executor aforesaid appear and renounce (c). So in the case of *Woolley v. Clark* (d), a will was proved by the executor named in it, who after probate sold the \*goods of the testator ; at the time of the sale he had notice of a subsequent will, which was afterward proved, and the probate of the former will revoked on citation : whereupon the executor under the latter will brought trover against the executor under the former for the goods sold : and it was holden, that the action was sustainable to recover the full value, and that the defendant was not entitled, in mitigation of damages, to show that he had administered assets to the amount.

In these cases, when the wrongful executor or administrator has sold the property of the deceased, the rightful representative may either, as in the case just mentioned, maintain trover, or *detinue* ; or he may bring *assumpsit* for the money produced by the sale, as so much money received to his use, as executor or administrator ; for the

(a) *Abram v. Cunningham*, 2 Lev. 182. But a grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void *ab initio*, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under these circumstances to a purchaser who was ignorant of the suppression of the will was upheld by the court although the grant was revoked after the sale : *Boxall v. Boxall*, 27 C. D. 220. It is to be observed that Kay,

J., in this case considered that *Abram v. Cunningham*, *ubi sup.*, was decided on the ground that the concealed will had appointed executors, who, therefore, had a right of property vested in them before probate, and not upon the fraud committed in concealing the will.

(b) Plowd. 276.

(c) *Abram v. Cunningham*, *ubi supra*.

(d) 5 B. & A. 744. But this case would seem to be of doubtful authority. See *ante*, p. \*222, note (a), and p. \*224.

plaintiff may waive the tort, and suppose the sale made with his consent (*e*).

It should seem, however, that, as between the rightful representative and a person to whom the executor or administrator under a void probate, or grant of letters, has aliened the effects of the deceased, the act of alienation, *if done in the due course of administration*, shall not be void. Thus in the case of *Graysbrook v. Fox*, above mentioned, it was laid down by the court, that if the sale had been made to discharge funeral expenses or debts, which the executor or administrator was compellable to pay, the sale would have been indefeasible forever (*f*).

If the grant were only voidable, then another distinction \*arises between the case of a suit by citation, which is to countermand or revoke a former probate or former letters of administration, and an appeal, which is always to reverse a former sentence (*g*). In case of an appeal all intermediate acts of the executor or administrator are ineffectual; because the appeal suspends the former sentence (*h*); and on its reversal it is as if it had never existed (*i*).

But if the suit be by citation, and the grant of administration be voidable only (as where it has been granted to a party not next of kin) (*k*), or on the refusal of an executor who has before administered (*l*), or *non vocatis jure vocandis*, without citing the necessary parties (*m*), all lawful acts done by the first administrator shall be valid: as a *bona fide* sale or a gift by him of the goods of the intestate (*n*), and such gift shall be available, even if it were with intent to defeat the second administrator, or were made *pendente lite*, on the

(*e*) *Lamine v. Dorrell*, 2 Lord Raym. 1216. Where an auctioneer, employed by a supposed executrix, sold goods of the testator, but before payment, the real executrix claimed the money from the buyer, it was held that the auctioneer could not afterward maintain an action against the buyer, though the latter expressly promised to pay on being allowed to take away the goods: *Dickenson v. Naul*, 4 B. & Adol. 638. See also *Crosskey v. Mills*. 1 Crompt. M. & R. 298. *Allen v. Hopkins*, 13 M. & W. 94.

(*f*) Plowd. 282, 283. See *ante*, pp. \*222, \*223. *Coulter's Case*, 5 Co. 30, *b*. *Parker v. Kett*, 1 Lord Raym. 661.

(*g*) *Packman's Case*, 6 Co. 18, *b*, *ante*, p. \*487.

(*h*) *Price v. Parker*, 1 Lev. 158.

(*i*) 6 Co. 18, *b*. Many such intermediate acts are now protected by the sections of 20 & 21 Vict. c. 77, above cited.

(*k*) *Ante*, p. \*493.

(*l*) *Ante*, p. \*227.

(*m*) *Ante*, p. \*492.

(*n*) *Wadesworth v. Andrews*, cited *Dyer*, 166, *b*, in marg.

citation (*o*) ; although by stat. 13 Eliz. c. 5, it be void as to a creditor (*p*). Again, if the administration be granted on condition, all the acts which the administrator does before the breach of the condition are good : so that the subsequent administrator cannot avoid any gifts or sales before such breach made by such conditional administrator (*q*). So if administration be committed to a creditor, and after repealed at the suit of the next of kin, the creditor shall retain against the rightful administrator, and his disposal of goods, even pending his citation, till sentence of repeal, is good (*r*). And where there was a citation to repeal administration, but the grant was affirmed and administration granted to \*another, upon which an appeal was sued, and both sentences repealed, an assignment of a lease, made by the first administrator in the meantime, was held good (*s*) : for the repeal was merely of the sentence in the citation, and so it is all one as if the administration had been avoided in the suit upon the citation.

But where an administrator sold a term charged with a trust, in trust for himself, although the administration was revoked on a suit by citation, and not on an appeal, the assignment was decreed to be set aside (*t*).

It may perhaps be laid down as a general test, whether an administration is void or voidable, that, where the grant is in derogation of the right of an executor, it is void : but where the administration is granted by the proper jurisdiction, and is only in derogation of the right of the next of kin, or residuary legatee, it is merely voidable (*u*).

And even before the passing of 20 & 21 Vict. c. 77, it was held that payment to an executor, who had obtained probate of a forged will, was a discharge to the debtor, notwithstanding the probate was afterward declared null in the Ecclesiastical Court (*x*) ; on the principle that if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor, as long as the probate

Test whether administration void or voidable.

Payment to an executor or administrator under a void probate or administration is a discharge.

(*o*) Bro. Abr. Administrator, pl. 33. Packman's Case, 6 Co. 18, *b*.

(*p*) 6 Co. 18, *b*. Treat. on Eq. Pt. 2, c. 1, s. 5.

(*q*) 6 Co. 19, *a*. Godolph. Pt. 2, c. 31, s. 5.

(*r*) Blackborough v. Davis, 1 Salk. 38.

(*s*) Semine v. Semine, 2 Lev. 90.

(*t*) Jones v. Waller, 2 Chanc. Cas. 129.

(*u*) However, it has been shown that an administration is not void, but voidable only, where improperly committed after acts of administration by an executor : *Ante*, p. \*227.

(*x*) Allen v. Dundas, 3 T. R. 125, 129.



was unrepealed; and the debtor was not obliged to wait for a suit, when he knew that no defense could be made to it.

This, however, was to be understood only where the grant was revoked on citation; if it were reversed on appeal, the administrator's or executor's authority was suspended by the appeal, and of course such payments would have been void (*y*).

\*Whether the administration be void, or voidable, or be revoked on citation or appeal, if an action was brought by the administrator, and while it was pending administration was committed to another, the writ would formerly have abated (*z*). By sect. 76 of the Court of Probate Act (20 & 21 Vict. c. 77), "where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such court may direct."

Abatement of suit by administrator by revocation of administration.

20 & 21 Vict. c. 77, s. 76.

Suggestion to be made on the record.

And since the Judicature Acts proceedings commenced by, or against, any administrator, before revocation of the administration, do not become abated, but upon such revocation they may be continued by, or against, the person to whom the new grant of administration is made. An order that the proceedings shall be carried on by or against such new administrator (as the case may be) may be obtained *ex parte* on application to the court or a judge upon an allegation of the transmission of interest to the new administrator by such grant of administration to him (*a*).

No abatement of suit since Judicature Acts.

Modern procedure.

And if an administrator, before the repeal of the administration, obtain a judgment for a debt due to the intestate, the new administrator, upon the grant to him of administration, may apply to the court or a judge for leave to issue execution, and the court or a judge, if satisfied that he is entitled to issue execution upon such judgment, may make an order to that effect (*b*).

(*y*) Toller, 131. But see stat. 20 & 21 Vict. c. 77, s. 77, *supra*.

(*a*) R. S. C. 1883, Ord. XVII., rr. 1-5.

(*b*) R. S. C. 1883, Ord. XLII., r. 23.

(*z*) Bro. Administrator, pl. 3, Toller, 131.

\*It was formerly held that where administration was granted, and afterward there appeared to be an executor, if the administrator had paid debts, legacies, or funeral expenses, which the law forced the executor to pay, the administrator, in an action against him by the executor, should recoup so much in damages, because he was compelled to pay it, and the true executor had no prejudice by it, forasmuch as he himself would have been bound to pay it (c). So it was holden in equity, where a widow possessed herself of the personal estate as an executrix, under a revoked will, and paid debts and legacies, but had no notice of revocation, that she should be allowed those payments (d). And now by stat. 20 & 21 Vict. 20 & 21 Vict. c. 77, s. 77, it is expressly enacted "that the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration shall be afterward granted might have lawfully made."

It was formerly held that a defendant sued as administrator might plead, that, *pendente brevi*, administration was committed to another (e). With respect to the proper plea, in a case where the administration is revoked before the action commenced; the defendant in *Garter v. Dee* (f), being sued as administrator, pleaded, that before the date of the writ, his administration was revoked and granted to another: *Per Wilde*: He ought to have set forth that he had fully administered all the goods in his hands, or else that he delivered them over to the new administrator (g). If he should be sued as executor *de son tort* (h), and has delivered the assets over \*before action brought, *plene administravit* seems to have been held to be the proper plea (i).

(c) *Peckham's Case*, cited *Plowd.* 282. *Bacon Abr. Exors. (E. 13)*; and see the authorities mentioned, *ante*, pp. \*221, \*222, with respect to an executor *de son tort*. But the contrary seems to have been holden in *Woolley v. Clark*, 5 B. & A. 744. *Ante*, p. \*222, note (a).

(d) *Hele v. Stowel*, 1 *Chanc. Cas.* 126, *Bac. Abr. Exors. (E. 13)*.

(e) *Bro. Administrator*, pl. 3.

(f) 1 *Freem.* 13.

(g) See also *Palmer v. Litherham*, *Latch.* 267. *Lawson v. Crofts*, 1 *Keb.* 114.

(h) See *Turner v. Davies*, 1 *Mod.* 63, by *Kelynge, C. J.*

(i) See *ante*, pp. \*218, \*219. These cases are retained in this edition of this work because, although they relate to the system of pleading as it existed before the Judicature Acts, they would still seem to be useful as indicating what facts will constitute a good defense in an action against an administrator, in cases where the administration is revoked before, or pending, action.

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† If a will has been admitted to probate without contest and letters have been granted, and any person files a petition praying that the case may be again examined and heard, a decision rendered against the probate revokes the letters issued, and all power given by the letters will cease. *Worthington v. Gittings*, 56 Md. 542; Code, Art. 93, § 320. The revocation of probate carries with it the revocation of the letters testamentary. *Clagett v. Hawkins*, 11 Md. 381. But see *Peeble's Appeal*, 15 S. and R. 39. So, letters of administration must be revoked upon reversal of judgment against a will. *Patton's Appeal*, 31 Pa. St. 465. But administration *cum testamento annexo* properly granted is not revoked by the revocation of probate in common form, *Floyd v. Herring*, 64 N. C. 409; nor by a mere contest of the will. *Elwell v. Universalist Church*, 63 Tex. 220.

The acts of an executor after probate and letters are valid notwithstanding subsequent revocation of the probate. *Jones v. Jones*, 14 B. Mon. 464. And sales by, or payments to, the executor are valid, although the probate is afterward set aside. *Woods v. Nelson*, 9 B. Mon. 600; and probate of a subsequent will or codicil granted. *Waters v. Stickney*, 12 Allen 1. So, a *bona fide* purchaser from a distributee under probate by a court of competent jurisdiction will be protected notwithstanding subsequent revocation of the probate. *Arteburn v. Young*, 14 Bush 509; *Thompson v. Samson*, 64 Cal. 330. But see, *Hughes v. Burriss*, 85 Mo. 660.

If any action be taken under void letters, such action is void *ab initio*, *Chinn v. Taylor*, 64 Tex. 385; but if the letters are avoidable only, acts rightfully done before revocation under them are valid. *Floyd v. Clayton*, 67 Ala. 265. But revocation of probate has been held to make void the payment of a legacy by the executor,

*Hinkle v. Eichelberger*, 2 Pa. St. 483; although it does not make the executor who acted under it an executor *de son tort*. *Bradford v. Boudinot*, 3 Wash. C. C. 122. The intermediate acts of an executor and the rights of third parties are protected on revocation of letters. *Rebhan v. Miller*, 114 Ill. 343. Letters of administration are not, in general, void until they are formally revoked, and all payments by debtors to the administrator are valid. *Schluter v. Bowery Savings Bank*, 117 N. Y. 125.

And where letters testamentary are revoked, and the executor is afterward reinstated by a decree in equity, the executor is not personally liable for his acts, although the decree is void. *Janes v. Williams*, 31 Ark. 175.

An agreement by heirs to account for advancements (to make up the deficiency in personal property and save real estate from sale) may be enforced by the successor after removal of the administrator with whom the agreement was made. *Smith v. Axtell*, Saxt. 494. Where probate of a forged will is afterward revoked, a *bona fide* purchaser under the will may still hold. *Steele v. Renn*, 50 Tex. 467.

The revocation of the letters of an administrator defendant in an action works a discontinuance of the action as to him upon his pleading the facts. *Taylor v. Savage*, 1 How. 282; S. C. 2 How. 395; *National Bank of Troy v. Stanton*, 116 Mass. 438; *Wiggin v. Plumer*, 31 N. H. 251. But, in Alabama, the suit may proceed against an executor after his resignation until he shows that he has accounted for, and turned over, the assets of the estate. *Skinner v. Frierson*, 8 Ala. 915. And a suit by or against an executor or administrator who has been removed may be continued by or against his successor in office. *Taylor v. Savage*, *ubi supra*; *Brown v. Pendergast*, 7 Allen 427; Mass. G. S. c. 128, § 11.

And in a suit by an administrator, his removal before judgment does not render him personally liable for costs. *Baxter v. Davis*, 3 Abb. Pr. N. S. 249.

On the other hand, where an administrator is removed, pending a suit, and this is not brought to the attention of the court, a judgment in his favor, though after his removal, is not void. *Ex parte Jones*, 54 Ala. 108. And he may bring suit on a note made to him as administrator, irrespective of the sufficiency of the letters. *Erwin v. Hill*, 51 Ala. 580.

Executors holding funds in trust under an order of court without separate appointment as trustees by the will, or order discharging them as executors, are still removable as executors for misconduct. *Matter of Hood*, 98 N. Y. 363. Where letters are revoked as informally or illegally granted, new letters may be granted to the same person. *Delaney v. Noble*, 2 Gr. Ch. 559. But see, *Matter of Dearing*, 4 Dem. 81. The removal of a testamentary trustee does not revoke his testamentary power to appoint his successor, *Foss v. Sowles*, 62 Vt. 221; and leaves undisturbed other trusts vested in him by the testator in his lifetime. *Matter of Clute*, 80 N. Y. 651. And where a testamentary trustee with the power to appoint his successor is removed without notice, and a successor appointed without giving him an opportunity of exercising his right of appointment, he may question the legality of the appointment in a suit by such successor to recover the trust fund. *Foss v. Sowles*, 62 Vt. 221.

The removal, in North Carolina, of a South Carolina executor, and the appointment of an ancillary administrator *cum testamento annexo*, does not affect in South Carolina a note made to the executor in North Carolina, but then held in South Carolina, where an action still lies upon the note. *Tillman v. Walkup*, 8 S. C. 60.

An executor after being removed may be cited to account. *Matter of Hood*, 104 N. Y. 103; *Peebles' Appeal*, 15 Serg. & R. 391. So, a universal legatee who has qualified as executrix, on removal for failure to give bond, is liable to account. *Succession of Frazier*, 35 La. An. 581.

The surrogate may, in like manner, on the application of a creditor, cite an administrator to account after his letters have been revoked, *Gerould v. Wilson*, 16 Hun 530, *affd.* 81 N. Y. 573; *Goods of Lawrence*, Tuck. 68; although his successor also may call upon him for an accounting. *Dunford v. Weaver*, 21 Hun 349. Upon removal an administrator should account to his successor for all unexpended moneys. *Whitworth v. Oliver*, 39 Ala. 286. And an administrator *de bonis non* may call on the removed administrator to account, *Marsh v. People*, 15 Ill. 284; by bill in equity. *Gleen v. Billingslea*, 64 Ala. 345. See also, p. \*415, n., *ubi supra*. And where an executor is removed pending his accounting, the court may conclude it and make a final decree therein. *Hayle v. Entrekin*, 44 O. St. 637; *Casoni v. Jerome*, 58 N. Y. 315. The accounting of an executor after removal must be upon notice to his successor. *Hatchett v. Billingslea*, 85 Ala. 16. In like manner, the resignation of a public administrator does not relieve him or his sureties from fully administering an estate then in his hands. *Olsen v. Rich*, 79 Ky. 244.

The Probate Court does not lose all jurisdiction over the person of the executor when he has been dismissed, but it may, by attachment, enforce its order for the delivery of the effects of the estate to his successor. *Tome's Appeal*, 50 Pa. St. 285.

Money received by an administrator after removal belongs to the administrator *de bonis non*. *Salter v. Cain*, 7 Ala. 478.

## \*BOOK THE SEVENTH.

### OF THE STAMP DUTIES ON PROBATES, AND ON LETTERS OF ADMINISTRATION (*a*).

By the Customs and Inland Revenue Act, 1880, 43 Vict. c. 14, section 9, it is enacted that "On and after the first day of April one thousand eight hundred and eighty, in lieu of the stamp duties now payable (*b*) upon probates of Wills and letters of administration in England and Ireland, and upon inventories to be exhibited and recorded in any Commissary Court in Scotland, there shall be charged and paid the duties specified in the schedule to this Act (*c*): Provided that an additional inventory to be so exhibited or recorded of any effects of a deceased person, where a former duly stamped inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of April one thousand eight hundred and eighty, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this Act had not been passed.

Stat. 43 Vict. c. 14.  
Grant of duties on probates and letters of administration.

Sect. 10.—(1.) "Together with the affidavit to be required and received from a person applying for a probate or letters of administration in England, in conformity with section thirty-eight of the Act passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, there shall be delivered an account (*d*) of the particulars of the personal estate for or in respect of which the probate or letters of administration is or are to be granted, and of the estimated value of such particulars.

Account to accompany affidavit on application for probate or letters of administration.

(*a*) The subject of the stamp duties on probates and letters of administration before 1880 will be found to be exhaustively dealt with in Hanson's Probate, Legacy, and Succession Duty Acts, 3rd ed., and the law after 1880, in the "Revenue Acts, 1880 and 1881," by the same author.

(*b*) *I. e.*, those imposed by 55 Geo. III. c. 184, as modified by 22 & 23 Vict. c. 36, and 27 & 28 Vict. c. 56.

(*c*) This schedule is here omitted, as it is superseded by the scale of duties contained in 44 Vict. c. 12, s. 27, in respect of probates or letters of administrations granted on or after 1 June, 1881. It should be observed that on and after that date stamp duties on affidavits of value are substituted for stamps on the grants themselves.

(*d*) For form of account, see 44 Vict. c. 12, s. 29, *post*, p. \*514.

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(2.) "The account so delivered shall be transmitted to the Commissioners of Inland Revenue, together with the documents mentioned in section ninety-three of the Act passed in the twentieth and twenty-first years of her Majesty's reign, chapter seventy-seven.

(3.) "A like account shall be annexed to the affidavit to be required and received from the person applying for a probate or letters of administration in Ireland, in conformity with section one hundred and seventeen of the Act passed in the fifty-sixth year of the reign of King George the Third, chapter fifty-six, and such account shall be in lieu of, and in substitution for, the account annexed to the form of affidavit set forth in Part III. of the schedule to the said Act.

(4.) "Every account to be delivered in pursuance of this section shall be in accordance with such form as may be prescribed by the Commissioners of Her Majesty's Treasury.

Sect. 11. "Where any legacy duty or succession duty shall be presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy, or residue, or in personal property comprised in a succession, and the duty (if any) payable upon the life or other temporary interest shall have been fully paid and satisfied, it shall be lawful for the Commissioners of Inland Revenue, in their discretion, upon the application of the executor or trustee or other person who would be accountable for the duty in respect of such interest in expectancy, if it were then in possession, to commute the duty (e) pre\*sumptively payable for a certain sum to be presently paid.

"For assessing the amount which shall be so payable the Commissioners shall cause a present value to be set upon the presumptive duty, regard being had to any contingencies affecting the liability to such duty, and the interest of money involved in the calculation being reckoned at the rate for the time being allowed by the Commissioners in respect of duties paid in advance under the Succession Duty Act, 1853.

"Upon the receipt of the certain sum the Commissioners shall give a discharge for the duty accordingly.

Sect. 12. "When an executor, administrator, or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to legacy duty or succession duty in respect of any fund in his hands which he intends to

(e) As to powers of the Commissioners of Inland Revenue to accept composition for legacy duty under a will, see 44 Vict. c. 12, s. 43, *post*, p. \*521.

distribute and shall have delivered to the Commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund.

“Such certificate shall not in any way affect the liability of any person other than the person in whose favor it is expressed to be given.

Sect. 13. “Where it appears upon an examination of the account rendered to the Commissioners of Inland Revenue that the value of the whole of the personal estate of any person dying after the passing of this Act does not amount to the sum of one hundred pounds, no legacy duty shall be charged in respect thereof or of any portion thereof.”

Relief from legacy duty when whole personal estate is less than 100*l*.

And by the Customs and Inland Revenue Act, 1881, 44 Vict. c. 12, which, as will appear, repeals the scale of duties imposed upon probates and letters of administration granted on or after 1st June, 1881, it is enacted as follows :

Stat. 44 Vict. c. 12.

Sect. 26. (1.) “The stamp duties hereinafter imposed shall \*be under the care and management of the Commissioners of Inland Revenue, who by themselves and their officers shall have the same powers and authorities for the collection, recovery, and management thereof as are by law vested in them for the collection, recovery, and management of any stamp duties, and shall have all other powers and authorities requisite for carrying into effect the provisions of this Act in relation to such stamp duties.

Stamp duties to be under the care and management of the Commissioners of Inland Revenue.

(2.) “Such stamp duties may be denoted by impressed or adhesive stamps, or partly by impressed stamps and partly by adhesive stamps, as the said Commissioners may think proper (*f*).

(3.) “As respects the duties imposed on affidavits in substitution for the duties on probates or letters of administration, the several provisions now in force (*g*) in relation to the last mentioned duties shall, so far as the same are consistent with the provisions of this Act, be deemed to be applicable to the said duties hereby imposed, and in the application thereof a probate or letters of administration having

(*f*) As to cases in which adhesive stamps may be used, see Hanson on the Revenue Acts, 1880, 1881, p. 22.

(*g*) See the provisions of 55 Geo. III. c. 184, *post*, pp. \*526, *et seq*.

thereon such a certificate as is hereinafter mentioned shall for all purposes be deemed to have been duly stamped in respect of the value stated in the certificate.

Sect. 27. "The duties imposed by the Customs and Inland Revenue Act, 1880, upon probates of Wills and letters of administration in England and Ireland shall not be payable upon probates or letters of administration granted on and after the first day of June one thousand eight hundred and eighty-one; and on and after that day in substitution for such duties, and in lieu of the duties imposed by the said Act upon inventories in Scotland, there shall, save as is hereinafter expressly provided, be charged and paid on the affidavit (*h*) to \*be required and received from the person applying for the probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland, the stamp duties hereinafter specified; (that is to say,)

Grant of duties in respect of probate and letters of administration and on inventories.

Where the estate and effects for or in respect of which the probate of letters of administration is or are to be granted, or whereof the inventory is to be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as trustee, and not beneficially, shall be above the value of 100*l.* (*i*), and not above the value of 500*l.*

#### DUTY.

At the rate of one pound for every full sum of 50*l.*, and for any fractional part of 50*l.* over any multiple of 50*l.*;

Where such estate and effects shall be above the value of 500*l.*, and not above the value of 1,000*l.* . . . . .

At the rate of one pound five shillings for every full sum of

(*h*) This is the affidavit required by 55 Geo. III. c. 184, s. 38, *post*, p. \*526. As to the transmission of this affidavit to the commissioners and penalty for neglect to do so, see 55 Geo. III. c. 184, s. 39, *post*, p. \*527.

(*i*) It follows by implication from this provision that all estates of or under the value of 100*l.* are now free from duty. Such estates were before this act exempt by virtue of 27 & 28 Vict. c. 56, s. 5, *post*, p. \*525.

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50*l.*, and for any fractional part of 50*l.* over any multiple of 50*l.*;

\*Where such estate and effects shall be above the value of 1,000*l.* (*k*) . . . . .

At the rate of three pounds for every full sum of 100*l.*, and for any fractional part of 100*l.* over any multiple of 100*l.* ;

“Provided that an additional inventory, to be exhibited or recorded in Scotland, of any effects of a deceased person, where a former inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of June, one thousand eight hundred and eighty-one, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this act had not been passed.

Sect. 28. “On and after the first day of June, one thousand eight hundred and eighty-one, in the case of a person dying domiciled in any part of the United Kingdom, it shall be lawful for the person applying for the probate or letters of administration in England or Ireland, or exhibiting the inventory in Scotland, to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses, and in that case, for the purpose of the charge of duty on the affidavit or inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects as specified in the account delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited.

Power to deduct debts and funeral expenses where deceased died domiciled in the United Kingdom.

“Debts to be deducted under the power hereby given shall be debts due and owing from the deceased and payable by law (*l*) out of any part of the estate and effects comprised in the affidavit or inventory, and are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bona fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real

(*k*) Where the estate exceeds 10,000*l.*, see stat. 52 Vict. c. 7, s. 5.

which in effect appeared in 5 & 6 Vict. c. 79, s. 23, see *Percival v. The Queen*, 3 H. & C. 217.

(*l*) As to the meaning of these words,

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estate may be primarily liable or a reimbursement may be capable of being claimed from any real estate of the deceased or from any other estate or person.

“Funeral expenses to be deducted under the power hereby given shall include only such expenses as are allowable as reasonable funeral expenses according to law (*m*).

Sect. 29. “The affidavit to be required or received from any person As to forms of affidavit. applying for probate or letters of administration in England or Ireland shall extend to the verification of the account of the estate and effects, or to the verification of such account and the schedule of debt and funeral expenses, as the case may be, and shall be in accordance with such form as may be prescribed by the Commissioners of Her Majesty’s Treasury (*n*); and the Commissioners of Inland Revenue shall provide forms of affidavit stamped to denote the duties payable under this Act.

Sect. 30. “No probate or letters of administration shall be granted Probate or letters of administration to bear a certificate in lieu of stamp duty. by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, or by the Probate and Matrimonial Division of the High Court of Justice in Ireland, unless the same bear a certificate in writing under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account.

Sect. 31. “If at any time after the grant of probate or letters Provision for return of duty overpaid. of administration (*o*), and during the administration of the estate, the value mentioned in the certificate of the officer of the Court shall be found to exceed the true value of the personal estate and effects of the deceased, or if at any time within three years after the grant, or within such further period as the Commissioners of Inland Revenue may allow, it shall appear that no amount or an insufficient amount was deducted on account of debts and funeral expenses, it shall be lawful for the said Commissioners, upon proof of the facts to their satisfaction, to return the amount of

(*m*) As to what funeral expenses are allowable to executors and administrators as against creditors, legatees, next of kin, see *post*, pp. \*886 *et seq.*

(*n*) For forms approved by the Treas-

ury, see Appendix to Hanson’s Revenue Acts, 1880 and 1881.

(*o*) Applications for return of duty under 55 Geo. III. c. 184, s. 40, had to be made within six months after discovery of overpayment.

stamp duty which shall have been overpaid (*p*), and to cause a certificate to be written by an authorized officer on the probate or letters of administration setting forth such true value, or, as the case may be, the amount, or corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the Court.

Sect. 32. "If at any time it shall be discovered that the personal estate and effects of the deceased were, at the time of the grant of probate or letters of administration, of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery (*q*), deliver a further affidavit (*r*), with an account to the Commissioners of Inland Revenue, duly stamped for the amount which, with the duty (if any) previously paid on affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said Commissioners interest upon such amount at the rate of five pounds per centum per annum from the date of the grant, or from such subsequent date as \*the said Commissioners may, in the circumstances, think proper.

Provision for payment of further duty.

"The Commissioners of Inland Revenue, upon the receipt of such affidavit duly stamped as aforesaid, shall cause a certificate to be written by an authorized officer on the probate or letters of administration setting forth the true value of the estate and effects as then ascertained, or, as the case may be, the corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the Court.

Sect 33.—(1.) "Where the whole personal estate and effects of any person *dying on or after the first day of June one thousand eight hundred and eighty-one* (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and effects situate out of the United Kingdom), without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, it shall be lawful for the person intending to apply for probate or letters of administration in England or Ireland, to deliver to the proper officer of the Court or to any officer of inland

Provisions as to obtaining probate, &c., where gross value of estate does not exceed 300*l*.

(*p*) See stat. 52 Vict. c. 7, s. 5 (6).

(*q*) For penalty of double duty for neglect, see *post*, section 40.

(*r*) As to cases where the estate exceeds 10,000*l*., see stat. 52 Vict. c. 7, s. 5 (3).

revenue duly appointed for the purpose, a notice in writing in the prescribed form (*s*), setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of fifteen shillings for fees of Court and expenses, and also, in case the estate and effects shall exceed the value of one hundred pounds, the further sum of thirty shillings for stamp duty.

(2.) "If the officer has good reason to believe that the whole personal estate and effects of the deceased exceeds the \*value of three hundred pounds, he shall refuse to accept the notice and deposit until he is satisfied of the true value thereof.

(3.) "The principal registrars of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, and of the Probate and Matrimonial Division of the High Court of Justice in Ireland, in communication with the Commissioners of Inland Revenue, shall prescribe the form of notice, and make such regulations as may be necessary with respect to the transmission of notices by officers of Inland Revenue, the steps to be taken for the preparation and filling up of forms and documents, and generally all matters which may be necessary, so as to authorize the grant of probate or letters of administration.

(4.) "Officers of Inland Revenue are hereby empowered to administer all necessary oaths or affirmations, and in the case of letters of administration, to attest the bond and accept the same on behalf of the President or Judge of the Division.

(5.) "Where the estate and effects shall exceed the value of one hundred pounds (*t*), the stamp duty payable on the affidavit for the Commissioners of Inland Revenue shall be the fixed duty of thirty shillings, and no more.

Sect. 34.—(1.) "The Intestates, Widows, and Children (Scotland) Act, 1875, and the Small Testate Estate (Scotland) Act, 1876, as amended by the Sheriff's Court (Scotland) Act, 1876, shall be extended so as to apply to any case where

Provision as to  
inventories where  
gross value of  
estate does not  
exceed 300*l*.

(*s*) For the directions issued for the guidance of the inland revenue officers appointed to receive notices of application for grants of probate and letters of administration with or without the will annexed, as to the particulars required to be stated in such notices and regulations with respect to the transmission of the same and of the necessary forms and

documents, see the Appendix to Hanson's Revenue Acts, 1880 and 1881.

(*t*) In cases where the whole estate does *not* exceed 100*l*., see the provisions of the Intestates' Widows and Children Act, 1873 (36 & 37 Vict. c. 52), extended by 38 & 39 Vict. c. 27, *ante*, pp. \*248, \*249.

the whole personal estate and effects of a person dying on or after the first day of June one thousand eight hundred and eighty-one, without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death, and \*the fees payable under Schedule C. of each of the two first mentioned Acts shall not exceed the sum of fifteen shillings, inclusive of the fee of two shillings and sixpence, to be paid to the commissary clerk, or sheriff clerk.

39 & 40 Vict. c. 24.

39 & 40 Vict. c. 70.

(2.) "In any such case where the estate and effects shall exceed the value of one hundred pounds, the stamp duty payable on the inventory shall be the fixed duty of thirty shillings, and no more.

Sect. 35. "Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterward discovered that the whole personal estate and effects of the deceased were of a value exceeding three hundred pounds, then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to Her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum.

Provision in case of subsequent discovery that the value of estate exceeded 300*l*.

Sect. 36. "The payment of the sum of thirty shillings for the fixed duty on the affidavit or inventory in conformity with this Act shall be deemed to be in full satisfaction of any claim to legacy duty or succession duty in respect of the estate or effects to which such affidavit or inventory relates.

Relief from legacy duty in cases under 300*l*.

Sect. 37. "It shall be lawful for the Commissioners of Inland Revenue at any time and from time to time within three years after the grant of probate or letters of administration or recording of inventory, as they may think necessary, to require the person acting in the administration of the estate and effects of any deceased person, to furnish such explanations, and to produce such documentary or other evidence respecting the contents of, or particulars verified by, the affidavit or inventory as the case may seem to them to require.

Power to commissioners to require explanations and proof in support of affidavit or inventory.

Sect. 38.—(1.) “Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and \*paid on accounts (u) delivered of the personal or movable property to be included therein according to the value thereof.

Grant of duties on accounts of certain property.

(2.) “The personal or movable property to be included in an account shall be property of the following descriptions, viz.:—

(a.) “Any property taken as a *donatio mortis causa* made by any person dying on or after the first day of June, one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made three (x) months before the death of the deceased.

(b.) “Any property which a person dying on or after such day having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person.

(c.) “Any property passing under any past or future voluntary settlement (y) made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.

\*(3.) “Where an account delivered duly stamped comprises property passing under a voluntary settlement, and, upon the production of the settlement, it shall appear that the stamp duty of five shillings per centum has been paid thereon according to the amount or value of the property so passing, or any part thereof, the amount of such stamp duty shall be returned to the person delivering the account.

(u) Where the value of the estate exceeds 10,000*l.*, see stat. 52 Vict. c. 7, s. 5 (2).

(x) Now “twelve” months. See 52 Vict. c. 7, s. 11.

(y) See *Crossman v. The Queen*, 18 Q. B. D. 256.

Sect. 39. "Every person who as beneficiary, trustee, or otherwise, acquires possession, or assumes the management, of any personal or movable property of a description to be included in an account according to the preceding section shall upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property duly stamped as required by this Act. Any officer authorized by the Commissioners for the purpose may administer the oath.

Delivery of accounts on oath.

Sect. 40. "If any person who ought to obtain probate or letters of administration or deliver a further affidavit or to exhibit an inventory or who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to Her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy, or succession duties.

Double duty payable in case of default.

Sect. 41. "In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, shall not be payable ;

Cesser of legacy and succession duties at the rate of one per cent. in certain cases.

"And in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty \*at the rate of one pound per centum imposed by the Succession Duty Act, 1853, shall not be payable.

16 & 17 Vict. c. 51.

Sect. 42. "Subject to the relief from legacy duty given by section thirteen of the Customs and Inland Revenue Act, 1880, every pecuniary legacy or residue or share of residue under the Will or the intestacy of a person dying on or after the first day of June one thousand eight hundred and eighty-one, although not of an amount or value of twenty pounds, shall be chargeable to the duties imposed by the said Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, as modified by this Act.

Charge of legacy duty on legacies not amounting to 20l.

Sect. 43. "It shall be lawful for the Commissioners of Inland Revenue, upon the application of the person acting in the execution of the Will of any deceased person, and upon the delivery to them of an account showing the amount of the estate and effects in respect whereof legacy duty is payable, together with the names or description of class of the persons entitled thereto and every part thereof, in possession or expectancy, and their degrees of consanguinity to the testator, to assess the duty upon the amount shown by the said account at such a sum by way of composition as, having regard to the circumstances, shall appear to be proper, and to accept payment of the duty so assessed in full discharge of all claims for legacy duty under such will.

Power to commissioners to accept composition for legacy duty under a will.

"If the Commissioners are of opinion that an application should receive the assent of any person, they shall refuse to entertain the application until such assent shall have been given."

The provisions of the above act have been supplemented by those of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), by section 5 of which it is enacted that:—

Stat. 52 Vict. c. 7, s. 5.

(1.) "Where, in the case of any person applying for probate or letters of administration granted in England or Ireland on or after the first day of June one thousand eight hundred and eighty-nine, or in the case of any person exhibiting an inventory in Scotland on or after that day, the value of the estate and effects in respect whereof duty is charged on the affidavit or inventory by section twenty-seven of the Customs and Inland Revenue Act, 1881, exceeds ten thousand pounds, he shall together with such affidavit or inventory deliver a statement of the value of such estate and effects. The statement shall be transmitted with the affidavit or inventory to the Commissioners of Inland Revenue by the proper officer of the High Court of Justice in England or Ireland, or of the proper Court in Scotland, and the certificate required under section thirty of the said Act shall extend to, and include the fact of the delivery of the statement.

Estate duty on personal property passing by will or on intestacy.

(2.) "Where the value of the personal or movable property included in an account delivered according to section thirty-eight of the Customs and Inland Revenue Act, 1881, on or after the first day of June one thousand eight hundred and eighty-nine, exceeds ten thousand pounds, the person delivering the account shall also deliver together therewith a statement of the value of such property.

(3.) "Where pursuant to the provisions of section thirty-two of the



Customs and Inland Revenue Act, 1881, a further affidavit is required to be delivered by any person, and where any person intromitting with, or entering upon the possession or management of, any personal or movable estate or effects in Scotland of any person dying, is required by law to exhibit an additional inventory, the following provisions shall apply :—

- (a.) “If the value of the estate and effects in respect whereof duty was charged on the former affidavit or inventory under section twenty-seven of the Customs and Inland Revenue Act, 1881, exceeded ten thousand pounds, the person delivering the further affidavit or exhibiting the additional inventory shall deliver together therewith a statement of the value of the estate and effects included therein or of the increase of value of the estate and effects included in the former affidavit or inventory, as the case may be :
- (b.) “If the value of the estate and effects in respect whereof duty has been charged under the Customs \*and Inland Revenue Act, 1881, did not exceed ten thousand pounds, and such value together with the value of the estate and effects included in the further affidavit or additional inventory delivered or exhibited or the increased value, as the case may be, exceeds ten thousand pounds, such person delivering the further affidavit or exhibiting the additional inventory shall deliver together therewith a statement of the value of the estate and effects included therein, and in the former affidavit or inventory, or of the value as increased of the estate and effects included in the former affidavit or inventory, as the case may be.
- (4.) “There shall be charged and paid on every statement to be delivered in conformity with this section a duty of one pound for every full sum of one hundred pounds, and for any fraction of one hundred pounds over any multiple of one hundred pounds of the value of the estate and effects or of the personal or movable property, as the case may be.”
- (5.) “The duties respectively imposed by this section are to be in addition to the stamp duties charged on the affidavit required from persons applying for probate or letters of administration in England or Ireland or on the inventory exhibited and recorded in Scotland, and in addition to the stamp duties charged on such accounts of personal and movable property as are specified in section 38 of the Customs and Inland Revenue Act, 1881, as amended by this Act, but are

not to be deemed 'probate duties' within the meaning assigned to that expression by section 21 of the Local Government Act, 1888, or by section 5 of the Probate Duties (Scotland and Ireland) Act, 1888.

(6.) "The provisions contained in section 31 of the Customs and Inland Revenue Act, 1881, for the return of stamp duty overpaid shall apply to the return of duty overpaid on any statement delivered under this section, and in Scotland a return of duty overpaid on any statement so \*delivered shall be made in like manner as a return is now made of stamp duty overpaid on an additional inventory.

(7.) "Where a further affidavit or additional inventory is delivered or exhibited of any estate or effects of a deceased person after a former affidavit or inventory of the estate and effects of the same person has been delivered or exhibited and recorded prior to the 1st of June, 1889, it shall not be necessary to deliver any statement of the value of the estate and effects of such person under this section.

Sect. 7. "The duties hereinbefore imposed by this part of this Act shall not be payable in respect of the value of the estate and effects of any person dying on or after the first day of June one thousand eight hundred and ninety-six, or of the value of any personal or movable property included in an account by relation to the death of any person so dying, or in respect of the value of any succession upon the death of any person so dying, and statements of such values shall not be required.

Sect. 8.—(1.) "If any person who ought to deliver a statement as required by this part of this Act shall neglect to do so, he shall be liable to pay to Her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy, or succession duties.

(2.) "In any case in which any duty hereinbefore imposed by this part of this Act shall be in arrear, the person by whom the arrears of duty may be payable shall be liable to pay interest thereon at the rate of four pounds per centum per annum, and such interest shall be recoverable by the Commissioners of Inland Revenue in the same manner as the arrears of duty and as part thereof: Provided always, that the acceptance or recovery by the said commissioners of arrears of duty, with interest thereon as aforesaid, shall be an absolute waiver of the penalties (if any) which may have been incurred.

Sect. 9.—(1.) "The duties hereinbefore imposed by this part of this

Act shall be stamp duties, and shall be under the care \*and management of the Commissioners of Inland Revenue, who by themselves and their officers shall have the same powers and authorities for the collection, recovery, and management thereof as are vested in them for the collection, recovery, and management of any stamp duties, and shall have all other powers and authorities requisite for carrying this part of this Act into execution.

The duties to be stamp duties.

(2.) "The statements required to be delivered under this part of this Act shall be in such form as may be prescribed by the Commissioners of Inland Revenue, who shall provide forms accordingly, and the duty on the statement shall be denoted in such manner as the commissioners may think proper."

It will be observed that by section 26 of 44 Vict. c. 12 above set out, the provisions then in force at the time of the passing of that act with regard to the duties on probate or letters of administration, so far as the same are consistent with the provisions of that act, are to be deemed applicable to the duties imposed on affidavits in substitution for the duties on probates or letters of administration. It has accordingly been thought convenient to print the former provisions, giving references when necessary to the new act.

By stat. 27 & 28 Vict. c. 56, s. 4, "The said stamp duties [on probates and letters of administration] shall be charged and paid in respect of the value of any ship or any share of a ship belonging to any deceased person which shall be registered at any port in the United Kingdom, notwithstanding such ship at the time of the death of the testator or intestate may have been at sea or elsewhere out of the United Kingdom; and for the purpose of charging the said duties, such ship shall be deemed to have been at the time aforesaid in the port at which she may be registered."

27 & 28 Vict. c. 56, s. 4.  
Duties on ships.

Sect. 5. "No stamp duty shall be chargeable on any such probate, letters of administration or inventory as aforesaid in any case where the whole estate and effects of the deceased person dying after the passing of this Act (exclusive of what he shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially) shall be sworn not to \*exceed, and shall not actually exceed, in value the sum of one hundred pounds" (z).

Sect. 5.  
Probates, &c., exempted from stamp duty where the effects do not exceed 100l.

(z) And since the duties in force on the passing of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), were by that act superseded, and since the Customs and Inland Revenue Act, 1881, contains no provision for charging

Probate of will, and letters of administration of the effects of any common seaman, marine, or soldier, who shall be slain or die in the service of his Majesty, his heirs or successors, are exempt from all stamp duties.

55 Geo. III. c. 184.  
Exemptions of wills and administrations of seamen and soldiers slain in battle.

Sect. 37.  
Penalty for not proving wills, or taking letters of administration, within a given time, 100%, and 10% per cent. on the duty.

By the 37th section, it is enacted, "That from and after the thirty-first day of August, 1815, if any person shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the Will or letters of administration of the estate and effects of the deceased" (a).

Sect. 38. "From and after the expiration of three calendar months from the passing of this Act (11th July, 1815), no Ecclesiastical Court or person shall grant probate of the Will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the \*case of Quakers, that the estate and effects of the deceased, for or in respect of which the probate or letters of administration

Sect. 38.  
Ecclesiastical courts not to grant probates or letters of administration without affidavit of the value of effects.

55 Geo. III. c. 184.

is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting anything on account of the debts due and owing from the deceased, are under the value of a certain sum to be therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp duty

estates of 100%. and under, all estates of or under the value of 100%. are now exempt from duty whatever may be the

date of the death of the testator or intestate, as the case may be.

(a) See also stat. 5 & 6 Vict. c. 82, s. 35, as to Ireland.

may be paid on such probate or letters of administration ; which affidavit or affirmation shall be made before the surrogate or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased " (b).

Sect. 39. "Every such affidavit or affirmation shall be exempt from stamp duty, and shall be transmitted to the said commissioners of stamps, together with the copy of the Will, or extract or account of the letters of administration to which it shall relate, by the registrar or other officer of the Court, whose duty it shall be to transmit copies of Wills, and extracts or accounts of letters of administration to the said commissioners, for the better collection of the duties on legacies and successions to personal estate upon intestacy ; and if any registrar or other officer whose duty it shall be, shall neglect to transmit such affidavit or affirmation to the said commissioners of stamps as hereby directed, every person so offending shall forfeit the sum of fifty pounds " (c).

Sect. 39.  
Affidavits to be free of stamp duty, and to be transmitted to commissioners of stamps. Penalty for neglect 50l.

By section 40, it is provided, "That from and after the passing of this Act (11th July, 1815), where any person, on applying for the probate of a Will or letters of administration, shall have estimated the estate and effects of the \*deceased to be of greater value than the same shall have afterward proved to be, and shall in consequence have paid too high a stamp duty thereon, if such persons shall produce the probate or letters of administration to the said commissioners of stamps within six calendar months after the true value of the estate and effects shall have been ascertained, and it shall be discovered that too high a duty was first paid on the probate or letters of administration, and shall deliver to them a particular inventory and account, and valuation of the estate and effects of the deceased, verified by an affidavit, or solemn affirmation in the case of Quakers ; and if it should thereupon satisfactorily appear to the said commissioners that a greater stamp duty was paid on the probate or letters of administration than the law required, it shall be lawful for the said commissioners to cancel and expunge the stamp on the probate or letters of administration, and to substitute another stamp for denoting the duty which ought to have been paid thereon, and to make an

Sect. 40.  
Provision for the case of too high a stamp duty being paid on probates, &c.

55 Geo. III. c. 184.

(b) As to form of affidavit, see 43 Vict. c. 14, s. 10, and 44 Vict. c. 12, s. 29.

Vict. c. 12, s. 27, the duty formerly payable on grants of probate or letters of administration is now payable on the affidavit of value.

(c) It will be observed that by 44

allowance for the difference between them, as in the cases of spoiled stamps, or if the difference be considerable, to repay the same in money, at the discretion of the said commissioners (d).

Sect. 41. "From and after the passing of this Act (11th July, 1815), where any person, on applying for the probate of a Will or letters of administration, shall have estimated the estate and effects of the deceased to be of less value than the same shall have afterward proved to be, and shall in consequence have paid too little stamp duty thereon, it shall be lawful for the said commissioners of stamps, on delivery to them of an affidavit or solemn affirmation of the value of the estate and effects of the deceased, to cause the probate or letters of administration to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value, and of the further sum or penalty payable by law for stamping deeds after the execution thereof, without any deduction or allowance of the \*stamp duty originally paid on such probate or letters of administration : Provided always, That if the application shall be made within six calendar months after the true value of the estate and effects shall be ascertained, and it shall be discovered that too little duty was at first paid on the probate or letters of administration, and if it shall appear by affidavit or solemn affirmation, to the satisfaction of the said commissioners, that such duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, and without any intention of fraud, or to delay the payment of the full and proper duty, then it shall be lawful for the said commissioners to remit the before mentioned penalty, and to cause the probate or letters of administration to be duly stamped, on payment only of the sum which shall be wanting to make up the duty which ought to have been at first paid thereon" (e).

Sect. 42. "Provided always, That in cases of letters of administration, on which too little stamp duty shall have been paid at first, the said commissioners of stamps shall not cause the same to be duly stamped in the manner afore-said, until the administrator shall have given such security to the Ecclesiastical Court or ordinary by whom the

Sect. 42.  
Administrator to  
give the proper  
security to the  
Ecclesiastical  
Court before ad-  
ministration is  
duly stamped.

(d) Since 1 June, 1881, these applications will be governed by 44 Vict. c. 12, s. 31.

(e) Since 1 June, 1881, these applications are governed by 44 Vict. c. 12, s. 32. As to penalty see 44 Vict. c. 12, s. 40.

letters of administration shall have been granted, as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained, and also that the said commissioners of stamps shall yearly or oftener transmit an account of the probates and letters of administration, upon which the stamps shall have been rectified in pursuance of this Act, to the several Ecclesiastical Courts by which the same shall have been granted, together with the value of the estate and effects of the deceased, upon which such rectifications shall have proceeded."

\*Sect. 43. "Where too little duty shall have been paid on any probate or letters of administration, in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, if any executor or administrator acting under such probate or letters of administration shall not, within six calendar months after the passing of this Act (11th July, 1815), or after the discovery of the mistake or misapprehension, or of any estate or effects not known at the time to have belonged to the deceased, apply to the said commissioners of stamps, and pay what shall be wanting to make up the duty which ought to have been paid at first on such probate or letters of administration, he or she shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the sum wanting to make up the proper duty" (f).

55 Geo. III. c. 184.

Sect. 43.

Penalty on executors, &c., not paying the full duty on probates, &c., in a given time after discovery of too little paid at first, 100*l.*, and ten per cent. on the duty wanting.

Sect. 44. "From and after the expiration of three calendar months from the passing of this Act (11th July, 1815), it shall not be lawful for any Ecclesiastical Court or person to call in and revoke, or to accept the surrender of any probate or letters of administration, on the ground only of two high or too low a stamp duty having been paid thereon, as heretofore hath been practiced: and if any Ecclesiastical Court or person shall so do, the commissioners of stamps shall not make any allowance whatever for the stamp duty on the probate or letters of administration which shall be so annulled."

Sect. 44.

Ecclesiastical courts not to take surrenders of probates, &c., on the ground only of wrong duty paid thereon.

Sect. 45. "And whereas it has happened in the case of letters of administration on which the proper stamp duty hath not been paid at first, that certain debts, chattels real, or other effects due or belonging to the deceased, have

Sect. 45.

Commissioners of stamps may give credit for the duty on probates

(f) See *Lacy v. Rhys*, 4 Best & S. now provided for by 44 Vict. c. 12, 873, *post*, p. \*539. The penalty is s. 40.

and letters of administration in certain cases.

been found to be of such great value, that the administrator hath not been possessed of money sufficient either of his own or of the deceased to pay the requisite stamp duty, in order to \*render such letters of administration available for the recovery

thereof by law : And whereas the like may occur again, and it may also happen that executors or persons entitled to take out letters of administration may, before obtaining probate of the Will or letters of administration of the estate and effects of the deceased, find some considerable part or parts of the estate and effects of the deceased so circumstanced as not to be immediately got possession of, and may not have money sufficient either of their own or of the deceased to pay the stamp duty on the probate or letters of administration which it shall be necessary to obtain :” it is enacted, “That from and after the passing of this Act (11th July, 1815), it shall be lawful for the said commissioners of stamps, on satisfactory proof of the facts by affidavit or solemn affirmation, in any such case as aforesaid which may appear to them to require relief, to cause the probate or letters of administration to be duly stamped for denoting the duty payable or which ought originally to have been paid thereon, and to give credit for the duty, either upon payment of the before mentioned penalty, or without, in cases of probates or letters of administration already obtained, and upon which too little duty shall have been paid, and either with or without allowance of the stamp duty already paid thereon, as the case may require, under the provisions of this Act ; provided in all such cases of credit that security be first given by the executors or administrators, together with two or more sufficient sureties to be approved of by the said commissioners, by a bond to his Majesty, his heirs or successors, in double the amount of the duty, for the due and full payment of the sum for which credit shall be given, within six calendar months, or any less period, and of the interest for the same, at the rate of ten pounds *per centum per annum*, from the expiration of such period until payment thereof, in case of any default of payment at the time appointed : and such probate or letters of administration, being duly stamped in the manner aforesaid, shall be as valid and available as if the proper duty had been at first paid thereon, and the same had been stamped accordingly.”

\*Sect. 46. “Provided always, That if at the expiration of the time to be allowed for the payment of the duty on such probate or letters of administration, it shall appear to the satisfaction of the said commissioners, that the

55 Geo. III. c. 184.

Sect. 46.  
Commissioners

[\*531]

[\*532]



executor or administrator to whom such credit shall be given as aforesaid shall not have recovered effects of the deceased to an amount sufficient for the payment of the duty, it shall be lawful for the said commissioners to give such further time for the payment thereof, and upon such terms and conditions as they shall think expedient."

Sect. 47. "Provided also, That the probate or letters of administration so to be stamped on credit as aforesaid shall be deposited with the said commissioners of stamps, and shall not be delivered up to the executor or administrator until payment of the duty, together with such interest as aforesaid, if any shall become due: but the same shall nevertheless be produced in evidence by some officer of the commissioners of stamps, at the expense of the executor or administrator, as occasion shall require."

Sect. 47.  
Probate or letters of administration stamped on credit, to be deposited with the commissioners.

Sect. 48. "The duty for which credit shall be given as aforesaid, shall be a debt to his Majesty, his heirs or successors, from the personal estate of the deceased, and shall be paid in preference to and before any other debt whatsoever due from the same estate; and if any executor or administrator of the estate of the deceased shall pay any other debt in preference thereto, he or she shall not only be charged with and be liable to pay the duty out of his or her own estate, but shall also forfeit the sum of five hundred pounds."

Sect. 48.  
Duty for which credit shall be given to be a debt to the crown.

Sect. 49. "If before payment of the duty for which credit shall be given in any such case as aforesaid, it shall become necessary to take out letters of administration *de bonis non* of the deceased, it shall also be lawful for the said commissioners to cause such letters of administration *de bonis non* to be duly stamped with the particular stamp provided to be used on letters of administration of that kind, for denoting the payment of the duty in respect of the effects of the deceased, on some prior probate or letters of administration of the same \*effects in such and the same manner as if the duty had been actually paid, upon having the letters of administration *de bonis non* deposited with the said commissioners, and upon having such further security for the payment of the duty as they shall think expedient; and such letters of administration shall be as valid and available as if the duty for which credit shall be given has been paid."

Sect. 49.  
Provisions for the case of letters of administration *de bonis non*, taken out before payment of the duty for which credit shall be given.

55 Geo. III. c. 184.

It has been decided that this section authorizes the commissioners

of stamps to stamp letters of administration *de bonis non* on security given, and without payment of the duty, as well in cases where too low a duty has been paid on the original letters of administration, as when such letters of administration have been originally stamped on credit (*g*).

By sect. 50, it is further enacted, in regard to probate of wills and letters of administration, "That where any part of the personal estate which the deceased was possessed of or entitled to shall be alleged to have been trust property, if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conformably to the provisions of the said Act of the forty-eighth year of his Majesty's reign (*h*), shall reside out of England, such affidavit or affirmation shall and may be made before any person duly commissioned to take affidavits by the Court of Session or Court of Exchequer in Scotland, or before one of his Majesty's Justices of the Peace in Scotland, or before a Master in Chancery, Ordinary or Extraordinary in Ireland, or before any Judge or civil Magistrate of any other country or place where the party or parties shall happen to reside; and every such affidavit or affirmation shall be as effectual as if the same had been made before a Master in Chancery in England, pursuant to the directions of the said last mentioned Act."

The statutes 55 Geo. III. c. 184, s. 51; 5 & 6 Vict. c. 79, s. 23; and 24 & 25 Vict. c. 92, s. 3, relate to the return of duty to be made in respect of debts. Formerly the duty was regulated by the *gross* amount or value of the estate, and the \*deduction in respect of debts could only be obtained in the shape of a return of the duty. Under the existing acts (Customs and Inland Revenue Acts, 1880 and 1881), the stamp need only be sufficient to cover the *net* value remaining after deducting the debts and funeral expenses of the deceased, so that there is no longer any occasion for a return of duty.

Besides these enactments, it is provided, by statute 55 Geo. III. c. 184, s. 8, "That all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties, contained in and imposed by the several Acts of Parliament relating to the duties hereby repealed, and the several Acts of Parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties hereby granted, and to the vellum, parchment and paper, instruments, matters and things charged or charge-

(*g*) Doe v. Wood, 2 Barn. & Ald. 724.

(*h*) See *post*, pp. \*534, \*535, \*536.

[\*534]

Sect. 50.

Directions concerning affidavits by executors, &c., residing out of England, relating to trust property.

personal estate which the deceased was possessed of or entitled to shall be alleged to have been trust property, if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conform-

ably to the provisions of the said Act of the forty-eighth year of his Majesty's reign (*h*), shall reside out of England, such affidavit or affirmation shall and may be made before any person duly commissioned to take affidavits by the Court of Session or Court of Exchequer in Scotland, or before one of his Majesty's Justices of the Peace in Scotland, or before a Master in Chancery, Ordinary or Extraordinary in Ireland, or before any Judge or civil Magistrate of any other country or place where the party or parties shall happen to reside; and every such affidavit or affirmation shall be as effectual as if the same had been made before a Master in Chancery in England, pursuant to the directions of the said last mentioned Act."

The statutes 55 Geo. III. c. 184, s. 51; 5 & 6 Vict. c. 79, s. 23; and 24 & 25 Vict. c. 92, s. 3, relate to the return of duty to be made in respect of debts. Formerly the duty was regulated by the *gross* amount or value of the estate, and the \*deduction in respect of debts could only be obtained in the shape of a return of the duty. Under the existing acts (Customs and Inland Revenue Acts, 1880 and 1881), the stamp need only be sufficient to cover the *net* value remaining after deducting the debts and funeral expenses of the deceased, so that there is no longer any occasion for a return of duty.

Besides these enactments, it is provided, by statute 55 Geo. III. c. 184, s. 8, "That all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties, contained in and imposed by the several Acts of Parliament relating to the duties hereby repealed, and the several Acts of Parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties hereby granted, and to the vellum, parchment and paper, instruments, matters and things charged or charge-

(*g*) Doe v. Wood, 2 Barn. & Ald. 724.

(*h*) See *post*, pp. \*534, \*535, \*536.

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able therewith, as far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, enforced and put in execution, for the raising, levying, collecting, and securing of the said duties hereby granted and otherwise relating thereto, so far as the same shall not be superseded by, and shall be consistent with, the express provision of this Act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted with reference to the said duties hereby granted" (*hh*).

It is therefore necessary to recur to some of the provisions of the earlier statutes.

By stat. 48 Geo. III. c. 149, s. 35, it is enacted, that "The probate of the Will of any person deceased, or the letters of administration of the effects of any person deceased, &c., &c., shall be deemed and taken to be valid and available by the executors or administrators of the deceased, for recovering, transferring, or assigning any debt or debts, or other personal estate or effects, whereof or whereto the deceased was possessed or entitled, either wholly or partially, as a trustee, notwithstanding the amount or value of such debt or debts, or other personal estate or effects, or the amount or value of so much thereof, or such interest therein, as was trust property in the deceased (as the case may be) shall not be included in the amount or value of the estate in respect of which the stamp duty was paid on such probate or letters of administration."

48 Geo. III. c. 149, s. 35.

Probates of wills and letters of administration valid as to trust property, although the value thereof be not covered by the stamp duty.

And by s. 36 of the same statute, it is provided, that where the executors or administrators of any person deceased shall be desirous of transferring, or of receiving the dividends of any share standing in the name of the deceased, of and in any government or parliamentary stocks or funds, transferable at the Bank of England, or of and in the stock and funds of the Governor and Company of the Bank of England, or of and in the stock and funds of any other company, corporation or society whatever, passing by transfer in the books of such company, corporation, &c., under any such probate or letters of administration, and shall allege that the deceased was possessed thereof, or entitled thereto, either wholly or partially, as a trustee; the bank and any other corporation,

48 Geo. III. c. 149, s. 36.

Where executors, &c., allege, that any property was vested in the deceased, as a trustee, a special affidavit thereof may be required in the several instances specified.

(*hh*) This section has been repealed by the Statute Law Revision Act, 1870, but it seems that the provisions of former acts saved by it nevertheless continue in force.

&c., or their officers may, for their indemnity, require an affidavit (i) or affirmation of the fact, as in s. 37 is mentioned, if it shall not otherwise appear, and thereupon may permit such executors or administrators to transfer the stock or fund in question, and receive the dividends thereof, without regard to the stamp duty on the probate or letters. And where the executors or administrators of any person deceased shall have occasion to recover any debt or other personal estate due to the deceased, and shall allege that he was possessed thereof, or entitled thereto, either wholly or partially, as a trustee; the person liable to pay such debt, may require a like affidavit as aforesaid, and thereupon make over such debt or effects to such executors, &c., regardless of such stamp duty as aforesaid; and where the executors, &c., of any person deceased shall have occasion to assign or transfer any debts due to the \*deceased, or any chattels real, or other personal estate, whereof or whereto the deceased was possessed or entitled, and shall allege that the same were due to, or vested in him, either wholly or partially, as a trustee, the person to whom or for whose use such debts, chattels, real, &c., shall be proposed to be assigned, may require such affidavit as aforesaid, and thereupon accept such assignment or transfer, regardless of such stamp duty as aforesaid.

And by sect. 37 of the same statute, upon any requisition as in sect. 36, such executors or administrators, or some person to whom the fact shall be known, shall make a special affidavit or affirmation of the facts, stating the property in question, and that the deceased had not any beneficial interest in the same, or no other than shall be therein set forth, but was possessed of or entitled thereto, wholly or in part, in trust for some other person, whose name or other description shall be specified, or for such purposes as shall be therein specified, and that the beneficial interest of the deceased, if any, in the property in question, does not exceed a certain value, also therein specified, according to the best estimate that can be made thereof, if reversionary or contingent: and that the value of the estate for which the stamp duty was paid on the probate or letters is sufficient to cover all such beneficial interest, as well as the rest of such personal estate of the deceased, and for which such probate or letters have been granted, as far as the same has come to the knowledge of such executors or administrators; and where such affidavit or affirmation is made by any other person than the executors or administrators of the deceased,

s. 37.  
Particulars to be stated in such affidavits by executors, &c., respecting trust property.

(i) See *ante*, p. \*533.

they also shall make an affidavit or affirmation that the same is true, to the best of their knowledge, and that the property in question is intended to be applied accordingly: which affidavits or affirmations shall be sworn before a Master in Chancery, and shall be delivered to the party requiring the same, and be sufficient indemnity to them; and if any person making such affidavit or affirmation shall knowingly and willfully make a false oath or affirmation of the matters therein contained, such persons \*shall, on conviction, be liable to the pains inflicted on persons guilty of perjury.

By stat. 39 & 40 Geo. III. c. 72, s. 16, Where due proof on oath is made to the commissioners of stamps (which oath one of such commissioners may administer) that any will has, through inadvertence, been proved, or that any letters of administration have been taken out on the same property, in more than one ecclesiastical or prerogative court, or more than once in any such ecclesiastical court, and by reason thereof more than one stamp duty has been paid, such commissioners may, on delivery to them of the useless probate or letters, to be canceled, and on production of the valid probate or letters granted on any such will or property, cancel the useless probate, &c., and stamp any vellum, &c., with stamps of the like denomination and value as those canceled, without taking any money for the same.

39 & 40 Geo. III. c. 72, s. 16. Commissioners of stamps may cancel useless probates of wills and letters of administration, and allow such stamps.

By stat. 41 Geo. III. c. 86, s. 3, after reciting that "it is expedient that the duties payable in respect of probates or letters of administration should not be paid more than once on the same estate;" it is enacted, "that it shall be lawful for the said commissioners of stamps, and they are hereby authorized and required to provide a stamp or mark distinguishable from all other stamps or marks used in relation to any stamp duties, for the purpose of stamping or marking any piece of vellum, parchment or paper, whereon any probate of any Will or letters of administration shall be engrossed, printed, or written, in relation to any estate in respect whereof any probate or letters of administration shall have been before taken out, and the full amount of the duties payable thereon, by any Act or Acts of Parliament then in force, according to the full value of such estate, shall have been duly paid and discharged; and in every case where any probate or probates, or letters of administration, shall have been taken out, duly stamped according to the full value of the estate in

41 Geo. III. c. 86, s. 3. To prevent the double payment of duties, the Stamp Office shall provide a stamp for marking probates of wills or letters of administration, relating to any estate in respect whereof any probates, &c., shall have been before taken out, and the duties then payable discharged.

respect whereof the same shall have been granted, then, and in such case any further or other probate or letters of administration as aforesaid, which shall be at any time thereafter applied for \*or in respect of such estate, shall and may be issued and granted upon any piece of vellum, parchment, or paper, stamped or marked with the stamp or mark provided by the said commissioners by virtue of this Act for such other probates or letters of administration as aforesaid ; and every such other probate or letters of administration, which shall be duly stamped or marked with such stamp or mark as last aforesaid, shall be as available in the law, and of the like force and effect in all respects whatever, as if the vellum, parchment or paper whereon the same shall be engrossed, printed, or written, had been duly stamped with the stamp or mark, denoting the full amount of the duties payable in respect of the probate or letters of administration taken out on the full value of such estate ; anything in any Act or Acts, or this Act, before contained, to the contrary thereof in any wise notwithstanding" (k). The statute 28 & 29 Vict. c. 104, ss. 57 and 58, provided for summary proceedings for payment of probate duties.

A very important regulation, as to the consequences of not obtaining the requisite stamp, which was contained in the former Stamp Acts, and re-enacted by section 8 of the stat. 55 Geo. III. c. 184, and all subsequent Stamp Acts, is that no instrument not properly stamped shall be given in evidence (l). Hence, where an executor or administrator brings an action, in which it is necessary for him, at the trial, to prove his representative character, if his case shows that he sues for a greater value than is covered by the stamp of his probate or \*letters of administration, he cannot recover ; for the instrument, not being properly stamped, cannot be given in evidence ; and he is therefore excluded from the only means of showing the fact of his being executor or administrator (m). Nor will it

Probate, &c., not properly stamped, cannot be given in evidence :

the stamp must cover the claim on which the action is brought.

(k) See also stat. 5 & 6 Vict. c. 82, s. 36.

(l) *Hunt v. Stevens*, 3 Taunt. 116. The old statute of 9 & 10 W. III. c. 25, s. 19, first contains the clause enacting this prohibition, and it has been continued through all the succeeding acts : *Ib.* The first act relating to probate duty is the stat. 5 W. & M. c. 21, s. 3. Stat. 44 Vict. c. 12, s. 30, substitutes for

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the stamp or a grant a certificate under the hand of the proper officer of the High Court showing that the affidavit has been delivered duly stamped and stating the gross value of the estate thereby shown, and the grant bearing such certificate shall for all purposes be deemed to have been duly stamped in respect of such gross value (s. 26 (3)).

(m) *Hunt v. Stevens*, 3 Taunt. 113.

make any difference, that he is suing for a doubtful claim (*n*). And it was formerly held that in a suit in equity a party suing as executor or administrator could not sustain proceedings to recover a larger sum than that upon which the probate duty was calculated (*o*).

But the grant is not *void* by reason of an original defect of stamp : and therefore it was held that a commission of bankrupt might be supported on a debt due to the petitioning creditor in the character of executor, although he had not obtained a probate on a sufficient stamp at the time when the commission issued, if he afterward procured the proper stamp to be affixed to the probate (*p*).

Grant not void by reason of an original defect of stamps.

So where letters of administration had been stamped under the 41st section of 55 Geo. III. c. 184 (*q*) (the trial of the cause having been adjourned, in order to enable the plaintiff to take advantage of that enactment), it was held, that the defendant could not object that they had not been stamped within six months after the discovery of the mistake, so that a penalty had been incurred under the 43rd section (*r*), and the penalty had not been paid (*s*).

The executor or administrator, it should seem, is bound to take out the grant to the extent of the sum he expects to receive (*t*).

Construction of foregoing statutes :

to what amount the grant should be taken out :

\*In the case of *Moses v. Crafter* (*u*), Lord Tenterden held that desperate and doubtful debts need not be included in the amount for which the probate duty is paid; and that the executor has a right to exercise his judgment fairly and *bona fide*, whether a debt is doubtful or bad (*x*).

as to debts due to deceased :

In *Swabey v. Swabey* (*y*), on the death of a mortgagor, his daughter became entitled, as his heir, to the equity of redemption of an estate which he had mortgaged to the trustees of his own marriage settlement, and under that

mortgage debt belonging to the owner of the mortgaged estate :

(*n*) *Ibid.* Carr *v.* Roberts, 2 B. & Adol. 906. *Post*, p. \*541. See *infra*, Pt. V. Bk. I. Ch. I.

(*o*) Jones *v.* Howells, 2 Hare, 342. Where A. claimed a fund in court, as his father's administrator, but the letters of administration were not stamped to a sufficient amount, the court refused to grant him a stop-order until he had procured the letters to be sufficiently stamped : Christian *v.* Devereux, 12 Sim. 264.

(*p*) Rogers *v.* James, 7 Taunt. 147.

(*q*) *Ante*, p. \*528.

(*r*) *Ante*, p. \*530.

(*s*) Lacy *v.* Rhys, 4 B. & Sm. 873.

(*t*) Butler *v.* Butler, 2 Phillim. 39.

(*u*) 4 C. & P. 524.

(*x*) But mere uncertainty as to the amount is no ground for omission. See Att.-Gen. *v.* Brunning, 8 H. L. *per* Ld. Wensleydale, p. 262, 263.

(*y*) 15 Sim. 502.

settlement she also became entitled, as *cestui que trust*, to the mortgage money : The trustees then conveyed the estate to her, subject expressly to the equity of redemption, and did not release her father's covenant for the repayment of the money : Afterward she granted an annuity, and as a security for it, conveyed the estate and assigned the money to a trustee for the annuitant : By her will she devised the estate, but did not dispose of her personal estate : and Sir L. Shadwell held, that though, as between her devisee and her next of kin, the latter had no claim to the stock, yet she was, when she died, *cestui que trust* of her father's covenant for repayment ; and that, therefore, the debt remained, and probate as well as legacy duty was payable on it.

The stamp must be of a sufficient amount to cover the value of the assets as it stood, not merely at the time of the death of the deceased, but also at the date of the grant of administration. Thus, in the case of *Doe v. Evans* (2), A. being possessed of a term of years in a house and land, died intestate in 1828 : In 1841, his next of kin took out administration to him : In the meantime B. had been wrongfully in possession, and had built a second house on the demised premises : And \*it was held that the stamp on the letters, which was sufficient to cover the value of the lease at the date of the death of the deceased, but not the improved value at the date of the grant of the administration, was insufficient.

If a married woman, entitled as next of kin to the estate of an intestate, dies without asserting her claim, leaving her husband surviving, who also dies without asserting his claim, it is necessary for the next of kin of the husband, in order to enforce the right of the wife and reduce it into possession, to take out letters of administration to both husband and wife, and pay stamp duty on the property for each grant of administration (a).

It will be observed that under the existing statutes, as under 55 Geo. III. c. 184, the *ad valorem* duty is exclusive of what the deceased shall have been possessed of, or entitled to, as a trustee and not beneficially (b). In *Carr*, administratrix of *Walker v. Roberts* (c), an intestate had granted an

What is trust property within the exemption of 55 Geo. III. c. 184 :

(2) 10 Q. B. 476. See also *Attorney-General v. Partington*, 1 Hurlst. & C. 457, Affirmed in error, 3 Hurlst. & C. 193, and subsequently affirmed in the

House of Lords. *Sub nom.* *Partington v. Att.-Gen.*, L. R. 4 H. L. 100.

(a) *Ibid.*

(b) *Ante*, p. \*512.

(c) 2 B. & Adol. 905.



annuity to Ann Smith, and afterward by deed conveyed his property to the defendant, who covenanted to indemnify him against the payment of the annuity : Default having been subsequently made in the payment during the intestate's lifetime, the annuitant sued his administratrix, and recovered judgment for debt and costs exceeding 20% : The administratrix paid this, and then sued the defendant on his covenant for the amount : It was held that the right to recover this sum was a part of the intestate's estate, and rendered the letters of administration liable to stamp duty ; and that the intestate, if he had lived, could not have been considered, in respect of this sum, as a mere trustee for the annuitant, and having no beneficial interest : Lord Tenterden, in giving judgment in this case, after stating the words of the act, observed, that this provision was made for the exemption of mere trustees, as where property is mortgaged in trust ; in which case, if the mortgagee's representative were bound to pay the whole amount of the duty, great injustice \*would be done : Here Walker, the intestate, did not stand in the position of a mere trustee ; for he had a beneficial interest in the covenant, since he was liable in the first instance to Smith, and had an interest in obtaining payment of her annuity from the defendant, to relieve himself.

The law appears to be now settled that, by the terms of the Act of Parliament, the amount of the probate duty is to be regulated, not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the wills or letters of administration, but *by the value of such part as is at the death of the deceased within the jurisdiction of the court by which the probate or letters of administration are granted (d)*.

the probate duty is to be regulated by the value of such part of the assets as is within the jurisdiction of the court which grants the probate or letters of administration :

Whatever may have been the origin of this jurisdiction (e), it is clear that it is a limited one, and can be exercised in respect of those effects only which the Ordinary would have had himself to administer

(d) Hence it follows that probate duty attaches on *bona notabilia* in the place where the goods happen to be situate, wholly irrespective of the question of the domicile of the testator : *Fernandes' Executors' Case*, L. R., 5 Ch. App. 314-317. And in *In the Goods of Ewing*, 6 P. D. 23, Sir J. Hannen, in speaking of the share of a deceased partner, stated that in his view it was situate where the business was carried on.

As to duty being payable upon assets on the high seas at the time of the testator's death, see *Att.-Gen. v. Pratt*, L. R., 9 Ex. 140. The question in each case would seem to be whether an English or a foreign probate is necessary to enable the personal representatives to recover the property on which the duty is claimed. *Laidlay v. Lord Advocate*, 15 A. C. 468.

(e) See *ante*, p. \*340.

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in case of intestacy, and which must therefore be so situated as that he could have disposed of them *in pios usus* (f).

These principles have been adopted in several important decisions respecting the liability to probate duty of the personal property of the testator, which at the time of his death, is in a foreign country, but which, after his death, is brought into this country by his executor. The first of these was the *Att.-Gen. v. Dimond* (g). In that case the \*testator died at Leicester on or about the 10th of May, 1828, and on the 28th June, 1828, the will was proved in the Prerogative Court of Canterbury, by the executor: The personal property of the testator was sworn to be under the value of 5,000*l.*, and a probate duty of 80*l.* only was paid: The testator, at the time of his death, was a creditor of the French Government, to the amount of the annual sum of 32,727 francs, 5 per cent. consolidated, inscribed in the great book of the debt public of France called *rentes*: The personal property of the said testator not including the said *rentes*, was under the value of 5,000*l.*: After the death of the testator, in July, 1828, the executor executed a power of attorney, authorizing Messrs. Mallet, a French house, to sell out the *rentes* in question: This power of attorney, together with a notarial exemplified extract of the clause in the will appointing the executors, and a notarial copy of the Probate Act, and a notarial certificate of the burial of Paul Francis Benfield, the testator, were produced by Messrs. Mallet to the Bank of France, and the said *rentes* were thereupon sold by them at Paris, under the said power of attorney, and the produce was received by them and transmitted by bills amounting to 27,183*l.* 9*s.* 2*d.* sterling, on account of the executor, to Messrs. Hammersley and Co., bankers of London, and was placed by them to the account of the executor, in his character of executor: and the said Messrs. Hammersley, by his order, as executor, invested the produce of the said bills in Bank Three per Cent. Annuities, in the English funds, in the names of himself and a co-trustee appointed by him, in the room of a co-executor, deceased, where the same still continued: The testator, as well as the executor, was at his death, and during his lifetime, an English subject, and resident in England: The question for the opinion of the court was, whether the executor was bound to pay a probate duty on the amount of the produce of the said French *rentes*: And the barons, after taking time to consider, decided in the

(f) See *ante*, p. \*340.

(g) 1 Crompt. & Jervis, 356. S. C. 1 Tyrwh. 243.

negative : Lord Lyndhurst, C. B., in delivering the judgment of the court, observed, that, by the terms of the Act of Parliament, the amount of \*the duty is regulated *by the value of the estate and effects for or in respect of which the probate is granted* ; and the question therefore was, for or in respect of what estate and effects was the probate granted in the present instance : that it could not have been granted for or in respect of the property in question, because, at the time of the death of the testator, it was in a foreign country, and, consequently, out of the jurisdiction of the Spiritual Court : And his lordship distinguished between the liability to probate duty, and that to legacy duty (*h*), inasmuch as it is not the administration of assets which renders the probate duty payable, but the local situation of the assets at the testator's death.

There was, in effect, an appeal from this judgment to the House of Lords, in the case of *The Att.-Gen. v. Hope* (*i*), where the same point arose with respect to moneys standing in the testator's name in the public funds or stock of the United States of America, and debts due to him from persons in that country : But their lordships, after hearing the case very fully and ably argued, recognized and adopted the decision of the Barons of the Exchequer : And Lord Chancellor Brougham, in delivering his opinion to the House, stated that he had made inquiries of the judge of the Prerogative Court (Sir J. Nicholl), and the king's advocate (Sir H. Jenner), and that they confirmed the view he had taken of the jurisdiction and nature of the Ordinary's office, *viz.*, that probate never has been granted except for goods, which, at the time of the death of the party, were within the jurisdiction of the Ordinary who makes the grant (*k*).

These two cases, in effect, have decided that French *rentes* and American stock, which are part of the national debt of France and America respectively, and are trans\*ferable there only, and debts due from persons in America, are not assets locally situated here. So in *Pearse v. Pearse* (*l*), the testator, who was domiciled in England, had, in the hands of his agents in India, certain securities of the Indian Government, the principal and interest of which were payable in India, either in cash or by bills on the East India Company, at the option of the creditor : Shortly before his death, he accepted an offer

(*h*) The court has decided that foreign stock, the property of a testator domiciled in this country, is liable to *legacy duty* : In *re Ewin*, 1 Crompt. & Jerv. 151. *Infra*, Pt. III. Bk. V, Ch. II.

(*i*) 1 Crompt. M. & R. 530. 2 Cl. & Fin. 84.

(*k*) See, however, *Spratt v. Harris*, 4 Hagg. 405. *Ante*, p. \*300.

(*l*) 9 Sim: 430.

made by the company to have his notes converted into stock, to be registered in England, and to be salable and transferable there: The conversion was not completed at the testator's death, nor until after his will had been proved in England; but ultimately the stock was transferred to his executors: And Sir L. Shadwell held, on the authority of the *Att.-Gen. v. Hope*, that no probate duty was payable in respect either of the notes or the stock (*m*).

In the *Att.-Gen. v. Higgins* (*n*), it was held that the crown could claim duty, payable in Scotland, under the stat. 48 Geo. III. c. 149, s. 38, in respect of shares in certain public companies in Scotland, which belonged to a testator who was domiciled in England and whose will had been proved there and the duty duly paid thereon. This case proceeded on the ground that the shares were assets in Scotland and not in England.

And in the *Att.-Gen. v. Bouwens* (*o*), the Barons of the Exchequer held that probate duty was payable upon the value of Russian, Danish and Dutch government bonds, which were the property of the testatrix, and were, at the time of her death, in the province of Canterbury: The \*question was raised upon a special verdict, which gave a description of the instruments, and found that they were marketable securities within this kingdom, transferred by delivery only, and that it never had been necessary to do any act whatever out of the kingdom of England, in order to make a transfer of any of the said bonds valid: And the barons held, that these securities were to be considered as assets locally situate within the province of Canterbury at the time of the testator's death, and were, therefore, liable to the duty: Their lordships, at the same time, expressed their opinion that no Ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad and incapable of being transferred here, and therefore that no duty would be payable on the probate or letters of administration in respect of

(*m*) Where a testator directed his bankers in India to realize certain securities and to transmit the proceeds to his bankers in England, which they did by transmitting certain bills payable six months after sight drawn by a bank in India upon a bank in London in favor of the testator's English

bankers, and the testator died while the bills were on their way to England, it was held that probate duty must be paid on the amount of the bills. *Att.-Gen. v. Pratt*, L. R. 9 Ex. 140.

(*n*) 2 Hurls. & N. 339.

(*o*) 4 Mees. & Wels. 171.

such effects : But that, on the other hand, it was clear that the Ordinary could administer all chattels within his jurisdiction : and if an instrument was created of a chattel nature, capable of being transferred by acts done here and sold for money here, there was no reason why the Ordinary or his appointee should not administer that species of property : That such an instrument was in effect a salable chattel, and followed the nature of other chattels as to the jurisdiction to grant probate : Here were valuable instruments in England the subjects of ordinary sale ; the debtors by virtue of such instruments, if there were any, resident abroad, out of the jurisdiction of any Ordinary, and, consequently, there being no fear of conflicting rights between the jurisdictions who were to grant probate (*p*).

These principles were also recognized and acted on by \*Lord Langdale, M. R., in *Matson v. Swift* (*q*), where his lordship held that no probate duty was payable in respect of land directed to be converted into money : And the learned judge adverted to the twofold character of the probate, which, besides granting administration, authenticates the will, and is evidence of the character of executor ; so that the probate may be required for the purpose of proving the executor's title to personal estate, which may not be comprised in the grant of administration contained in the same probate. This decision was relied on by Wigram, V.-C., in *Custance v. Bradshaw* (*r*), where his honor held that the share of a deceased partner in the freehold and copyhold estates of the partnership is not personal estate for the purpose of being included in the value or amount in respect of which probate duty is payable.

In supposed accordance with these decisions, the case of the Attorney-General *v. Brunning* (*s*) was decided by the Court of Exchequer. There a testator having by a valid con-

the duty is not payable on land directed to be converted into money :

nor on partnership's real property :

*Secus*, as to the price of land contracted to be sold :

(*p*) It may be proper to remind the reader, that judgment debts are assets for the purposes of the jurisdiction of the Ordinary, where the judgment is recorded ; leases where the land lies ; specialty debts where the instrument happens to be ; and simple contract debts where the *debtor* resides at the time of the testator's death : (See 1 Saund. 274 a, note (3) :) The instruments in question were incorrectly called bonds, not being under seal, but being merely

certificates of the rights of the holders to claim the amounts therein specified from the respective governments.

(*q*) 8 Beav. 368.

(*r*) 4 Hare, 315. But of this case Brett, M. R., said, "I am of opinion that in a Court of Law *Custance v. Bradshaw* ought never to be cited again as an authority." Att.-Gen. *v. Hubbuck*, 13 Q. B. D. 275, 289.

(*s*) 4 H & N. 95.

tract agreed to sell a freehold estate for 115,000*l.* and received a deposit of 15,000*l.* in his lifetime, the contract was specifically performed, and the remainder of the purchase money paid to his executor after his death: And the barons held that probate duty was not payable in respect of any portion of the 115,000*l.* as part of the personal estate of the testator.

But this decision was reversed by the House of Lords (*t*), \*who acted on the principle that all moneys recoverable by the executors by virtue of the probate, in whatever form recovered, whether through the agency of a court of equity or of a court of law, are part of the estate and effects of the testator, and are liable to probate duty: and *Matson v. Swift* and *Custance v. Bradshaw* were distinguished on the ground, that in neither of those cases was there any change in the nature of the property created by the obligation of a binding contract, and the property in question remained real estate at the death of the testator;—whereas in the present case, there was a contract binding on the testator and on the purchaser by virtue of which the former had a right to the stipulated purchase money on completing the purchase, the latter had a like right to the estate; so that in equity, the testator at the time of his death had a claim for 115,000*l.*, in the event of a good title being made out, and that claim devolved on the executor (*u*).

In *Att.-Gen. v. Lomas* (*x*) this case was followed, and it was held that, when a will contains an absolute trust for the conversion of land, and, by reason of the failure of the limitations of the proceeds contained in the will, the testator's heir takes the undisposed of interest,

(*t*) 8 H. of L. 243. *Re De Lancey*, L. R. 5 Exch. 102. Where a testator bequeathed his personal estate to his son, who died in his father's lifetime leaving issue, who became entitled to the bequest under sect. 33 of Wills Act, it was held that the executors of the son were chargeable with probate duty on the amount of the bequest in the same manner as they would have been had the son actually survived the father: *Executors of Perry v. The Queen*, L. R. 4 Ex. 27.

(*u*) See also *Forbes v. Steven*, L. R. 10 Eq. 178, in which case, after consideration of the above cases, it was held that legacy duty was payable upon the

share of a deceased partner in the proceeds of freehold property used for the purposes of the partnership, and forming a partnership asset. And see the provision of the new Partnership Act, 1890 (53 & 54 Vict. c. 39, sect. 22), that where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appear, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators as personal or movable, and not real or heritable estate.

(*x*) L. R., 9 Exch. 29.

he takes it as money, and on his death probate duty is payable upon it, though the land remains unsold.

\*Again, in the case of *Att.-Gen. v. Hubbuck (y)*, it was held that the shares of partners in realty forming part of partnership property, must be regarded as personal estate in the absence of any binding agreement between the partners to the contrary, and probate is payable on a deceased partner's share in such realty irrespective of the question, whether or not there is, in the event, any actual conversion into personalty. In this case the learned judges in the Court of Appeal cite, with approval, the judgment of Lord Cranworth in *Att.-Gen. v. Brunning*, when dealing with the cases of *Matson v. Swift* and *Custance v. Bradshaw*, and distinguishing them from that case. The principle contained in the above cases seems to be that "the character that is impressed upon property by law at the time when the breath leaves the body of the owner is its character for the purpose of the fiscal duties which are alleged to attach upon it" (z).

In the case in the House of Lords of *Att.-Gen. v. Ailesbury (a)*, money of a lunatic was invested by his committees by order of the Lords Justices having jurisdiction in lunacy, in purchases of lands which, under their lordships' direction, were conveyed to the committees, "their heirs and assigns, upon trust for" the lunatic, "his executors, administrators, and assigns," with a declaration that the lands so conveyed (and all others to be purchased in lieu of them) under any exercise of certain powers of sale and reinvestment which were contained in the deed should, "to all intents and purposes be considered as part of the personal estate of" the lunatic. Upon the death of the lunatic, who never recovered, it was held that the value of the lands was part of the *personal* estate of the lunatic at his death and liable to probate duty.

Where freehold property is, by the doctrine of Equitable Conversion, to be considered as personalty, it is liable to \*probate duty, and a will disposing of it is therefore entitled to probate (b).

By stat. 23 and 24 Vict. c. 15, s. 4 (c), "The stamp duties payable

(y) 13 Q. B. D. 275, affirming S. C., 10 Q. B. D. 488.

(z) *Per* Lord Coleridge in *Atty.-Gen. v. Hubbuck*, 13 Q. B. D. 275, 280.

(a) 12 App. Cas. 672, reversing the decision of the Court of Appeal, 16 Q. B. D. 408, and restoring the decision of

*Mathew and A. L. Smith, JJ.*, 14 Q. B. D. 895.

(b) In the *Goods of Gunn*, 9 P. D. 242.

(c) This statute applies to the wills of persons dying after 3 April, 1860. Prior to this statute probate duty was not payable in respect of property over

by law upon probates of Wills and letters of administration with a Will annexed in England and Ireland, and upon inventories in Scotland, shall be levied and paid in respect of all the personal or movable estate and effects which any person hereafter dying shall have disposed of by Will, under any authority enabling such person to dispose of the same, as he or she shall think fit ; and for the purpose of this Act such personal or movable estate and effects shall be deemed to be the personal or movable estate and effects of the person so dying in respect of which the probate of the Will, or the letters of administration with the Will annexed, of such person are or is granted, or the inventory is or is required to be exhibited or recorded, as the case may be ; and such estate and effects, and the value thereof shall accordingly be included in the affidavit required by law to be made on applying for probate or letters of administration, in order to the full and proper stamp duty being paid."

Sect. 5. "The said last mentioned duties shall be a charge or burden upon the property in respect of which the same are so payable, and shall be paid thereout by the trustees or owners thereof to the person for the time being lawfully having or taking the burden of the execution of the Will or testamentary instrument, or the administration or management of the personal or movable estate and effects of the deceased, for the benefit of the persons entitled to the personal or movable estate and effects of the deceased."

which the testator had merely a power of appointment. *Platt v. Routh*, 6 M. & W. 756, affirmed in the House of Lords, *sub. nom. Drake v. Att.-Gen.*,

10 Cl. & Fin. 257. The contrary had previously been held in *Palmer v. Whitmore*, 5 Sim. 178, and in *Att.-Gen. v. Staff*, 2 Cr. & M. 124.



## \*PART THE SECOND.

OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

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### BOOK THE FIRST.

OF THE TIME WHEN THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR VESTS : AND OF THE QUALITY OF THAT ESTATE.

In considering the nature of the estate which an executor or administrator has in the property of the deceased, it is proposed to inquire, 1. At what time his estate vests; 2. The quality of his estate.

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#### CHAPTER THE FIRST.

OF THE TIME WHEN THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR VESTS.†

As the interest of an executor in the estate of the deceased is derived exclusively from the will (a), so it vests in the executor from the moment of the testator's death (b). <sup>Estate of executor.</sup>

Thus where the demise by an executor, the lessor of the plaintiff in ejectment, was laid two years before he had proved the will under which he claimed, it was held good (c). So where a testator had given a bailiff authority to distrain, but died almost immediately before the distress was taken: and, after \*it had been taken in his name, his executor ratified the distress; it was held that the plaintiff might well avow as the bailiff of the executor: because the rent was due from the estate, and the law knows no interval between the testator's death and the vesting of the right in his executor: as soon as he obtains probate, his right is considered as accruing from that period (d).

† See American note at end of this Chapter.

(a) *Ante*, p. \*243.

(b) Com. Dig. Administration (B. 10).  
*Woolley v. Clark*, 5 B. & A. 745, 746.

(c) *Roe v. Summerset*, 2 W. Black. 692.

(d) *Whitehead v. Taylor*, 10 A. & E. 210.

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On the other hand, an administrator derives his title wholly from the court: he has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant (e).

Accordingly, no right of action accrues to an administrator until he has sued out letters of administration. In an action on a bill of exchange by an administrator, where the bill was accepted after the death of the deceased, and the acceptance, and also the day of payment, was more than six years before the commencement of the suit, but the granting of administration was less than six years before, it was held that the Statute of Limitations began to run from the date of administration, and not from the day of payment, since there was no cause of action until the administration was granted (f). So where to a declaration in trover by an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant knowing the goods to have been the property of the intestate in his lifetime, and of the plaintiff as administrator since his death, afterward, and after the death of the intestate, to wit, on, &c., converted the same goods, it was pleaded that the defendant was not guilty of the premises within six years, such plea was held bad upon special demurrer, on the ground, that although it might be true that the defendant was not guilty within six years, yet the cause of action might have accrued to the plaintiff by the grant of letters of administration within that period (g).

The proposition, however, respecting the vesting of an administrator's interest, must be taken with some qualification; for it seems clear that, for particular purposes, the letters of administration relate back to the time of the death of the intestate, and not to the time of granting them (h). Thus, although it has been held that detinue cannot be maintained by an administrator against a person who has got possession of the goods of the intestate since his death, but has ceased to hold them prior to the grant of administration (i), yet an administrator may have an action of trespass (j) or trover for the goods of the intestate taken by one before the letters granted unto

(e) *Woolley v. Clark*, 5 B. & A. 745, 746.

(f) *Murray v. E. I. Company*, 5 B. & A. 204. *Post*, Pt. V. Bk. I. Ch. I.

(g) *Pratt v. Swaine*, 8 B. & C. 285.

(h) *Godolph. Pt. 2*, c. 20, s. 6. 2 Roll. Abr. 399, tit. Relation (A.), pl. 1. 2

Roll. Abr. 544, Trespass (T.), pl. 1. *Middleton's Case*, 5 Co. 28 b. Com. Dig. Administration (B. 10). *Wentw. Off. Ex.* 115, 116, 14th edition.

(i) *Crossfield v. Such*, 8 Exch. 825.

(j) *Tharpe v. Stallwood*, 5 M. & Gr. 760.

him; otherwise there would be no remedy for this wrongdoing (*k*). So where goods had been sold after the death of an intestate and before the grant of letters of administration, avowedly on account of the estate of the intestate, by one who had been his agent, it was held that the administrator might ratify the sale and recover the price from the vendee in assumpsit for goods sold and delivered (*l*). And accordingly it should seem that whenever anyone acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back, in order not to lose the benefit of the contract, so that the administrator may sue upon it, as made to himself (*m*.) And so if, during the time when there is no personal representative of the estate of a deceased person,\*services have been rendered which not only were for the benefit of the estate, but also were rendered under a contract with someone who subsequently by becoming administrator became authorized to bind the estate, and ratified the contract, the estate of such deceased person is liable for such services (*n*). Further, it has been held on the bare doctrine of relation, that in a case where the administrator might maintain trover for a conversion between the death of the intestate and the grant of administration, he may waive the tort and recover as on a contract: Thus, where money belonging to an estate at the time of his death, or due to him and paid in after his death, or proceeding from the sale of his effects after his death, has, before the grant of administration, been applied by a stranger to the payment of the intestate's debts and funeral expenses, the administrator may recover it from such stranger as money had and received to his use as administrator (*o*). So it should seem the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property, for all matters affecting the same subsequent to the death of the intestate, and so as to render him liable to account for the rents and profits of it from the death of the intestate (*p*). \*Again, although an executor *de son tort* cannot plead

(*k*) *Foster v. Bates*, 12 M. & W. 233, *per Parke, B.* *Searson v. Robinson*, 2 Fost. & F. 351.

(*l*) *Foster v. Bates*, 12 M. & W. 226.

(*m*) *Bodger v. Arch*, 10 Exch. 333.

(*n*) In *re Watson*, *Ex parte Phillips*, 18 Q. B. D. 116, affirmed in the Court of Appeal, 19 Q. B. D. 234. See, however, the remarks of Lord Esher,

M. R., in his judgment on appeal, who doubted whether an administrator after becoming administrator, and while acting in the interests of other persons, could have ratified a prior contract made with himself.

(*o*) *Welchman v. Sturgis*, 13 Q. B. 552.

(*p*) *Rex v. Horsley*, 8 East, 410, in  
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a retainer of his own debt, yet if, even *pendente lite*, he obtains administration, he may retain: for it legalizes those acts which were tortious at the time (*q*). And there has been already occasion (*r*) to point out other acts of an administrator before administration granted, which the relation of the letters in some measure renders valid. But the relation of the grant of administration to the death of the intestate, shall not, it is said, divest any right legally vested in another between the death of the intestate and the commission of administration. Thus, in *Waring v. Dewbury* (*s*), a landlord who had rent due to him, died intestate; after which the plaintiff in the action sued out execution against the defendant, who was the tenant, and levied the debt upon him; after this, administration was committed to J. S.; who thereupon came into the court, and moved for a rule on the sheriff to pay him a year's rent out of the money levied, pursuant to the 8 Ann. c. 17, urging, that though he was not administrator at the time of serving the execution, yet as soon as the administration was committed, it had relation to the death of the intestate, and he might bring trover for goods taken between the death of the intestate and commission of the administration: But the court held, that relations which are \*but

Lord Ellenborough's judgment. So it is laid down in Selw. N. P. 717, 6th edition, that in ejectment by an administrator, the demise may be laid on a day after the intestate's death, but before administration granted; for the administration, when granted, will relate back, and show the title to have been in the administrator from the death of the intestate. This point was expressly decided accordingly, by the Court of K. B. in Ireland, after a full consideration, in *Patten v. Patten*, T. 3 W. 4. 1 *Alcock & Napier*, 493: and Bushe, C. J., in delivering judgment, regards this decision as reconcilable with that of *Keane v. Dee* (K. B. Ireland, June, 1821), 1 *Alcock & Napier*, 496, note (1), in which case it had been holden that an administrator could not justify a distress for rent (accrued out of a chattel term of the intestate after his death) made before the grant of the administration, on the ground that al-

though letters of administration will operate by relation, to enable an administrator to recover a chattel property from the time of the death of the intestate, yet it does not effectuate a *legal proceeding*, taken before administration granted, in order to recover such property. See, however, *Bacon v. Simpson*, 3 Mees. & Wels. 87, in which case an administratrix, before she had taken out administration, had contracted to assign a term for years of the intestate in a leasehold house; and Parke, B., was of opinion, that an allegation, that she was lawfully possessed of the term at the time of the making of the contract, could not be supported. See also *ante*, pp. \*342, \*343.

(*q*) *Curtis v. Vernon*, 3 T. R. 587, 590.

(*r*) *Ante*, pp. \*344, \*345.

(*s*) *Gilb. Eq. Rep.* 223, cited by *Strange, arguendo*, in *Rex v. Mann*, S. C. 1 Stra. 97.

fictions of law, should never divest any right legally vested in another, between the death of the intestate and the commission of administration; and the plaintiff in the action having duly served his execution, before the administrator had a right to demand his rent, it was not reasonable the plaintiff should be defeated by any relation whatsoever; they did not in that case deny the authorities which gave the administrator trover, but went on a distinction between relations that are to defeat lawful acts, and such as are to punish those that are unlawful (*t*).

There appears, in some instances, to be the same relation back of the title of the personal representative in cases where the deceased had only a special property in the goods as where he had the absolute property. Thus, if an uncertificated bankrupt acquired goods after his bankruptcy, and died possessed of them, having been allowed to retain possession by the assignees, his administrator might maintain trover against a third party who had sold the goods between the period of the death of the intestate and the grant of the administration; for there was a good title in the bankrupt as against all the world but the assignees, and this title passes to his administrator (*u*). But there is no such relation back as to chattels in which the deceased had no personal interest, but held merely as the administrator of another: The bare circumstance of his dying in possession will not enable his personal representative to maintain trover even against a mere wrongdoer; for it will be a good defense that the right to the goods in question has devolved on the administrator *de bonis non* of the original intestate (*x*).

By stat. 3 & 4 Wm. IV. c. 27 (entitled *An Act for the \*Limitation of Actions and Suits relating to real property, &c.*), s. 6, it is enacted, that "for the purposes of this Act an administrator claiming the estate or interest of the deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person, and the grant of the letters of administration."

Relation back of title where the deceased had only a special property.

3 & 4 Will. IV. c. 27. Administrator to claim for purposes of this act, in actions relating to real property, as if he obtained the estate without interval after death of deceased.

(*t*) See also *Rex v. Horsley*, 8 East, 405, *post*, p. \*566, note (*m*). The rule that a party cannot be made a trespasser by relation is only applicable where the act complained of was lawful at the

time: *Tharpe v. Stallwood*, 5 M. & Gr. 760.

(*u*) *Fyson v. Chambers*, 9 M. & W. 460.

(*x*) *Elliot v. Kemp*, 7 M. & W. 306.

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By 21 & 22 Vict. c. 95, s. 19, "From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the Judge of the Court of Probate for the time being in the same manner and to the same extent as heretofore they vested in the Ordinary."

All movable goods, though in ever so many different and distant places from the executor, vest in the executor in possession, presently upon the testator's death (*y*): for it is a rule of law, that the property of *personal* chattels draws to it the possession (*z*). But it is otherwise of things immovable, as leases for years of lands or houses: for of these the executor or administrator is not deemed to be in possession before entry (*a*). So of leases for years of a rectory, consisting of glebe lands and tithes for years, it may be doubtful if actual possession can be without actual entry into the glebe land (*b*). But in case of a lease for years of tithes only, it was held that the executor, though in never so remote a place, should instantly, upon the setting out thereof, be in actual possession to maintain action of trespass for taking them away (*c*).

(*y*) Wentw. Off. Ex. 228, 14th edit. 11 Vin. Abr. 240.

(*z*) 2 Saund. 47, *b. n.* (1), to Wilbraham v. Snow.

(*a*) Wentw. Off. Ex. 228, 14th edit. See the observations of Parke, B., in Barnett v. Earl of Guildford, 11 Exch. 32. But a *reversion* of a term, which

the testator granted for a part of the term, is in the executor immediately by the death of the testator: Trattle v. King, T. Jones, 170.

(*b*) Wentw. Off. Ex. 229, 14th edit. 11 Vin. Abr. 240.

(*c*) *Ibid.*

† What actions may be brought by an executor or administrator for torts or liabilities incurred to the estate before letters issued, but after the death of the deceased, will be considered hereafter. In general, it may be assumed as the American rule that the title of either

relates back, for that purpose at least, to the death of the deceased. Schouler on Exrs. §§ 194, 238; Woerner on Admn. § 173; Crosswell on Exrs. § 614; 3 Redf. on Wills 127. See also the American notes, pp. 362, 488, *ubi supra*.

## \*CHAPTER THE SECOND.

## OF THE QUALITY OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.†

The interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which everyone has in his own proper goods (a): For an executor or administrator has his estate as such in *auter droit* merely, *viz.*, as the minister or dispenser of the goods of the dead (b).

Therefore, if before the Act 33 & 34 Vict. c. 23, for the abolition of forfeiture for treason and felony, an executor or administrator had been attainted of treason or felony, the goods which he had as executor or administrator would not thereby have been forfeited (c): and though disabled by such attainder from suing *proprio jure*, he might still have maintained an action in *auter droit* as executor or administrator (d).

The goods of the deceased not forfeited by attainder of executor, &c.

So, where an executor brought a *quo minus* in the Court of Exchequer, stating that he was not able to pay the king's debt, because the defendant detained from him 100*l.* which he owed to him as executor of J. S., it abated: because it could not be intended that the king's debt could be satisfied with that which the plaintiff should recover and receive as executor (e).

not applicable to the debts which the executor owes the crown.

\*So though a lord of a villain might take all the villain's own goods, yet he might not take those which the villain held as executor (f).

Upon this principle also, if the executor or administrator becomes bankrupt, with any property in his possession belonging to the testator or intestate, distinguishable from the

Where the executor becomes bankrupt.

† See American note at end of this Chapter.

(a) Wentw. Off. Ex. 192, 14th edit.

(b) Pinchon's Case, 9 Co. 88, b. 2 Inst. 236. An executor has the property only under a trust to apply it for payment of the testator's debts, and such other purposes as he ought to fulfill in the

course of his office as executor: by Ashhurst, J., *Farr v. Newman*, 4 T. R. 621, 645.

(c) 1 Hale, P. C. 251. Hawk. P. C. Bk. 2, c. 49, s. 9.

(d) *Ante*, p. \*186.

(e) Wentw. Off. Ex. 194, 14th edit.

(f) Lit. L. 2, c. 11, s. 192.

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rupt, the goods of the testator do not pass : general mass of his own property, it is not distributable under the bankruptcy (*g*). The trustee cannot seize even money which specifically can be distinguished and ascertained to belong to the deceased, and not to the bankrupt himself (*h*). But where a person entitled to take letters of administration neglected to do so, yet remained in possession of the goods of the intestate for twelve years, and being so in possession became a bankrupt; and a creditor of the intestate afterward took out letters of administration, and claimed the goods from the assignees; it was held that these goods were within the stat. 21 Jac. I. c. 19, being property in the possession, order, and disposition of the bankrupt, with the consent of the true owner: and that the assignees were therefore entitled to them (*i*). So where an innkeeper, who was a widow, having died intestate, two of her children, a son and daughter, took possession of her furniture and stock in trade, and carried on her business in their own names for two years after her death, during which time they paid her funeral expenses and some of her debts, but without taking out administration to her estate, and, at the end of that time, became bankrupts, the daughter having a few months previously retired from the business, and sold \*her share of it to the son: Another of the children then took out administration to the intestate, and claimed that part of her furniture and stock in trade which still remained in specie: But it was held that it belonged to the assignees, as having been in the order and disposition of the son at the time of his bankruptcy (*k*).

It must be observed, that if the testator were a lessee for years, and the lease contained a proviso that if the lessee, or his executors, administrators, or assigns, shall become bankrupt: *his executors, administrators, or assigns, shall become bankrupt, the lease shall become void, the bankruptcy*

(*g*) See Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, § 44 (1).

(*h*) By Lord Mansfield in *Howard v. Jemmett*, 3 Burr. 1369, cited by Lord Kenyon, in *Farr v. Newman*, 4 T. R. 621, 648. Under the bankruptcy of an executor and trustee, directed by the will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable: *Ex parte Garland*, 10 Ves. 110. See *post*, Pt. IV. Bk. II. Ch. II. § I.

(*i*) *Fox v. Fisher*, 3 B. & A. 135; *Kitchen v. Ibbetson*, L. R. 17, Eq. 46.

(*k*) In re Thomas, 1 Phill. C. C. 159.

It is to be observed that under the Bankruptcy Act, 1883, § 44 (2), iii., reputed ownership is limited to goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent or permission of the true owner. It must be noticed that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, are not "goods" within the meaning of this section.



of the executor will operate as a forfeiture of the lease, notwithstanding the lease itself does not pass to his assignees (*l*).

Where a trustee in bankruptcy possesses himself of effects, which belong to the bankrupt as executor only, the court, upon application made to it, will order the return of such effects to the bankrupt, or will, if necessary, appoint a receiver (*m*). Where a bankrupt is an executor and residuary legatee, and has paid the debts and particular legacies out of part of the assets, if he refuses to collect the rest, notwithstanding trustee in bankruptcy has not the legal interest vested in him, the court will assist him to get in the remainder in the name of the executor (*n*).

receiver appointed  
to whom assign-  
ees shall account:

bankrupt execu-  
tor residuary leg-  
atee.

Again, the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right (*o*). So if an executor dies \*indebted, leaving to his executor goods which he had as executor, these are not assets liable to the payment

The goods of the  
testator cannot be  
taken in execu-  
tion for the debt  
of the executor.

(*l*) 1 Cr. M. & R. 405.

(*m*) As to the powers exercisable by the court as regards a trustee in bankruptcy, see the cases of *Ex parte James*, L. R., 9 Ch. 609, and *Ex parte Simons*, 16 Q. B. D. 308.

(*n*) *Ex parte Butler*, 1 Atk. 213.

(*o*) *Farr v. Newman*, 4 T. R. 621, where all the former authorities are collected and discussed. In this case, Buller, J., dissented from the rest of the court, viz. Lord Kenyon, and Ashhurst and Grose, Justices. The action was against the sheriff for a false return, and the question was, whether certain goods of the testator, which had been seized by the sheriff under an execution against the husband of the executrix, in a house in which the husband and wife resided, and the testator had resided, but which had not been sold under the execution, were bound by it. In a previous case, *Whale v. Booth*, B. R. 25 Geo. III. 4 T. R. 625, note (*a*), where the goods of the testator had actually been sold under a *fiery facias* against the executor for his own debt, and the

executor joined in a bill of sale, it was held by the Court of K. B. that the property passed by the execution, and could not afterward be seized under a writ sued out by a creditor of the testator; upon the principle that the sale under the execution could not be distinguished from an alienation by the executor. But although the two cases may thus in some degree be reconciled, Eyre, C. J., in *Quick v. Staines*, 1 Bos. & Pul. 295, considers them as entirely conflicting, and the law as still unsettled. See also the observations of Sir Thomas Plumer, V.-C., in *Ray v. Ray*, Coop. 267. However, Lord Eldon, C., in *M'Leod v. Drummond*, 17 Ves. 168, adverts to *Farr v. Newman*, as having decided absolutely, that the effects of the testator cannot be taken in execution for the debt of the executor, and expresses his satisfaction of that decision. See also *Kinderley v. Jervis*, 22 Beav. 23, per Romilly, M. R. See *infra*, Pt. III. Bk. I. Ch. I., as to the power of an executor to dispose by sale of the goods of his testator. If an executor,

of his debts, but only for the payment of the first testator's (*p*). But when an executrix used the goods of her testator as her own, and afterward married and then treated them as the \*property of her husband, it was held, that she could not be allowed to object to their being taken in execution for her husband's debt: for where an executrix or her husband have converted the goods, it does not lie in the mouth of either of them to say they are not the property of the husband, in a case between the executrix and one of his creditors (*q*). So after a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution property of the testator which is assets in equity (*r*). However, where goods of an intestate had been taken possession of, and used by an administrator, in the house of the intestate, for three months after the death of the intestate, Lord Tenterden held that they could not be taken in execution for the administrator's own debt, the time, in this case, not being sufficient to make the goods the administrator's property (*s*).

With reference also to the principle, that an executor or administrator holds the property of the deceased *in auter droit* Merger: merely, it has been laid down, that in respect to land, no merger can take place of the estate held by a man as executor in that which he holds in his own right (*t*). However, in the former editions of this work the authorities were referred to at length in

in pursuance of the directions in the testator's will, carries on the testator's business and in so doing contracts debts, the fact that he has carried on the business in his own name, and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets. Lapse of time, and an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. But, when the possession and the time which has elapsed are in accordance with the trusts of the will, no such in-

ference can arise: *Re Morgan*, 18 C. D. 93.

(*p*) *Wentw. Off. Ex.* 194, 14th edit.

(*q*) *Quick v. Staines*, 1 Bos. & Pull. 293.

(*r*) *Ray v. Ray*, Coop. Chanc. Cas. 264. Upon this case in his judgment in *Re Morgan*, 18 C. D. 93, 101, Fry J., remarks that "the Court thought the circumstances were such as to raise an inference of a gift by the testator's creditor to the executor."

(*s*) *Gaskell v. Marshall*, 1 Mood. & Rob. 132. S. C. 5 C. & P. 31. The learned judge, upon *Quick v. Staines* being cited, observed that the marriage in that case made all the difference.

(*t*) 2 Black. Comm. 177. *Jones v. Davies*, 5 H. & N. 767. See *Chambers v. Kingham*, 10 C. D. 743.

support of an important distinction, apparently well sustained, between the cases in which either of the two estates was an accession to the other by *act of law*, when no merger would take place, and those where the accession was by *act of the party*, when the less estate would merge.

\*But with respect to assets the distinction was considered immaterial. In case of purchase, as of descent, all, says L. C. B. Gilbert, agree that the term would not be extinct as to creditors. And as it would seem that in no case would the term held by an executor or administrator have been considered to merge in equity, the learning on the subject appears to be rendered obsolete by the Judicature Act, 1873, s. 25, sub-sect. 4, which enacts that "there shall not after the commencement of this Act, be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." And sub-sect. 11 provides that "generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail."

It may be observed in this place, with respect to the continuance of the privilege from merger, that, though a person is originally entitled to a term, or to an estate of freehold, as an executor or administrator, yet in process of time he may become the owner of that estate in his own right (*u*). This happens in the case of executors when the executor is also residuary legatee, and he performs all the purposes of the will, and holds the estate as legatee; or when the executor pays money of his own, to the value of the term, in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu of the money: And in the case of administrators, when the administrator is the only person entitled to the beneficial ownership of the intestate's property, or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid: Under these, and the like, circumstances the executor or administrator will have the estate in his own right; and when he has the estate in his own right, it will be subject to merger (*x*).

\*Generally speaking, it is difficult to ascertain when the character of executor or administrator ceases, and the ownership, independent of that character, commences. Every case must depend on its own circumstances. This only is certain, that when the executor or

(*u*) See *post*, p. \*566, *et seq.*

(*x*) 3 Preston on Conv. 310, 311.

administrator ceases to hold the estate in that character, he will hold the same in his own right, and it will be subject to merger (*y.*)

Since no man can bequeath anything but what he has to his own use, an executor cannot by his will dispose of any of the goods which he has as executor to a legatee (*z*): although we have seen (*a*) that if an executor appoint an executor, the goods will pass to him as the representative of the first testator; while, on the other hand, an administrator cannot transmit any interest in the property of the intestate to his own personal representative.

But, generally speaking, an executor or administrator, in his own lifetime, may dispose of and alien the assets of the testator: he has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased (*b*). This rule, however, is subject to some qualifications, which will be pointed out when this treatise arrives at the general discussion of the power of executors and administrators (*c*).

With reference to the possession in *auter droit*, it has been held that if an executor or administrator grant *omnia bona sua* by an executor: *sua*, the goods of the deceased will not pass, unless the grantor have no goods but as executor or administrator (*d*). So if an executor releases all actions, suit and demands \*whatsoever, which he had for any cause whatever, this extends only to such as he has in his own right, and not to such as he hath as executor (*e*).

Since the passing of the Married Women's Property Act, 1882, a married woman can act as executrix or administratrix as if she were a *feme sole* without the control of her husband: the husband, therefore, of an executrix or administratrix has since that act, no power of disposition over the personal estate so vested in his wife (*f*).

(*y*) 3 Preston on Convey. 311.

(*z*) Bransby v. Grantham, 2 Plowd. 525. Godolph. Pt. 2, c. 17, s. 3.

(*a*) *Ante*, p. \*204.

(*b*) By Lord Mansfield, in *Whale v. Booth*, 4 T. R. 625, note to *Farr v. Newman*.

(*c*) See *post*, Pt. III. Bk. I. Ch. I.

(*d*) *Hutchinson v. Savage*, 2 Lord Raym. 1307. *Wentw. Off. Ex.* 193, 14th edit. But an executor may have trespass for taking goods in his time, *quare bona et catalla sua*, because of the possession: by *Holt, C. J.*, in *Knight v. Cole*, 1 Show. 155.

(*e*) *Knight v. Cole*, 1 Show. 153.

(*f*) See *ante*, pp. \*185, \*186.

With respect to the Poor Laws, it may be here observed, that an executor or administrator will gain a settlement by estate by a residence as such upon a leasehold property of the deceased (*g*). And a settlement will equally be gained, although the tenement to which he comes as executor or administrator be under the value of 10*l.* a year (*h*). When an executor, &c., will gain a settlement by residing on the leasehold of the testator, &c.

So it was held, that the husband of an administratrix, entitled to the trust only of a term, gained a settlement by residence thereon for forty days (*i*). And the executor to a tenant of an estate under 10*l.* a year gains a settlement by forty days' residence, although he does not prove the will; because the property vests in him from the death of the testator (*k*): but a next of kin of a lessee for years, in a case where several are in equal degree of kindred, can gain no settlement by residing on the land, if he does not take out letters of administration; because no right is vested in him till that is done (*l*). Yet in the case of a *sole* next of kin, exclusively entitled to the administration of the personal \*estate, who had resided more than forty days in the parish in which a leasehold tenement belonging to the intestate lay, it was held, that she thereby gained a settlement, although she had not then obtained a grant of the administration; upon the ground that the exclusive right to enforce the proper means of acquiring the legal title to the property, coupled with the actual enjoyment of it, gave so much color of right to reside, as to exempt such residence from being considered a vagrant intrusion into a parish in which the party has nothing of *his own*, within the purview and scope of the Poor Laws (*m*).

By stat. 3 & 4 Wm. IV. c. 74 (*An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance*), s. 27, it is provided and enacted, 3 & 4 W. IV. c. 74. Executor not to be protector. "that no bare trustee, heir, executor, administrator, or assign, in respect of any estate taken by him as such bare trustee,

(*g*) *Rex v. Sundrish*, Burr. Sess. Ca. 7.

(*h*) *Rex v. Uttoxeter*, Burr. Sess. Ca. 538. Even though the letters be taken out for a pauper administrator by parish officers, on purpose to create the settlement: *Rex v. Great Glenn*, 5 B. & Adol. 188.

(*i*) *Mursley v. Grandborough*, 1 Stra. 97.

(*k*) *Rex v. Stone*, 6 T. R. 295.

(*l*) *Rex v. Barnard Castle*, 2 A. & E. 108.

(*m*) *Rex v. Horsley*, 8 East, 405. A grant of administration will not operate by relation so as to vest a term in the administrator from the death of the intestate, and thus make a person irremovable for a time past, who during that time was removable: *Ibid.* 409; and see also *Rex v. Widworthy*, Burr. Sess. Ca. 109.

heir, executor, administrator, or assign, shall be the protector of a settlement."

It may be proper to conclude these doctrines as to the difference between the interest which an executor or administrator has in the goods of the deceased, and such as a man has in his own proper goods, by considering more fully a subject to which there has already been occasion to advert (*n*), *viz.*, how the property which the executor or administrator has at first in his representative character, may become his own to his own use, as his other goods which he has not as executor or administrator (*o*).

As first, in regard to the ready money left by the testator; on its coming into the hands of the executor, the property \*in the specific coin must of necessity be altered: for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value; and therefore a creditor of the testator cannot, by *fiery facias* on a judgment recovered against the executor, take such money as *de bonis testatoris* in execution (*p*).

So if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation; and if it be not more than adequate, the chattel by such election shall become his own (*q*): Consequently, if by such election he acquire the absolute ownership of the chattel, and die, his executor may defend himself in an action of *detinue* brought for the same by the surviving executor of the first testator (*r*). Hence, if an executor pays with his own money the debts of the testator in such order as the law appoints, to the value of the whole of the personal assets, he acquires an absolute right to

(*n*) *Ante*, p. \*563.

(*o*) Wentw. Off. Ex. c. 7, p. 197, 14th edition.

(*p*) Wentw. Off. Ex. c. 7, p. 196, 14th edition. Toller, 238. It would seem, however, that a creditor of the testator would be entitled, now that the Judicature Act has provided that where there is a difference between the principles of law and equity those of equity

are to prevail, to have the judgment debt satisfied out of such intermixed moneys to the amount of the testator's money: *Re Hallett*, 13 C. D. 696.

(*q*) Wentw. Off. Ex. c. 7, pp. 196, 199, 14th edition. *Elliott v. Kemp*, 7 M. & W. 813, *per Parke*, B.

(*r*) Toller, 239.

them; and he may dispose of them as he pleases, without being guilty of any *devastavit* (s)

\*So, if the debt due to him from the testator amount to the full value of all his effects in the executor's hands, there is a complete transmutation of the property in favor of the executor, by the mere act and operation of law: in the former case, his election, and in the latter the mere operation of law, shall be equivalent to a judgment and execution; for he is incapable of suing himself (t).

So, in the case of a lease of the testator, devolved on the executor, such profits only as exceed the yearly value shall be held to be assets: it therefore follows, that, if the executor pay the rent out of his own purse, the profits to the same amount shall be his (u).

There are likewise other means of thus changing the property: as if the testator's goods be sold under a *feri facias*, the executor, as well as any other person, may buy such goods of the sheriff; and in case he does so, the property which was vested in him as executor shall be turned into a property in *jure proprio* (x).

Again, if the executor among the testator's goods find and take some which were not his, and the owner recover damages for them in an action of trespass or trover, and the judgment is followed by satisfaction, in this, as in all similar cases, the goods shall become the trespasser's property, because he has paid for them (y.)

If an executor or administrator makes an underlease of a term of years of the deceased, rendering rent to himself, his executors, &c., though he has the term wholly in right of the intestate, yet, when he makes this lease, he has power to dispose of the whole; and by making a lease of part, he appropriates that to himself, and divides it

(s) *Merchant v. Driver*, 1 Saund. 307. *Chalmer v. Bradley*, 1 Jac. & Walk. 64. *Vanquelin v. Bouard*, 15 C. B., N. S. 341, 372. However, in *Hearn v. Wells*, 1 Coll. 333, Knight Bruce, V.-C., said he could not accede to the proposition that an executor has a right in equity to acquire as a purchaser an absolute title to specific chattels by intending so to deal with them, and by paying the testator's debts to an amount exceeding the value of those chattels: Whatever might be the rule of law upon a plea of *plene administravit*, he apprehended that not to be the rule in

equity: His honor did not agree that in equity, the executor had, under such circumstances, an absolute right to the property. It may be that, since the Judicature Act, the rule in equity will prevail, and the rule in law, established by the above cited cases, cease to be in force.

(t) Plowd. 185. Toller, 239.

(u) Went. Off. Ex. c. 7, p. 200, 14th edition. Toller, 239.

(x) *Ibid.*

(y) Went. Off. Ex. c. 7, p. 200, 14th edition. Toller, 239. *Brinsmead v. Harrison*, L. R., 6 C. P. 584.

from the rest, and has \*the rent in his own right: and if he dies, the rent will be payable to his personal representative, and not to the administrator *de bonis non* of the original deceased (2).

As an executor, who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee (a), so an administrator, who is also entitled to share in the residue as one of the next of kin under the Statute of Distribution, may acquire a legal title, in his own right, to goods of the deceased, either by taking them by an agreement with the parties entitled to share with himself under the statute, or even without such agreement, by appropriating them to himself as his own share (b).

If one of several executors or administrators alone sell any of the goods of the testator, he alone may maintain an action for the price, not naming himself executor (c).

In a case where bills of exchange had been accepted by A., for the accommodation of B., one of the executors of C., it appeared that B., having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in his possession, discounted the bills with such money, by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box: And it was held, by Alexander, C. B., that B. could not sever his character of an accommodation holder of these bills from his character of executor, so as to enable him and his co-executor to sue as indorsees of the bills for a valuable consideration (d).

(2) *Drue v. Baylie*, 1 Freem. 403. But see *Cowell v. Watts*, 6 East, 405. *Catherwood v. Chabaud*, 1 B. & C. 150, *infra*, Pt. II. Bk. III. Ch. II.; Bk. IV. Ch. II.

(a) See *post*, Pt. III. Bk. III. Ch. IV. § III.

(b) *Elliott v. Kemp*, 7 M. & W. 313, *per Parke, B.* See, however, *ante*, note (s).

(c) *Godolph. Pt. 2, c. 16, s. 1. Wentw. Off. Ex. 224*, 14th edit. *Brassington v. Ault*, 2 Bing. 177. S. C. 9 Moo. 340.

(d) — *v. Adams*, 1 Younge, 117.

† The estate of the deceased passes to the personal representative in trust. Schouler on Exrs. § 242; Woerner on Admn. § 174. The circumstances under which it may change its trust

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character and become the individual property of the executor or administrator will be considered hereafter with the subjects of transfer of assets, payment of debts, and accounting.



## \*BOOK THE SECOND.

### ON THE QUANTITY OF THE ESTATE IN POSSESSION OF AN EXECUTOR OR ADMINISTRATOR.†

After the administration is granted, the interest of the administrator in the property of the deceased is equal to and with the interest of an executor (*a*). Executors and administrators differ in little else than in the manner of their constitution (*b*).

The estate of an administrator is the same as that of an executor.

The general rule is, that all goods and chattels, real and personal, go to the executor or administrator (*c*). By the laws of this realm, says Swinburne (*d*), as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to deal with the lands, tenements, and hereditaments. In other words it may be stated, that, both at law and equity, the whole personal estate of the deceased vests in the executor or administrator.

The whole personal estate of the deceased vests in the executor :

The personal property in which the deceased had but a joint estate † or possession will survive to his companions, and his executor or administrator will not be entitled to a moiety of it (*e*): for a survivorship<sup>3</sup> holds place regularly as well between joint tenants of goods and chattels in possession or in right, as between joint tenants of inheritance or freehold (*f*). But the wares, merchandise, debts, or duties, \*which joint merchants have, as joint merchants or partners, shall not survive, but shall go to the executors of the deceased; and this is *per*

Personal property of which the deceased was joint tenant shall not go to the executor :

† See American note at end of this Book, p. \*591.

(*a*) Touchs. 474. Blackborough v. Davis, 1 P. Wms. 43, by Holt, C. J.

(*b*) Treat. Eq. Bk. 4, Pt. 2, c. 1, s. 1.

(*c*) Com. Dig. Biens (C). Co. Lit. 388, *a*. The *hæres* of the civil law, answering to our executor or administrator, succeeded in *universum jus defuncti* : Godolph. Pt. 2, c. 1, s. 1.

(*d*) Swinb. Pt. 6, s. 3, pl. 5.

(*e*) Swinb. Pt. 3, s. 6, pl. 1. See *post*, Pt. III. Bk. III. Ch. V. § I., as to what constitutes a joint tenancy in personal property.

(*f*) Co. Lit. 182, *a*. Harris v. Ferrgusson, 16 Sim. 308. Crossfield v. Such, 8 Exch. 825.

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*legem mercatoriam* which is part of the laws of this realm, for the advancement and continuance of commerce and trade, except in the cases of partners in trade, &c. which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (g). And this part of the *lex mercatoria* has been extended to all traders (including manufacturers) (h), and as it should seem, to all persons engaged in joint undertakings in the nature of trade (i). Thus, if two take a lease of a farm jointly, the lease shall survive, but the stock on the farm, though occupied jointly, shall not survive (j). So where two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one of them dies; when the money is paid the survivor shall not have the whole, but the representative of him who is dead shall have his proportion (k). So if two or more make a joint purchase of land, and afterward one of them lays out \*a considerable sum in repairs and improvements and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it (l). But where two

(g) *Ibid.* Rex v. Collectors of Customs, 2 M. & S. 225. But with respect to *choses in action* though the right of the deceased joint tenant devolves on his personal representative, the remedy survives to his companion, who alone must enforce the right by action: See *post*, Pt. II. Bk. III. Ch. I. § II.; Pt. V. Bk. I. Ch. I. And it has been doubted whether the rule can in any case be enforced but in a court of equity. See Smith's Mercantile Law, 149, 3rd edition. Abbott on Shipping, 97, 7th edit. But it was decided by the Court of Exchequer, after full consideration, that the title to partnership chattels does not survive at law: Buckley v. Barber, 6 Exch. 164. In the same case it was argued that the surviving partners have, at law, at all events, a *jus disponendi* as to the partnership chattels, for the purpose of winding up the partnership debts: The court, however, doubted whether they have a power to sell and give a good legal title to the share belonging to the executor of the deceased partner when they sell in order to pay the debts of the partner-

ship; and the barons held that certainly the survivors have no power to dispose of his share otherwise than to pay such debts.

(h) Buckley v. Barber, 6 Exch. 164.

(i) Hamond v. Jethro, 2 Brownl. & Gold. 99.

(j) Jeffereys v. Small, 1 Vern. 217.

(k) Fonbl. Treat. B. 2, c. 4, s. 2, note (g). Vickers v. Cowell, 1 Beav. 529.

(l) Lake v. Gibson, 1 Eq. Cas. Abr. 291, pl. 3. See further Harrison v. Barton, 1 Johns. & H. 287, where, on the purchase by two persons contributing equally to the costs of it, Wood, V.-C., held that parol evidence of surrounding circumstances and of subsequent dealings was admissible, notwithstanding the Statute of Frauds, to prove an intention to hold in severalty: and his honor relied on the observation of Sir W. Grant, in Aveling v. Knipe, 19 Ves. 441, that equity will not hold a purchase joint, if there are any circumstances from which it can be collected that a joint tenancy was not contemplated.

become joint tenants, or jointly interested, in personal property, by way of gift, there the same shall be subject to all the consequences of the law of survivorship (*m*).

In the case of *Morris v. Barrett* (*n*), the residue of real and personal estates was devised by a testator to his two sons as joint tenants; and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other; it was held, under the circumstances, that they continued, till the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates.

The general rule of law is, that on the death of one of several partners, in the absence of express stipulation, his representative is entitled to have the whole concern wound up and disposed of, and if the surviving partners continue the trade, the representative of the deceased partner may elect to take his share of the profits, or may charge the survivors with interest on the amount of capital retained and used by them. If the property of the partnership consists in part of \*leaseholds, the executor of the deceased partner may treat the survivors as trustees, and if they renew the lease, they are considered to do so for the benefit of the partnership (*o*).

Rights of executor of one of several partners.

In some instances the title which the deceased had in respect of a special property only in goods is transmissible to his personal representative. Thus if an uncertificated bankrupt had acquired goods after his bankruptcy and died possessed of them, having been allowed to retain possession by the assignees, his executor or administrator might recover them from a stranger; for there was a good title in the bankrupt as against all the world but the assignees, and this title passed to his personal representative (*p*).

In what cases the title goes to the executor, where the deceased had only a special property.

(*m*) 1 Vern. 217. *Post*, Pt. III. Bk. III. Ch. V. § I.

(*n*) 3 Younge & Jerv. 384.

(*o*) *Clements v. Hall*, 2 De G. & J. 173, 186. *Townend v. Townend*, 1 Giff. 201. *Wedderburn v. Wedderburn*, 22 Beav. 84, 86. As to the proper mode

of taking the partnership accounts of bankers, as between a surviving partner and the estate of a deceased partner, see *Bate v. Robins*, 32 Beav. 73.

(*p*) *Fyson v. Chambers*, 9 M. & W. 460. *Ante*, p. \*556. See also *Morgan v. Knight*, 15 C. B., N. S. 669.

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circumstance of the deceased having died in possession of goods will not give his executor or administrator a title to them even against a mere wrongdoer, if it can be shown that, in truth, the title is elsewhere (*q*).

Where a person had the option upon the death of the survivor of certain other persons, to purchase an hotel at a given price, and before the death of such survivor, he died leaving a will and appointing executors, it was held that the option to purchase the hotel was a right personal to the testator, and could not be exercised after his death by his executors (*r*).

Besides the interest which an executor or administrator in all cases

An executor may be seised of real property as trustee:

rule that you must find intention of testator from the whole will taken together:

takes in the whole personal estate of the testator or intestate, he may in some instances be seised of real property of the deceased as trustee,† or be *ex officio* invested with a power of disposing of it. The rule is that you must find out the \*intention of the testator from the whole will taken together, and, if it appears on the whole construction that you cannot give effect to

the will, unless you give the executors a legal estate, then you must hold that they have the legal estate. Therefore, where a testator, after directing his debts to be paid, and setting apart certain sums to provide annuities for his two sons, devised and bequeathed all his real and personal estate to his wife and his four daughters to be equally divided between them: provided as follows, that the share of his wife should be divided after her death between his four daughters, or the survivors and their children: and the testator appointed his wife and another executors to act jointly in carrying out all the intentions of his will, and to invest his daughters' shares for their benefit and the benefit of their children; it was held upon an application under the Vendor and Purchaser Act, that the legal estate in freeholds was vested in the executors, who could make a good title to a purchaser (*s*). It has been a subject of some discussion in what cases executors take a fee-simple, in trust

in what cases executors take the fee in trust to sell, or merely a power of disposition:

to sell, under a will, or are invested merely with a power of disposition. The distinction resulting from

(*q*) *Elliott v. Kemp*, 7 M. & W. 306. *Ante*, p. \*556.

(*r*) *Re Cousins*, 30 C. D. 203.

† See American note at end of this Book, p. \*591.

(*s*) *Davies to Jones*, 24 C. D. 190.

In *Anthony v. Rees*, 2 Cr. & J. 75. Bayley, B., in his judgment says, "when trustees are directed to do anything for the performance of which the legal estate is requisite they are to have the legal estate."

the authorities appears to be this: that a devise of the land to *executors to sell* passes the interest in it; but a devise that *executors shall sell the land*, or that *lands shall be sold by the executors*, gives them but a power (*t*). An eminent writer has concluded from an examination of all the cases, that even a devise of *land to be sold by the executors*, without giving the estate to them, will invest them with a power only, and not give them an interest (*u*).

\*It sometimes happens that a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made. In the absence of such a declaration, *if the proceeds be distributable by the executor*, he shall have the power by implication. Thus, a power in a will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies (*x*); and it seems, that whilst the chain remains unbroken, the power, until exercised, will go from him to his executors (*y*).

executors shall have a power to sell land by implication, where the proceeds are distributable by them:

(*t*) All the cases will be found in 1 Sugden on Powers, 128, *et seq.*, 6th edit. See also *Doe v. Shotter*, 8 A. & E. 905. *Accord.*

(*u*) 1 Sug. on Pow. 133, 6th edit. But see, on this subject, Co. Lit. 113, *a*, and Mr. Hargrave's note, where that learned person inclines to construe a devise that executors shall sell the land, as well as a devise of lands to be sold by executors, as investing them with a fee-simple, and not merely a power. Powell on Devises, vol. 1, pp. 245, *et seq.*, 3rd edit., takes the same view of the question as Edw. Sugden. In *Knocker v. Bunbury*, 6 Bing. N. C. 306, a testator possessed of real and personal property desired his executors, out of such moneys of his as might come to their hands, to purchase two annuities for A. W. and her children: And with regard to the rest of his property, of what kind soever, he desired his executors, after payment of his debts and funeral expenses, to pay and make over the whole to his daugh-

ter, and to the children of the said daughter after her decease: The Court of Common Pleas were of opinion that the executors took no interest in the freehold property: but that they had a power to settle it upon the daughter for life, with remainder after her decease to her children and their heirs.

(*x*) 1 Sug. on Pow. 238, 6th edit., where all the cases are collected: See also 2 Preston on Abstracts, 264. *Curtis v. Fulbrook*, 8 Hare, 278 (correcting the report of S. C. 8 Hare, 25): And if the produce of the real estate is blended with the personal estate, the power to sell will vest in the executors by implication: *Tylden v. Hyde*, 2 Sim. & Stu. 238. See also *Forbes v. Peacock*, 11 Sim. 152. 12 Sim. 528. 11 M. & W. 630. *Gosling v. Carter*, 1 Coll. 644. *Robinson v. Lowater*, 17 Beav. 592. 5 De G. M. & G. 272. *Wrigley v. Sykes*, Rolls, 22 Jan., 1856, 20 Jurist, 78.

(*y*) 1 Sugd. on Pow. 138, 6th edit. So it may be exercised by the survivor

But in *Bentham v. Wiltshire* (z), where a testator bequeathed an estate to his wife for life, and directed that \*after her decease the estate should be sold to the highest bidder by public auction, and the money arising from such sale be disposed of among certain persons named in his will, and he appointed his wife and another person executors; it was held, that the power was not given by implication to the executors; because they had nothing to do with the produce of the sale, nor any power of distribution with respect to it (a).

In this case the vice-chancellor (Leach) said that the power to the executors to sell is "necessarily to be implied from the produce being to pass through their hands in the execution of their office, as in the payment of debts and legacies." And accordingly before the case of *Doe v. Hughes* (b), the law had, it appears, been considered to be that the effect of a charge of the real estate with debts was to give to the executors an implied power of sale (c), but in that case the Barons of the Exchequer deliberately denied this proposition (d).

of two or more executors: *Forbes v. Peacock*, 11 M. & W. 630. Where a testator directs that his debts shall be paid by his executors thereafter named, and in case his personal estate should be insufficient charges his real estate with the deficiency, an administrator *test. annex.* has no power to sell the real estate either under the terms of the will or by virtue of 22 & 23 Vict. c. 35, s. 16. *Re Clay and Tetley*, 16 C. D. 3.

(z) 4 Madd. 44.

(a) See also *Patton v. Randall*, 1 Jac. & Walk. 189. 1 Sugd. on Pow. 138, 139, 6th edit. *Allum v. Fryer*, 3 Q. B. 442, 446. *Accord.* But the authority of *Bentham v. Wiltshire* was doubted by Shadwell, V.-C., in *Forbes v. Peacock*, 11 Sim. 152, 12 Sim. 528: and his honor said (12 Sim. 536), that he did not think Sir John Leach would have decided as he did in that case if he had seen the case of *Ward v. Devon*, which was decided by Sir W. Grant (11 Sim. 160). See, however, *Haydon v. Wood*,

8 Hare, 279, note (a), and *Curtis v. Fulbrook*, *Ibid.* 278 (correcting the report, *Ibid.* 25).

(b) 6 Exch. 223.

(c) See 17 Beav. 601, by Romilly, M. R.

(d) Where therefore there is a general charge of debts, and no distinct provision as to the person by whom the sale is to be made, then the executors take an implied power to sell for the payment of debts: *Hodkinson v. Quinn*, 1 Johns. & H. 309, by Wood, V.-C. See also *Wrigley v. Sykes*, 21 Beav. 337. *Sabin v. Heape*, 27 Beav. 553. *Cook v. Dawson*, 29 Beav. 123, 126. See also S. C. on appeal, 3 De G. F. & J. 127. But see also *Ibid.* 128, by Lord Justice Knight Bruce. But an exception, it seems, prevails where the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executor, for that in such case it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor: *Cook v. Daw-*

\*With respect to all wills which have come into operation after 13th August, 1859, the power to sell is expressly conferred on executors by Lord St. Leonards' Act [22 & 23 Vict. c. 35], where the testator has charged his real estate with the payment of his debts or legacies, and has not devised the hereditaments so charged to trustees.

Charge of debts or legacies on real estate not devised to trustees gives executors power of sale :

22 & 23 Vict. c. 35, ss. 14, 16.

Even without a charge, express or implied, executors can make a good title to leaseholds, although specifically devised, unless they have assented to the bequest: but in this case the purchaser generally requires the concurrence of the legatee (*e*).

Where executors in whom the legal estate is vested are selling real estates charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease (*f*).

son, 29 Beav. 126, 127. 3 De G. F. & J. 127. So where the estate is devised to another charged with the payment of debts, the doctrine of implying a power in the executors does not apply; for there the money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title: *Colyer v. Finch*, 5 H. of L. 905; *Corser v. Cartwright*, L. R., 7 H. L. 731. *West of England Bank v. Murch*, 23 C. D. 138. So where a testator after a charge of debts devised real estates to trustees upon trusts for his daughters and their families and after the death of the surviving daughter upon trust to sell, with power to give receipts, and to apply the proceeds after satisfying all incumbrances affecting the said real estates upon certain trusts; *Wood, V.-C.*, held, on demurrer, that the trustees could make a good title without the concurrence of the executors, though the learned judge appears to have conceded that the executors would have had the power to sell previously if they had chosen to do so: *Hodkinson v. Quinn*, 1 Johns. & H. 303. The powers, however, conferred on executors by Lord St. Leonards' Act (22 & 23 Vict. c. 35,

s. 16) do not apply to cases in which the executor has renounced and an administrator *test. annex.* has been appointed. The administrator who is not appointed by the testator but is the officer of the court, has no power to sell the real estate either under the terms of the will or under the above act: *Re Clay and Tetley*, 16 C. D. 3.

(*e*) *Dart's Vendors and Purchasers*, 5th edit. 598.

(*f*) *Re Tanqueray Willaume and Landau*, 20 C. D. 465. The executor who is also devisee of an estate charged with the payment of debts may be presumed by a *bona fide* purchaser or mortgagee of that estate to be dealing with it for the purposes of the administration and may give a valid title to it. Such purchaser or mortgagee therefore will not be bound to look to the application of the money. Mere absence of statement of the purpose for which the money obtained by the sale is to be used will not make the purchaser or mortgagee liable on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts. *Corser v. Cartwright*, L. R. 7 H. of L. 731. The rule intimated in *Re Tanqueray Willaume*

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\*And there is no distinction whatever between a devise of estates to executors subject to a charge of debts, with the implied power of sale which follows from it, and a trust for payment of debts where the legal estate is expressly devised to trustees for the purpose of making such payment. In neither case, where the death is recent, has a purchaser any obligation to inquire whether the debts are paid or not, and if he does not inquire, and has no notice that the debts are paid, he is quite safe.

As to what words are sufficient to indicate an intention, that real estate devised to executors shall be held charged with the debts of the testator, by reason of a direction that the executors shall pay the testator's debts, it has been held that if there is a direction that the executors shall pay the testator's debts, followed by a gift of all his estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest as in *Henvell v. Whitaker (g)*, or only a life interest as in *Finch v. Hattersley (h)*, or no beneficial interest at all as in *Hartland v. Murrell (i)*. But this rule seems only to apply, where the entirety of the liability has been thrown on the entirety of the estate (*gg*). Generally the intention must be collected \*from the whole will (*hh*), and it has been said that there is an exception from the general rule, where there are two or more executors to whom unequal benefits are given by the will (*ii*).

It is here necessary to observe, that a testator cannot alter the *legal* character of real property, by directing, either impliedly or expressly, that it shall be considered part of his personal estate. Accordingly, it may now be considered a settled rule, that where lands are devised to executors, to be sold for the payment of debts and legacies, the money arising from the sale is to be considered equitable and not legal assets (*k*). The distinction between these two kinds of assets, and

A testator cannot turn his real estate into legal personal assets by directing it to be sold or otherwise.

and Landau (*ubi sup.*) that where an executor is selling real estate after twenty years have elapsed from the testator's death, a presumption arises that the debts have been paid and the purchaser is therefore put upon inquiry does not in general apply to the case of an executor selling leaseholds of his testator. Re Whistler, 35 C. D. 561.

(g) 3 Russ. 343.

[\*578]      [\*579]

(h) 3 Russ. 345 n.

(i) 27 Beav. 204.

(gg) Bailey v. Bailey, 12 C. D. 268.

(hh) Wasse v. Heslington, 3 My. & K. 495.

(ii) Harris v. Watkins, Kay, 438.

(k) Clay v. Willis, 1 B. & C. 364. Barker v. May, 9 B. & C. 489. See Attorney-General v. Brunning, 8 H. of L. 243, ante, p. \*547.



the consequences of that distinction, will be considered hereafter, with the subject of assets generally.

It is, however, an established doctrine in courts of equity, that things shall be considered as actually done, which ought to have been done: and it is with reference to this principle, that land is under some circumstances regarded as money, and money as land.† It was laid down by Sir Thomas Sewell, M. R., in *Fletcher v. Ashburner* (l), “that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by Will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land” (m). It follows, therefore, that every person \*claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to that species of property (n).

Doctrine of equitable conversion :

land considered as money, and money as land :

† See American note at end of this Book, p. \*591.

(l) 1 Bro. C. C. 497.

(m) See *Weldale v. Partridge*, 5 Ves. 396, where Lord Alvanley remarks the accuracy of this statement of the doctrine. This doctrine does not extend to the interpretation of statutes imposing duties on personal estate: *Re De Lancey*, L. R., 4 Exch. 345, *per* Kelly, C. B.

(n) 2 Powell Dev. 61, Jarman's edition. See also Sugden's Law of Property, 460, and the cases as to legacy duty collected *post*, Pt. III. Bk. V. Ch. II. Where by a marriage settlement freehold property has had imposed upon it by reason of the doctrine of equitable conversion the character of personalty, a will made under a power contained in the settlement disposing of it is entitled to probate and the property

is liable to probate and legacy duty: In the Goods of Gunn, 9 P. D. 242. An absolute order for sale, made within the jurisdiction of the court in an administration action, operates as a conversion from the date of the order and before any sale takes place: *Hyett v. Mekin*, 25 C. D. 735. There is no equity for the crown to call for a conversion of real property in order that it may take the produce of it: *Taylor v. Haygarth*, 14 Sim. 8. *Henchman v. Att.-Gen.*, 3 M. & K. 485. It should be further observed that though a new character may, by this doctrine of equitable conversion, have been impressed upon the property, yet it is in the power of any person (not personally incompetent) who is entitled to it absolutely, to elect to take it in its actual state: *Mutlow v. Bigg*, 1 C. D. 385. *Re Gordon*, 6 C. D. 531. *Meek v. Devenish*, *Ibid.* 566.

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\*Again, since equity looks upon things agreed to be done, as land contracted to be sold : actually performed, it follows, that, when a real estate is contracted to be sold, the vendor is regarded in equity as a trustee for the purchaser of the estate sold (*o*), and the purchaser as a trustee of the purchase money for the vendor (*p*). Hence, the death of the vendor or vendee before the conveyance (*q*), or surrender (*r*), or even before the time agreed upon for completing the contract, is in equity immaterial (*s*). If the vendor die before the payment of the purchase money, it will go to his executors and form part of his assets (*t*): and even if a vendor reserve the purchase

Re Davidson, 11 C. D. 341. But those electing must be absolutely entitled; if they have only a defeasible interest in the proceeds of the sale they cannot effect a conversion: *Sisson v. Giles*, 32 L. J. Ch. 606. Slight circumstances, and even parol declarations of such an intention, will be sufficient for this election: (See 1 Roper on Leg. 473, 3rd edit. *Matson v. Swift*, 8 Beav. 375, *per* Lord Langdale, M. R. ;) but they must be unequivocal. Changing the security of the money to be laid out in land will effectuate the purpose: *Lingen v. Sowray*, 1 P. Wms. 172; or bequeathing it as personalty; *Triquet v. Thornton*, 13 Ves. 345; or making a lease of the estate directed to be sold: *Crabtree v. Bramble*, 3 Atk. 680. Preserving the property in its actual state may be sufficient: *Dixon v. Gayfere*, 17 Beav. 433. *Mutlow v. Bigg*, 1 C. D. 385. Re Gordon, 6 C. D. 531. But the mere circumstance of the funds remaining unconverted in the hands of the person entitled to it at all events is not, unaccompanied by length of time, evidence of his intention to alter its new character: *Kirkman v. Miles*, 13 Ves. 338. Nor is continued receipt of rent by the testator's widow of property, let for a term of years by a testator by lease running for twenty years after his death, evidence of an election by the widow, who died during the term, to take such property as real estate, if the

tenant has by the lease an option to purchase the reversion at any time during the term: Re Lewis, 30 C. D. 654.

(*o*) *Atcherley v. Vernon*, 10 Mod. 518. *Davie v. Beardsham*, 1 Chan. Cas. 39. *Sugden's Vendors, &c.*, Ch. 4, s. 1.

(*p*) *Green v. Smith*, 1 Atk. 572. *Pollexfen v. Moore*, 3 Atk. 272.

(*q*) *Paul v. Wilkins*, Toth. 106.

(*r*) *Barker v. Hill*, 2 Chanc. Rep. 218.

(*s*) *Sugden, ubi supra*. In the case of *Hudson v. Cook*, L. R., 13 Eq. 417, where an intestate was at the time of his death under a contract to purchase realty which the vendor might have specifically enforced, but which he afterward rescinded under a power thereby reserved to him, it was held that the heir-at-law of the intestate was entitled to receive the purchase money out of the intestate's personal estate.

The rents which accrue between the vendor's death and the time for completing the contract belong to the vendor's heir and not to his executor: *Lumsden v. Fraser*, 12 Sim. 263. See also *Shadforth v. Temple*, 10 Sim. 184.

(*t*) *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28. *Baden v. Earl of Pembroke*, 2 Vern. 213. *Bubb's Case*, 2 Freem. 38. *Smith v. Hibbert*, 2 Dick. 712. *Foley v. Percival*, 4 Bro. C. C. 429. *Sugden, ubi supra*. *Eaton v. Sanxter*, 6 Sim. 517.

money payable as he shall appoint by an instrument executed in a particular manner, and afterward exercise his power, the money will, as between his creditors and appointees, be assets (*u*). So if the contract be valid at the death of the vendor, but the purchaser loses his right to a specific performance by subsequent laches, the estate belongs to the \*next of kin and not to the heir-at-law (*x*). Again, if a man devises his real estate and afterward sells it, and the purchase is not completed until after his death, the purchase money belongs to his personal representatives, notwithstanding the stat. 1 Vict. 26, s. 23, and not to his devisee (*y*). So where after making a will devising a specific estate and bequeathing the personal residue to other persons, a testator entered into a contract, giving an option of purchase over part of the estate, which option was exercised after the death; it was held by Wood, V.-C., that the property was converted, from the date of the exercise of the option, and went to the residuary legatee (*z*).

On the same principle, money covenanted to be laid out in land, will descend to the heir (*a*). Nor will it make any difference that the covenant is a voluntary one: There-  
money covenanted to be laid out in land:  
 fore, if a man, without any consideration, covenant to lay out money in a purchase of land to be settled on him and his heirs, a court of equity will compel the execution of such contract, though merely voluntary. But where a person covenants to lay out money in land, and afterward himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for the money, center in the same \*person, the money, it should seem, is considered as discharged; as where a man, on his marriage, covenants to lay out a sum

(*u*) *Thompson v. Towne*, 2 Vern. 319. *Sugden, ubi supra*.

(*x*) *Curre v. Bowyer*, 5 Beav. 6, note (*b*).

(*y*) *Farrer v. Winterton*, 5 Beav. 1. See also *Moor v. Raisbeck*, 12 Sim. 123. The law is the same where the sale was by contract under the compulsory powers of a railway company: *Re Manchester and Southport Railway*, 19 Beav. 365. See also *Richards v. Attorney-General of Jamaica*, 6 Moo. P. C. 381. On the general question whether the proceeds of compulsory sales, under Acts of Parliament, are to be considered real or personal estate, see *In re Horner*,

5 De G. & Sm. 483. *In re Taylor*, 9 Hare, 596. *Re Stewart*, 1 Smale & G. 32; *Frewen v. Frewen*, L. R. 10 Ch. 610, and the cases cited *post*, p. \*590.

(*z*) *Weeding v. Weeding*, 1 Johns. & H. 424.

(*a*) *Edwards v. Countess of Warwick*, 2 P. Wms. 171. The proceeds of realty sold under the Settled Estates Acts, and not yet converted into realty, have not become personal property in respect of which letters of administration can be granted, such property being realty converted into personalty to be again changed into realty: *In the Goods of Lloyd*, 9 P. D. 65.

of money in the purchase of lands to be settled for the use of himself for life, remainder to his intended wife for life, remainder to the first and other sons of the marriage in tail, remainder to the daughters in tail, remainder to his own right heirs, and the husband does not lay out the money, and survives his wife, who dies without issue; it has been held that the money, though once bound by the articles, became free again by the death of the wife without issue, and the consequent failure of the objects of the several limitations, and was, therefore, at the death of the settlor, his personal estate (*b*).

So a testator has the power, by his will, to change the nature of his real estate, to all intents and purposes, so as to pre-  
conversion "out and out" by will : clude all questions between his real and personal representatives after his death (*c*): This has been sometimes described as "a conversion out and out" (*d*): And when it clearly appears to have been his intention thus to impress on it the character of personal estate to all intents and purposes, the mere appointment of an executor will be sufficient to carry that property to him (*e*), either for his own benefit, in cases where he is beneficially entitled to the personal estate; or as a trustee for the next of kin, in cases where he holds the personal estate on the like trust (*f*). But this doctrine has been qualified by modern decisions; and it is now fully established, that in order to exclude the heir, it is not enough that the testator shows an intention that \*his real estate should become money *after* his death; it must also be apparent that he meant it to be treated as if it had been personal estate *before* his death: For if the property in question was real estate at his death: the *onus* is on the next of kin to show a devise of it in his favor: And though the will may determine in what quality the property shall be taken by those on whom it may devolve, yet if it does not also determine who are the persons to take, the original right of the heir-at-law must prevail (*g*). There-

(*b*) *Chichester v. Bickerstaff*, 2 Vern. 295. This decision was questioned by Lord Talbot in *Lechmere v. Lechmere*, Cas. temp. Talb. 90, and by Sir J. Jekyll in *Lechmere v. Earl of Carlisle*, 3 P. Wms. 221; but confirmed by Lord Thurlow, in *Pulteney v. Lord Darlington*, 1 Bro. C. C. 238, and the determination of the House of Lords in the same case, 7 Bro. P. C. 530. Toml. edit. See 2 Powell, Dev. 73, Jarman's edition.

(*c*) *Johnson v. Woods*, 2 Beav. 409, 413, by Lord Langdale.

(*d*) As to this expression, see 10 Beav. 175; 12 Beav. 508.

(*e*) By Sir Wm. Grant, in *Berry v. Usher*, 11 Ves. 91.

(*f*) See *infra*, Pt. III. Bk. III. Ch. V. § II., and 1 Rop. Leg. 455, 3rd edition.

(*g*) *Fitch v. Weber*, 6 Hare, 145, 149. A different view must be taken where the question arises on a *deed* which has altered the character of the property

fore, the testator's declaration, however explicit, that the estate shall be absolutely converted, *e. g.*, a direction that it shall be sold and deemed part of his personal estate, will not exclude the heir; because such a direction does not, generally speaking, amount to a gift by implication to the next of kin (*h*): And the law is the same, even where the direction is accompanied by a declaration, that the proceeds of the land to be converted shall not, nor shall any part thereof, in any event lapse or result for the benefit of the heir (*i*), or where the direction itself is, that the proceeds shall be considered, "to all intents and purposes," as part of the personal estate (*k*): except, perhaps, where there is no further disposition; in which case it might be inferred that such a direction was intended to operate as a gift to the next of kin (*l*).

It is plain, therefore, that where the conversion of land into money is directed by the testator for a particular purpose, which fails, (as in the case of the death of a party intended to be benefited,) so much of the estate, or of its \*produce, as remains undisposed of, will result to the heir (*m*). If, on the other hand, there is a conversion of personal estate into real estate, and there is an ultimate limitation which fails to take effect, the interest which fails results for the benefit of the persons entitled to the personal estate, *i. e.*, the persons who take under the Statute of Distributions as next of kin (*n*). And it is further established, that where a testator directs his real estate to be sold, and the mixed fund arising from the produce of the real estate and the personal estate to be applied

conversion for  
particular pur-  
poses which fail;

mixed fund from  
produce of sale of  
real estate and  
personal estate.

before the death of the author of the deed: *Griffith v. Ricketts*, 7 Hare, 299. *Biggs v. Andrews*, 5 Sim. 424.

(*h*) *Johnson v. Woods*, 2 Beav. 409. *Flint v. Warren*, 16 Sim. 124. *Fitch v. Weber*, 6 Hare, 145. *Bromley v. Wright*, 7 Hare, 334. *Shallcross v. Wright*, 12 Beav. 505. *Taylor v. Taylor*, 3 De G. M. & G. 190 (overruling *Phillips v. Phillips*, 1 M. & K. 649).

(*i*) *Fitch v. Weber*, 6 Hare, 145.

(*k*) *Robinson v. Governors of the London Hospital*, 10 Hare, 19.

(*l*) *Ibid.* 27.

(*m*) *Ex parte Pring*, 4 Y. & Coll. Exch. 507.

(*n*) *Hereford v. Ravenhill*, 1 Beav. 481; 5 Beav. 51. *Cogan v. Stephens*, 5 L. J. Ch. 17. If the heir-at-law becomes entitled to an undisposed-of interest in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representatives, and consequently his executor takes it as part of his personal estate. On the other hand, if the next of kin having become entitled to freehold estate dies, there is no equity to change the freehold estate into anything else on his death. It will go to the devisee of the real estate or to his heir-at-law if he has not devised it, and

to certain specified purposes; if any part of the disposition fails, either by lapse or otherwise, then to the proportional extent in which the real estate would have contributed to that disposition, it is to be considered as failing for the benefit of the heir-at-law, and as so much real estate in that event undisposed of (*o*). A different point arises, \*where there is a general residuary bequest of personal estate, in the same will in which there is a direction for the conversion of the real estate. In such a case it should seem, that if there is a declaration in the will that the money to arise from the sale shall be deemed part of the testator's personal estate, the undisposed of residue of the proceeds will pass under the gift of the residue, but not, generally speaking, without such a declaration (*p*). As to specific sums given out of the proceeds, it has been a subject of controversy, whether the circumstance of the produce of the real estate being blended by the testator with the general personal estate in one residuary gift, constitutes a ground for excluding the heir from lapsed or void legacies by applying to the mixed fund the rule applicable to personalty (*viz.*, that the residuary legatee takes what is not effectually disposed to other persons) (*q*). A very eminent writer (*r*) has expressed his opinion that it is difficult to discover any solid reason why the blending of the two funds should produce this consequence: But he further

will pass as real estate. The principle is that where you trace property into a man there is no equity between his different classes of representatives as to altering the position in which that property is. See *Curteis v. Wormald*, 10 C. D. 172, overruling *Reynolds v. Godlee*, Johns. 582. A decree for the sale of real estate having been made in a partition suit, the property was sold, and the proceeds of the sale were paid into court. Three of the persons entitled to shares in the property died intestate before the money was distributed, leaving their father their heir-at-law and sole next of kin. He took out administration to each of them, and then died intestate, and it was held that the father took his children's shares of the money as their heir-at-law, but that he took them as money, and that on his death they passed to his personal representative and not to his heir-at-

law. *Mordaunt v. Benwell*, 19 C. D. 302.

(*o*) *Ackroyd v. Smithson*, 1 Bro. C. C. 503. *Johnson v. Woods*, 2 Beav. 409. *Hopkinson v. Ellis*, 10 Beav. 169. *Taylor v. Taylor*, 3 De G. M. & G. 190. *Cooke v. Dealey*, 22 Beav. 196. *Edwards v. Tuck*, 23 Beav. 268. *Bective v. Hodgson*, 10 H. of L. 656.

(*p*) See 1 *Jarman on Wills*, 531, *et seq.*, 2nd edit. See page 643, 4th edition.

(*q*) The principal modern cases on the subject are *Amphlett v. Parke*, 2 Russ. & M. 221. *Green v. Jackson*, *ibid.* 238. See also *Court v. Buckland* 1 C. D. 605. *Salt v. Chattaway*, 3 Beav. 576. As to wills made or republished since the Wills Act, 1 Vict. c. 26, see sect. 25 of that statute. *Ante*, Preface.

(*r*) *Jarman on Wills*, vol. i. pp. 636-644, 4th edition.

observes that the state of the authorities is not such as to justify the hope of all litigation being at an end on this perplexing subject.

Whether the property so resulting to the heir shall be considered as land or money in his hands, is a question of some nicety. The principle seems to be, that where the purpose of the testator still requires a sale of the whole land, and there is only a partial disposition of the produce, the surplus belongs to the heir as money and not land, and will go to his personal representative; but where no purpose of the devisor demands, in the events that have happened, that \*the whole land shall be converted into money, there the heir shall take the resulting property as land, and it shall descend as such to his heir. Thus where a devisor directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale for the convenience of division; and if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the testator still applies to the case; therefore the heir will take the share of A. as money and not as land: But if A. and B. both die in the lifetime of the testator, and the whole interest in the land descends to the heir, the purpose of the testator, that there shall be a sale for the convenience of division, has no application, and the heir will, therefore, take the whole interest as land (s). So where a

(s) *Smith v. Claxton*, 4 Madd. 492, 493. *Davenport v. Coltman*, 12 Sim. 610, 613. See also on this subject, *Hewit v. Wright*, 1 Bro. C. C. 86. *Wright v. Wright*, 16 Ves. 188. *Dixon v. Dawson*, 2 Sim. & Stu. 340. *Jessopp v. Watson*, 1 Myln. & K. 665. *Hatfield v. Pryme*, 2 Coll. 204. *Burley v. Evelyn*, 16 Sim. 290. In re *Cooper's Trusts*, 4 De G. M. & G. 757. *Wall v. Colshhead*, 2 De G. & J. 683. *Clarke v. Franklin*, 4 Kay & J. 237. *Bagster v. Fackerell*, 26 Beav. 469, in which last case the testator expressly directed a conversion for the purpose of giving a life interest to his widow, and after her death there was a gift to a charity which was void, and it was held, that the heir of the testator took the produce (subject to the life estate) in the character of personalty. It should be observed that "conversion must be considered in all cases to be directed

for the purposes of the Will, and is limited by the purposes and exigencies of the Will. If therefore the real estate is directed to be sold with a view to a disposition made by a Will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate for the purpose of ascertaining the ownership, *i. e.* the title of the heir, although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the Will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the Will has no effect in altering the quality of the property; but the property, even in the shape of lands, retained its pristine and original

\*testator devises his real estate in trust to be sold to pay debts and legacies, and dies intestate as to the excess, his heir will take it as land (*t*): In such a case also if any of the legacies lapse, they will result to the heir as land; for the purpose of the testator does not require a sale of so much of the real property (*u*).

It has been laid down that in equity all property, whether real or personal, whatever may be its nature, purchased with partnership capital for the purposes of the partnership trade, continues to be partnership capital, and to have as between the real and personal representative of a deceased partner the quality of personal estate (*x*). Where, however, a new partner was taken into the firm, and the real property continued to be used for the partnership purposes, but a rent was paid for it, under the terms of the partnership, to the old partners by the new firm, it was held that, on the death of one of the old partners, the property was to be considered as part of his real estate (*y*).

Another example of land being considered as money, and *vice versa*, may be found in the cases where guardians or trustees alter the nature of the property committed to them. Thus the lands purchased by the guardian of an infant with his personal estate will, in case of his death during his minority, be considered still as his personal property (*z*). So where the trustees of an infant's estate having a considerable sum of money in their hands, out of the profits of his estate, laid it out in a purchase of lands lying near the estate, with the consent of his guardian, and by the conveyance to the trustees, it was declared that they stood seised in trust for the infant, in case, when he came of age, he should agree to it; the infant dying within age, the trustees were held accountable to the administrator of the infant for the sum laid

quality of personal estate for the purposes of determining the ownership: "Bective v. Hodgson, 10 H. of L. 667, by Lord Westbury, C. The cases cited in the earlier part of this note appear to establish the distinction, that if all the purposes of an intended conversion of land into money fail, the conversion fails, and the heir would take such unconverted estate as land; but that if there is only a partial failure, the heir-at-law would receive the benefit of such

partial failure and take the property as moneys, and not as land.

(*t*) By Sir W. Grant, in *Wright v. Wright*, 16 Ves. 191.

(*u*) See 1 Rep. Leg. 471, 3rd edition.

(*x*) *Darby v. Darby*, 3 Drewr. 495. And see the express enactment to this effect contained in the new Partnership Act, 1890 (53 & 54 Vict. c. 39, s. 22), *ante*, p. \*548, note (*u*).

(*y*) *Rowley v. Adams*, 7 Beav. 548.

(*z*) *Gibson v. Scudamore*, 1 Dick. 45.



out, and his heir was declared to have no title to the land (a). So where an executor in trust for an infant of a lease for ninety-nine years, determinable on three lives, on the lord's refusal to renew but for lives absolutely, complied with his requisition, and changed the years into lives; on the infant's dying under twenty-one, this was held to be a trust for his administrator, and not for his heir (b).

Again, where the committee of a lunatic invested part of his personal estate in the purchase of lands in fee, it was held <sup>by committee of a lunatic:</sup> that this should be taken as personal estate, and at his death should not go to his heir-at-law (c). So where the grantee of the custody of a lunatic, with the rents and profits of the estate purchased lands, the lunatic dying, the question was between the heir and administrator, who should have the benefit of the purchase; and the court was of opinion, that the administrator should have it, and not the heir; for if the money had not been laid out, it had been clear that the administrator should have had it; and if laying out of the money would alter the case, then it would be in the power of the grantee of the custody to prefer the heir or the administrator as he pleased (d). But it must be observed, that in the management of a lunatic's estate, it is his benefit, solely, which is considered; and, therefore, if it be clearly for his advantage, that the nature of one part of his estate should be altered for the improve\*ment of the other, such alteration will be directed by the Court of Chancery (e); and when such alteration is made, there is no equity between the real and personal representatives, at the lunatic's death, to have the nature of the property restored (f).

In the case of *Att.-Gen. v. Ailesbury* (g), where money of a lunatic was invested by his committees by order of the Lords Justices having jurisdiction in lunacy, in purchase of lands, which, under their lordships' directions, were conveyed to the committees, "their heirs and assigns upon trust for" the lunatic, "his executors, administrators, and assigns," with a declaration that the land so conveyed (and all others to be purchased in lieu of them under any exercise of certain powers of sale and reinvestment which were contained in the deed) should "to all intents and purposes be considered as part of the

(a) *Lord Winchelsea v. Norcliffe*, 1 Vern. 435.

(b) *Witter v. Witter*, 3 P. Wms. 99.

(c) *Awdley v. Awdley*, 2 Vern. 192.

(d) *Lord Plymouth's Case*, 2 Freem. 114.

(e) *Ex parte Phillips*, 19 Ves. 123.

(f) *Oxenden v. Lord Crompton*, 2 Ves. Jun. 69. *Re Leeming*, 3 De G. F. & J. 43. *Re Freer*, 22 C. D. 622.

(g) 12 App. Cas. 672, reversing S. C. 16 Q. B. D. 895, and affirming S. C. 14 Q. B. D. 408.

personal estate of" the lunatic, it was held by the House of Lords, upon the death of the lunatic, who never recovered, that the value of the lands was part of the personal estate of the lunatic, and liable to probate duty.

By stat. 53 Vict. c. 5, s. 117, certain provisions are made for the sale or mortgage or other disposition of the lunatic's property for debts, maintenance, and other purposes. By sect. 123 (1) it is provided that "The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act, which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of." And sub-sect. (2) provides for \*the disposition of moneys arising in certain ways as between the real and personal representatives of the lunatic.

In *Ex parte Flamank* (*h*), Lord Cranworth, V.-C., held that money paid into court by a railway company for land taken under the Lands Clauses Act (7 & 8 Vict. c. 18), from a person who was in a state of mental imbecility, and who continued in that state till his death, but was not the subject of a commission of lunacy, was not to be reinvested in or considered as land, but to be paid to his executors; for that the effect of the 7th section of the act was to make the contract as good as if he had been *compos mentis*. And his lordship distinguished the case from *The Midland Counties Railway v. Oswin* (*i*), where Knight Bruce, V.-C., had come to a contrary decision, inasmuch as his honor's decision turned on the express terms of the local act on which the case before him arose (*k*).

In pursuing the complicated inquiry, of what shall be accounted personal estate, it may be advisable to consider the subject in the divisions employed by Godolphin and the author of the *Office of an Executor*, viz., first to divide the effects of the deceased into things actually in his possession, and things not so, usually called *choses in action*;—and to subdivide the first class into chattels real, and chattels personal.

(*h*) 1 Sim. N. S. 260.

(*i*) 1 Coll. 80.

(*k*) See *Cramer's Case*, 1 Smale &

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G. 32, and *Re Harrop's Estate*, 3 Drew. 726, for instances where money paid into court under certain local acts was treated as realty.

† *Partnership property.* Upon the death of a partner the surviving partner has the right to the control of the partnership property, *Voorhies v. Child*, 17 N. Y. 355; *Fillee v. Phelps*, 18 Conn. 294; *Roys v. Vilas*, 18 Wis. 169; to enable him to settle the affairs of the firm. *Lang v. Waring*, 17 Ala. 154; *Holland v. Fuller*, 13 Ind. 195. It seems that in some states he has the legal title for this purpose. *Robertshaw v. Henway*, 52 Miss. 517; *Bassett v. Miller*, 39 Mich. 133. His possession and title is in trust for partnership purposes. *Barry v. Briggs*, 21 Mich. 209; *Butts v. June*, 51 N. Y. 278. The surviving partner accordingly takes the law books in a law firm, *Strange v. Graham*, 56 Ala. 614; or the stock in trade of a general partnership. *Andrews v. Brown*, 21 Ala. 437. So, the partnership books of account, *Waring v. Waring*, 1 Redf. 205; *Platt v. Platt*, 61 Barb. 52; and its interest in a lease, *Oram v. Rothermel*, 98 Pa. St. 312; or in the right to renew a lease. *Butts v. June*, 51 N. Y. 278. So, with choses in action, *Adams v. Hackett*, 27 N. H. 293; *Bernard v. Willcox*, 2 Johns. Cas. 374; notes due the partnership, *Stearns v. Houghton*, 38 Vt. 587; the right of action in replevin for the possession of partnership personalty. *Smith v. Wood*, 31 Md. 293. So also, the right to sue for trespass to realty of the partnership. *Peffer v. Steiner*, 27 Mich. 537. See as to good will, *Finn v. Bolles*, 7 Abb. Pr. 202; *Bowman v. Floyd*, 3 Allen 76. A debt due to the firm should be paid to the survivor and will not be discharged by payment to the administrator of the deceased partners. *Wallace v. Fitzsimmons*, 1 Dall. 248. A surviving partner is entitled to the exclusive possession and control of the assets, *Pinckney v. Wallace*, 1 Abb. Pr. 82; *Willson v. Nicholson*, 61 Md. 241; although merely a nominal partner. *Rice v. Bank (Ala.)*, 13 So. Rep.

659. The partnership personalty has been held to become so completely the property of the survivor as to be subject to an allowance to his widow notwithstanding its insufficiency for the debts of the firm, in *Bush v. Clark*, 127 Mass. 111; and subject to attachment for his individual debts. *Knox v. Schepler*, 2 Hill (S. C.) 264. And an action brought by the survivor on a debt due to the firm is subject to a set-off against him individually. *Holbrook v. Lackey*, 13 Met. 132.

Partnership effects vest in the survivor for the purpose of winding up partnership affairs, *Mendenhall v. Benbow*, 84 N. C. 649; *Bohler v. Tappan*, 1 McCrary 135; *Stearns v. Houghton*, 38 Vt. 587; and he is trustee for this purpose. *Smith v. Walker*, 38 Cal. 385; *Offutt v. Scott*, 47 Ala. 126; *Butts v. June*, 51 N. Y. 278. And the executor of the survivor must account with the assignee of the partner who died first. *Stokes v. Stokes*, 59 Hun 431. As to whether the surviving partner should exhibit the partnership assets to the appraisers of the estate of the deceased partner for the purpose of inventory, see *Camp v. Frazer*, 4 Dem. 212. In some states, the surviving partner is required by statute to give a bond for the faithful performance of his trust. *Adams v. Marsteller*, 70 Ind. 381; acts of 1877, p. 137. Other cases hold that he is not a trustee, *Bush v. Clark*, 127 Mass. 111; but a tenant in common with the deceased partner's representatives, having, however, the sole control for partnership purposes. *Tremper v. Conklin*, 44 N. Y. 61. This seems to be true also of choses in action. *Adams v. Ward*, 26 Ark. 138; *Skipworth v. Lea*, 16 La. An. 248. But see, *contra*, *Wilson v. Soper*, 13 B. Mon. 411, which, however, holds them to be tenants in common as to things in possession. After payment of debts and settlement of partnership accounts, the

effects belong equally to the survivor and the representatives of the deceased partner, *People v. White*, 11 Ill. 350; *Caskie v. Harrison*, 76 Va. 85; and where the surviving partner is the executor of the deceased, he should hold the partner's share of surplus partnership funds as executor. *Caskie v. Harrison*, *ubi supra*.

The deceased partner's share of the partnership realty descends to his heirs, who hold in common with the surviving partner, subject, however, to a trust for the purposes of the partnership. *Way v. Stebbins*, 47 Mich. 296; *Pratt v. Oliver*, 3 McLean 27. The partnership realty preserves its distinct quality. *Robertshaw v. Henway*, 49 Miss. 758. But the surviving partner has control of it until its affairs are settled, *Cobble v. Tomlinson*, 50 Md. 550; *Smith v. Walker*, 38 Cal. 385; see *Whitman v. Railroad Co.*, 3 Allen 133; amounting to an equitable title to the property. *Clay v. Field*, 34 Fed. Rep. 375. See as to a contract for the sale of land to partners upon the death of one of them, *Martin v. Morris*, 62 Wis. 418. The legal title vests in the heirs of the deceased partner and the survivor, while the equitable title is in the survivor for the payment of the partnership debts. *Clay v. Field*, 34 Fed. Rep. 375; *Merritt v. Dickey*, 38 Mich. 41. In Mississippi, no partnership property, real or personal, devolves upon the administrator of the deceased. *Robertshaw v. Henway*, 49 Miss. 758. And in some states, a surviving partner is a trustee of the property of the concern, and if he does not settle up its affairs promptly, he may be removed on application of the administrator of the deceased partner. *McKean v. Vick*, 108 Ill. 373; see, *Davis v. Sowell*, 77 Ala. 262.

*Joint property of husband and wife.* Real property owned by husband and wife by entirety passes to the survivor.

*Bertles v. Noonan*, 92 N. Y. 152; *McDuff v. Beauchamp*, 50 Miss. 531; *Pray v. Stebbins*, 141 Mass. 219. If the wife survives, she has the entire interest. *French v. Mehan*, 56 Pa. St. 286; *Pierce v. Case*, 108 Mass. 254.

In general, the personal property of husband and wife is held by them in common, and the share of the deceased passes to his or her personal representatives (not to the survivor as such). So, with a bond and mortgage, *Matter of Albrecht*, 136 N. Y. 91; *S. C. Connolly* 12; *Wart v. Bovee*, 35 Mich. 425; or a note payable to husband and wife, *Sanford v. Sanford*, 45 N. Y. 723; or stock owned jointly, *Craig v. Craig*, 3 Barb. Ch. 76; or a bank deposit in the name of husband and wife. Roman Catholic Orphan Asylum *v. Strain*, 2 Bradf. 34; *Matter of Brooks*, 5 Dem. 336; *Platt v. Grubb*, 41 Hun 447. But if the property is held by them as joint tenants, it goes to the survivor. This is true of a joint legacy, *Cowden v. Perry*, 11 Pick. 503; *Jackson v. Roberts*, 14 Gray 546; *Stires v. Van Rensselaer*, 2 Bradf. 172; a life insurance policy for the benefit of wife and children, *Robinson v. Duvall*, 79 Ky. 83; a benefit insurance policy, *Farr v. Trustees*, 83 Wis. 446; *Day v. Case*, 43 Hun 179; *Covenant Association v. Hoffman*, 110 Ill. 603; a fire insurance policy made to two persons jointly. *Northrup v. Phillips*, 99 Ill. 449. The right of action on a bond to joint obligees vests in the survivor, *Blake v. Sanborn*, 8 Gray 154; and, in general, on a joint contract, in the representative of the last survivor. *Stowell v. Drake*, 3 Zab. 310. See, however, *Mulcahey v. Bank*, 89 N. Y. 439.

*Community property.* Under the statutes in those states which recognize the doctrine of community property in husband and wife, the survivor is entitled to at least one-half of the property upon the death of the other.

*Texas* (1879 R. S. Arts. 1653-54), *Louisiana* (Civ. Code, §§ 2399 *et seq.*), *Nevada* (1873 C. L. §§ 151 *et seq.*), *Montana* (1887 C. S. p. 551), *Arizona* (1887 R. S. § 1409). In California, the entire community property belongs without administration to the surviving husband (Civ. Code, §§ 1401-2). Either husband or wife may by will dispose of his or her part of such property, but neither can by will affect the interest of the other. *Brown v. Prigden*, 56 Tex. 124; *De Godey v. De Godey*, 39 Cal. 157; *Greiner v. Greiner*, 58 Cal. 115. The heirs of the deceased spouse, at her death, take one-half of it, *Glasscock v. Clark*, 33 La. An. 584; subject to the payment of debts, *Tugwell v. Tugwell*, 32 La. An. 848; and subject to the administration for that purpose by the survivor. *Bell v. Schwartz*, 56 Tex. 353; *Smith v. Dorsey*, 5 La. An. 382. But in Colorado, land in the name of the wife, purchased with community funds, goes entirely to the surviving husband without administration. *Dean v. Parker*, 88 Cal. 283. And in Louisiana, the survivor has a usufruct of so much of the community property as may be inherited by his or her issue. *Succession of Planchet*, 29 La. An. 520; *Forstall v. Forstall*, 28 La. An. 197.

In general, the relation between the survivor and the heirs of the deceased spouse is that of tenants in common. *Caruth v. Grisby*, 57 Tex. 259; *Dickson v. Dickson*, 36 La. An. 453. And the survivor having qualified as required by statute, may settle the estate by paying the debts which are a charge upon it, *Sanger v. Moody*, 60 Tex. 96; *Williams v. Fuller*, 27 La. An. 634; and is liable to an action after twelve months, in Texas, if he fails to pay approved debts. *Nichols v. Oliver*, 64 Tex. 647; R. S. Arts. 2177-79. In Texas, the right to the absolute management of the community property is conditioned on the filing of the statutory

bond by the survivor, *Brown v. Seaman*, 65 Tex. 628; and ceases when the bond is set aside and a new one given, his sureties being in that case liable to the administrator of the deceased for his share of the property. *Id.* Where bond is given by the widow, the creditors of the deceased husband may sue on it for conversion or waste. *Green v. Raymond*, 58 Tex. 80. If the husband survives, the legal representatives of the wife have no right of interference, but her children and heirs may enjoin him from applying the community property to other uses than payment of the community debts, *Moody v. Smoot*, 78 Tex. 119; and the administrator of the deceased husband supercedes the surviving widow. *Hollingsworth v. Davis*, 62 Tex. 438. So, if the husband survives the wife and is the executor of her will, on his death her administrator *de bonis non* may by his acquiescence be estopped from disputing the right of the husband's executor to administer the community property. *Matter of Hill* (Wash.), 33 Pac. Rep. 585. The survivor has full power over the community property, and whatever an administrator could do under order of a probate court the survivor can do without such order. *Green v. Raymond*, 58 Tex. 80. If he pays community debts out of his individual property, he may reimburse himself out of the community property. *Leatherwood v. Arnold*, 66 Tex. 414. But action lies in favor of the deceased wife's estate against the executor of the surviving husband for misappropriation of her share of the estate to debts contracted by him after her death. *Redding v. Boyd*, 64 Tex. 498. The interest of the surviving spouse is residuary, and can only be ascertained after the payment of community debts, *Dickson v. Dickson*, 33 La. An. 1370; and a mortgage made by the survivor is subject to such debts. *Id.* All the debts

of the community must be settled before the survivor or the heirs of the deceased have personally any interest therein. *Good v. Combs*, 28 Tex. 34; *Durham v. Williams*, 32 La. An. 162. And the administrator of the surviving husband may sell the community property for payment of community debts. *Oriol v. Herndon*, 38 La. An. 759.

*Trust property.* Upon the death of one of several trustees, the whole trust estate devolves upon the survivor. This is true both as to real property, *Golder v. Bressler*, 105 Ill. 419; *Shortz v. Unangst*, 3 Watts & S. 45; and personal property. *Whiting v. Whiting*, 4 Gray 236; *Stewart v. Peters*, 10 Mo. 755; *Powell v. Knox*, 16 Ala. 364. And even where survivorship is formally abolished by statute, *Parsons v. Boyd*, 20 Ala. 112; *Philadelphia &c. Railroad Co. v. Lehigh Navigation Co.*, 36 Pa. St. 204; *Shortz v. Unangst*, *ubi supra*. Upon the death of the last surviving trustee the estate devolves according to its legal quality upon his heir-at-law or his personal representative, *Zabriskie v. Morris &c. Railroad Co.*, 6 Stew. (N. J.) 22; if it is personality, upon his legal representatives, *Schenck v. Schenck*, 1 C. E. Gr. 182; if realty, upon his heirs. *Abbott, Petitioner*, 55 Me. 580.

Personal property held by a guardian goes to his executor. *Bloxham v. Crane*, 19 Fla. 163. And it has been held that where a guardian takes a note as such, and recovers judgment and files a bill in equity upon it, and dies *pendente lite*, his administrator is entitled to be substituted in the action. *Zellaer v. Cleveland*, 69 Ga. 631. But see, *contra*, *Alexander v. Wriston*, 81 N. C. 191, as to notes taken by a guardian; and *Gary v. People's Bank*, 26 S. C. 538, as to guardian's deposit in bank in his official name.

Where a commissioner appointed to sell real property dies insolvent, and

the proceeds of such sale in his hands are inventoried by his administrator as assets, they cannot be afterward paid out by him as a special trust fund to the surviving commissioner. *Cooley v. Vansyckle*, 1 McCart. 496. So, where a mortgage is made to an executor in his individual name, although for moneys of the estate loaned by him, it survives to his administrator, and not to the administrator *cum testamento annexo* of his testator. *Caulkins v. Bolton*, 98 N. Y. 511. As to the statutory substitution of the administrator *de bonis non* for the common-law succession of the executor's executor, see American note, p. \*415, *ubi supra*. So, money in the hands of a township trustee goes to his administrator. *Rowley v. Fair*, 104 Ind. 189. If, however, the trust is executed upon the death of the trustee, the proceeds should be paid by the representative to the *cestui que trust*. *Matter of Van Duzer*, 51 How. Pr. 410.

In some states, by statute, trusts of real property vest in the court on death of the last surviving trustee, and do not descend to the heir. *Clark v. Crego*, 47 Barb. 597; *Hawley v. Ross*, 7 Paige 103; *McDougald v. Carey*, 38 Ala. 320; *Reigart v. Ross*, 63 Wis. 449. In New York, the trust vests in the Supreme Court. *Estate of Fithian*, 5 Dem. 305; *Spencer v. Popham*, 5 Redf. 425; Code Civ. Pro. § 2606. In Wisconsin, it vests in the Circuit Court (1889 An. Stats. § 294); in Michigan, in the Court of Chancery (1882 An. Stats. § 5586); and in Alabama, it does not descend to heirs or personal representatives of the surviving trustee (1886 Code, § 1848). These statutes relate, however, only to real property, and trusts of personality devolve upon the deceased trustee's representatives as in other states. *Bucklin v. Bucklin*, 1 Abb. App. Dec. 242; *Brunn v. Vaughan*, 3 Keyes 345. So, with stock in a corporation. *Matter of North Shore Ferry Co.*, 63

Barb. 572. But see as to the devolution of a trust for the benefit of creditors on the death of the assignee, *Bowman v. Rainetaux*, 1 Hoff. Ch. 150.

*Power of sale. When implied.* An implied power of sale will be raised where it is the intention to confer a power to enable the executors to execute the provisions of the will, *Blount v. Moore*, 54 Ala. 360; especially where there is a devise to the executors for purposes which require a sale, *Stewart v. Hamilton*, 37 Hun 19; or where the will cannot be carried into execution without it, *Van Winkle v. Fowler*, 52 Hun 355. So, a devise to executors for the payment of debts, *Brown v. Brown*, 7 Or. 285. So, after a direction to pay debts a residuary devise to the executors, *Coogan v. Ockerhausen*, 55 N. Y. Super. Ct. 286. So, a devise to executors to invest and pay the income to certain beneficiaries, *Livingston v. Murray*, 39 How. Pr. 102. So, where the will directs the payment of all gifts in money and treats the whole estate as if it were personalty, *Webster v. Morris*, 66 Wis. 366. So, also, where the whole estate is to be divided and shares invested for certain beneficiaries, *Haggerty v. Lauterman*, 3 Stew. (N. J.) 37; or simply to divide the estate, where that cannot be done without sale of the land, *Maloney v. Hawkins*, 9 Lea 663. So, a direction that the executors should collect the residue and pay it over, but "not force the sale of certain property in an improper manner, not, however, to exceed five years." *Going v. Emery*, 16 Pick. 107. And a direction to consult the heirs whether it will be best to sell the homestead does not make the power of sale conditional on their consent, *Haggerty v. Lauterman*, *ubi supra*. So, where no person is designated to sell, but a power of sale is expressly created, *Officer v. Board of Home Missions*, 47 Hun 352; *Magruder v. Peter*, 11 Gill & J. 217; or

a sale is directed and the executors are to dispose of the proceeds pursuant to the will, *Hale v. Hale*, 137 Mass. 168; *Loring v. Binney*, 3 How. Pr. N. S. 143; *Whitehead v. Wilson*, 2 Stew. (N. J.) 396; or to be distributed, *Potter v. Adriance*, 17 Stew. (N. J.) 14; or used for purposes naturally devolving upon them as executors, *Vaughan v. Farmer*, 90 N. C. 611; or to pay debts and legacies, *Meakings v. Cromwell*, 2 Sandf. 512.

So, where the will blends the personalty and realty into one fund, *Gray v. Henderson*, 71 Pa. St. 368; for the purpose of distribution, *Winston v. Jones*, 6 Ala. 550; *Belcher v. Belcher*, 11 Stew. (N. J.) 126; or for the purpose of accumulation, *Putnam School v. Fischer*, 30 Me. 523; even where there is no direction to distribute, *Myer's Appeal*, 62 Pa. St. 107. And an express power of sale may, by implication, extend over property other than that to which it expressly relates, *Bates v. Woodruff*, 123 Ill. 205; or beyond the period within which an express power is to be exercised, *Waldron v. Schlang*, 47 Hun 252. And if the will works a conversion, a power of sale is necessarily implied, *Bogert v. Hertell*, 6 Hill 492.

*When not implied.* On the other hand, a direction to invest and keep invested the share of testator's daughter does not confer a power of sale by implication, *Cruikshank v. Parker*, (N. J. Eq.) 26 Atl. Rep. 925. So, a gift of the use to A. until sale "by my executor as hereinafter provided," with no further provision, *Cahill v. Brennan*, 68 Hun 540. So, where there is no express provision for sale, and the division provided by the will can be attained by partition, *Bijur v. Bijur*, 49 Hun 235; or where property is merely dedicated to uses by the will, to which the law would dedicate it, *Chandler v. Chandler*, 87 Ala. 300. So, a discretionary power to

"settle my estate as they judge best for the interests of my heirs-at-law." *Skinner v. Wood*, 76 N. C. 109. A power will not be implied merely from a direction to pay debts, *Hall v. Den*, 54 Cal. 6; and distribute residue, *Waller v. Logan*, 5 B. Mon. 532; nor in order to increase the income of improved real estate by the sale of unimproved, *Roe v. Vingut*, 21 Abb. N. C. 404; nor from a clause giving the executrix full and entire control of all the estate, *Rakestraw v. Rakestraw*, 70 Ga. 806; nor from a mere direction to sell without naming the donee or giving the executor power of disposing of the proceeds, *Lippincott v. Lippincott*, 4 C. E. Gr. 121; nor from a mere charge upon the realty of debts, *Will of Fox*, 52 N. Y. 530; *Oliver v. Ellis*, 64 Mo. 77; or of specific debts. *Den v. Allen*, 1 Pen. (N. J.) 45. So, no power of sale is implied where a trust was organized for a fixed period, amounting to a direction that land, and not its proceeds, should be held for the beneficiaries. *Matter of Roe*, 119 N. Y. 509.

*Express power.* A power of sale of real estate may be given by express words, or may be implied by the imposition of duties on the executors which cannot be performed except by a sale. *Skinner v. Wood*, 76 N. C. 109. Unless empowered by will, an executor cannot sell lands at common law. *Hoyt v. Daly*, 32 O. St. 109. To create a valid power of sale, its objects should be specified in, or clearly ascertainable from, the instrument attempting to create the power, *Sweeney v. Warren*, 127 N. Y. 426; as well as the part to be sold. *Gill v. Grand Tower & Co.*, 92 Ill. 249.

A general direction to sell "should it be thought best by my executors to divide the real estate into small lots and sell at public auction," confers a power of sale on the executors. *Gray v. Henderson*, 71 Pa. St. 368. So also, a

provision to turn realty into cash as soon as the executor deemed it advisable. *Dennis v. Jones*, 1 Dem. 80. And two clauses providing for the sale of realty by the executor, one for commercial purposes, the other for payment of debts, are not irreconcilable. *Sweeney v. Warren*, 52 Hun 246. So, a general power "to sell and reinvest" is not limited to sales for the purpose of reinvestment. *Manier v. Phelps*, 15 Abb. N. C. 123. But a power to sell for the payment of debts cannot be exercised after the debts are otherwise fully paid. *Sweeney v. Warren*, 127 N. Y. 426. And a power to sell trust property does not give authority to borrow money on it. *Fridenburg v. Wilson*, 20 Fla. 359.

*Sale not authorized.* Direction in a will that executors should take charge of "my entire estate and execute this my last Will" does not confer a power of sale, *Alexander v. Wallace*, 8 Lea 569; nor a direction "to manage and control" the estate, *Blanton v. Mayes*, 58 Tex. 422; nor a devise to A. "after all my debts are paid," *Dunn v. Keeling*, 2 Dev. 283; nor a "discretionary power to settle my estate as my executors judge best for the interest of my heirs-at-law." *Skinner v. Wood*, 76 N. C. 109.

*When the power carries the estate.* A naked power of sale will carry no estate to the donee of the power. *Jackson v. Scauber*, 7 Cow. 187; *S. C.* 2 Wend. 13; *Doe v. Lanius*, 3 Ind. 441; *Thompson v. Schenck*, 16 Ind. 194; *Beadle v. Beadle*, 2 McCrary 586. But if he cannot carry out the provisions of the will without taking a legal title to the property, he will take such title. *Morton v. Barrett*, 22 Me. 257; *Deering v. Adams*, 37 Me. 264. See too, *Hanson v. Brown*, 78 Me. 195.

A devise to executors in trust to sell for debts and funeral expenses within six months after testator's death, and a



residuary devise to testator's sons, gives the sons an estate in fee subject to the power of sale. *Dunshee v. Goldbacker*, 56 Barb. 579; S. C. 8 Abb. Pr. N. S. 439. But a devise to an executor to be sold for the payment of debts and legacies, with power to give deeds in fee, gives the legal estate to the executor in fee and in trust. *Inman v. Jackson*, 4 Me. 237; *Richardson v. Woodbury*, 43 Me. 206. And if trusts are created by will which require for their proper execution that the trustee take an estate in fee, such estate will be implied. *Deering v. Adams*, 37 Me. 264. And a devise to executors in trust for the executor's children until the youngest attain twenty-one, vests a fee simple estate in the executors in trust, defeasible upon the youngest child's arriving at twenty-one. *Pearce v. Savage*, 45 Me. 90.

*Title in executors.* A devise of land to executors to sell passes the title to them. *Compton v. McMahon*, 19 Mo. Ap. 494; *West v. Fretz*, 109 Ill. 425. So, a devise in trust to executors with full power "to sell and manage the realty." *Gerard v. Buckley*, 137 Mass. 475. So, in general, where the devise is of such a nature as to require a legal estate in the executors. *Packard v. Marshall*, 138 Mass. 301. So, where the power of sale works a conversion, the executor being in such case entitled to the rents and profits. *Lent v. Howard*, 89 N. Y. 169.

On the other hand, a devise that lands shall be sold by executors confers no title, but merely a naked power. *Cohea v. Jemison*, 68 Miss. 510. So, a direction to sell land and pay legacies leaves the title to the unsold land in the devisees. *Beadle v. Beadle*, 2 McCrary 586. And in New York, a general devise to executors in trust to sell and convey vests no title in them, *Chamberlain v. Taylor*, 105 N. Y. 185; *Stewart v. Hamilton*, 37 Hun 19; al-

though elsewhere, under such devise, they may convey in their individual names. *Alley v. Lawrence*, 12 Gray 373. Until a power of sale is exercised, real property devised goes to the devisees, *Haskell v. House*, 3 Brev. \*242; *Scott v. Mowell*, 1 Redf. 431; or to the heirs if there is no devisee, *Beam v. Jennings*, 89 N. C. 451; *Perkins v. Perkins*, 100 N. C. 220; *Cohea v. Jemison*, 68 Miss. 510; subject to be divested by an exercise of the power. *Moore v. Moores*, 12 Vr. 440.

The interest of those entitled to the land is subordinate to the power, and is not subject to an execution after sale by the executor. *Bolton v. Stretch*, 3 Stew. (N. J.) 536. And an executor conveys a clear title notwithstanding the attachment of a devisee's interest in the land, *Smith v. Anderson*, 31 O. St. 144; or of annuities charged upon the land, "into whose hands soever it may come." *Bradford v. Mogk*, 55 How Pr. 482. The heirs, however, may bring an action for partition. *Duffy v. Duffy*, 50 Hun 266. And they are entitled to the rents and profits, *Herbert v. Tuthill*, Saxt. 141; so, with devisees, *Clift v. Moses*, 44 Hun 312; and may devise their interest. *Bonnell v. Bonnell*, 2 Dick. 540. The husband of an heir is entitled to curtesy. *Romaine v. Hendrickson*, 9 C. E. Gr. 231.

Executors with a power of sale are not chargeable for their failure to rent the land, *Dunn v. Renwick*, 33 W. Va. 476; nor can they maintain an action of ejectment, *Gossage v. Crown Point Co.*, 14 Nev. 153; nor sue for trespass to the realty, *Aubuchon v. Levy*, 23 Mo. 99; nor for the recovery of money awarded for lands taken by right of eminent domain. *Cashman v. Wood*, 6 Hun 520. An absolute power of sale over real property gives the executor the right to contract with an attorney to protect the property in consideration

of an interest being given him in it. *Hughes v. Washington*, 72 Ill. 84.

*Conversion.* On the principle that equity considers that as done which ought to have been done, it is well established that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted. 2 Jarm. on Wills 170; Story Eq. Jur. § 790; 1 Rep. on Leg. 501; 3 Redf. on Wills 139; Theobald on Wills 95; Flood on Wills 49; Reading v. Blackwell, Baldw. C. C. 166; Peter v. Beverly, 10 Pet. 533; Craig v. Leslie, 3 Wheat. 577; Sharpley v. Townsend, 4 Harring. 336; Rawling v. Landes, 2 Bush 158; Green v. Johnson, 4 Bush 164; Clay v. Hart, 7 Dana 11; Thomas v. Wood, 1 Md. Ch. 296; Maddox v. Dent, 4 Md. Ch. 543; Leadenham v. Nicholson, 1 Harr. & G. 267; Holland v. Cruft, 3 Gray 162; Holland v. Adams, 3 Gray 188; Scudder v. Van Arsdale, 2 Beas. 109; Wurts v. Page, 4 C. E. Gr. 365; Meakings v. Cromwell, 5 N. Y. 136; Bramhall v. Ferris, 14 N. Y. 41; Savage v. Burnham, 17 N. Y. 561; Dodge v. Pond, 23 N. Y. 69; Horton v. McCoy, 47 N. Y. 21; Moncrief v. Ross, 50 N. Y. 431; Hatch v. Bassett, 52 N. Y. 359; Arnold v. Gilbert, 5 Barb. 190; Vail v. Vail, 7 Barb. 226; Forsyth v. Rathbone, 34 Barb. 388; Johnson v. Bennett, 39 Barb. 237; Irish v. Huested, 39 Barb. 411; Haxtun v. Corse, 2 Barb. Ch. 506; Marsh v. Wheeler, 2 Edw. 156; King v. Woodhull, 3 Edw. 79; Ross v. Roberts, 2 Hun 90; Gott v. Cook, 7 Paige 522; Bunce v. Vandergrift, 8 Paige 37; Van Veghten v. Van Veghten, 8 Paige 104; De Peyster v. Clendining, 8 Paige 295; Martin v. Sherman, 2 Sandf. Ch. 341; Shumway v. Harmon, 6 N. Y. Sup. Ct. (T. & C.) 626; Croom v. Her-ring, 4 Hawkes 393; Proctor v. Ferebee,

1 Ired. Eq. 143; Brothers v. Cartwright, 2 Jones Eq. 113; Conley v. Kincaid, 2 Winst. Eq. 44; Collier v. Collier, 3 O. St. 369; Furguson v. Stuart, 14 Ohio 140; Richey v. Johnson, 30 O. St. 288; Willing v. Peters, 7 Pa. St. 287; Nagle's Appeal, 13 Pa. St. 260; Parkinson's Appeal, 32 Pa. St. 455; Bro-lasky v. Galley, 51 Pa. St. 509; Horner's Appeal, 56 Pa. St. 405; Evans' Appeal, 63 Pa. St. 183; Dundas' Appeal, 64 Pa. St. 325; McClure's Appeal, 72 Pa. St. 414; Bailey v. Allegheny National Bank, 104 Pa. St. 425; Wills v. Sloyer, 1 Clark (Pa.) 516; Estate of Heberton, 3 Phila. 436; Estate of Sebastian, 4 Phila. 236; Morrow v. Brenizer, 2 Rawle 185; Simpson v. Kelso, 8 Watts 247; Burr v. Sim, 1 Whart. 252; North v. Valk, Dud. Eq. 212; Stephenson v. Yandle, 3 Hayw. 109; Postell v. Postell, 1 Desaus. 173; Rumsey v. Durham, 5 Ind. 71; Gates v. Hunter, 13 Mo. 511; McCabe v. Spruil, 1 Dev. Eq. 189; Siter v. McClanachan, 2 Gratt. 280; Hurtt v. Fisher, 1 Harr. & G. 88. The interest of a devisee in land so to be converted cannot be sold on execution. Baker v. Copenbarger, 15 Ill. 103. If the direction is to purchase lands in another state, the laws of that state must determine the validity of the investment. Ford v. Ford, 72 Wis. 621; S. C. 80 Mich. 42. Property may also be changed in its character by an order of the court, but the personal representatives of the deceased take it in the character in which it is left by him. Hamer v. Bethea, 11 S. C. 416.

Every person claiming property under a will or settlement directing its conversion must take it in the character which such improvement has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character. 2 Jarm. on Wills 171; Estate of Sweedes (Pa.), 28 W. N. C. 544. And conversely, one

claiming against the will cannot avail himself of a conversion directed by the will for its purposes. *McReynolds v. Jones*, 30 Ala. 101; *Barnett v. Barnett*, 1 Met. (Ky.) 254; *Brink v. Layton*, 2 Redf. 79; *Hoover v. Landis*, 76 Pa. St. 354. But until a direction to sell is carried out, the formal transfer of title is governed by the actual character of the property. *Wilder v. Ranney*, 95 N. Y. 7; *Snover v. Squire* (N. J. Eq.), 24 Atl. Rep. 365. See, however, *Ramsey v. Hanlon*, 33 Fed. Rep. 425; *Allen v. Watts* (Ala.), 11 So. Rep. 646. And where a distributee died immediately after the testator and before the sale, his share was held to pass as realty to his heirs, in *Banta v. Boyd*, 118 Ill. 186.

*Election by beneficiary.* But although a new character may have been in plain and unequivocal terms impressed upon property by means of a trust for conversion, yet such constructive quality is liable to be determined by the act of the person or persons beneficially entitled, who may, at any time before its conversion *de facto*, elect to take the property in its actual state. 2 Jarm. on Wills 188; *Bailey v. Allegheny, National Bank*, 104 Pa. St. 425; *Henderson v. Henderson*, 133 Pa. St. 399; *Mellon v. Reed*, 133 Pa. St. 1; *Prentice v. Jansen*, 14 Hun 548; *Laird's Appeal*, 85 Pa. St. 329; *Rawling v. Landes*, 2 Bush 158; *Holt v. Lamb*, 17 O. St. 374; *Ross v. Drake*, 37 Pa. St. 373; *Hannah v. Swarner*, 3 Watts & S. 230; 2 Story Eq. § 793; *Swan v. Goodwin*, 2 Duv. 298; *Wills v. Sloyer*, 1 Clark (Pa.) 516; *Stuck v. Mackey*, 4 Watts & S. 196; *Burr v. Sim*, 1 Whart. 265; *Smith v. Starr*, 3 Whart. 62; *Baker v. Copenbarger*, 15 Ill. 103; *Tazwell v. Smith*, 1 Rand. 313; *Mandlebaum v. McDonell*, 29 Mich. 78; *Harcum v. Hudnall*, 14 Gratt. 369. This right of election is personal, *High v. Worley*, 33 Ala. 196; and when exercised, the devisee

electing to take the land takes it as unconverted. *Samuel v. Samuel*, 4 B. Mon. 245. But renting of the lands by one devisee before the happening of the contingency upon which the conversion is to take place, and taking the rents is not sufficient evidence of such election. *Harcum v. Hudnall*, *ubi supra*.

In order to amount to an election to take property in its actual, as distinguished from its eventual, or destined state, the act must be such as to absolutely determine and extinguish the converting trust; and hence where two or more persons are interested in the property, it is not in the power of any one to change its character, in regard even to his own share; for, as the act of the whole would be requisite to put an end to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator. 2 Jarm. on Wills 192; *Baker v. Copenbarger*, 15 Ill. 103; *Harcum v. Hudnall*, 14 Gratt. 369. But see, *Mandlebaum v. McDonell*, 29 Mich. 78. Even the joint action of all of the devisees in remainder cannot defeat a trust for conversion of realty, where the life interest of another beneficiary is interposed. *Delafield v. Barlow*, 107 N. Y. 535.

*Failure of purpose.* "But every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the Will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin." 2 Jarm. on Wills 216; *Roy v. Monroe*, 2 Dick. (N. J.) 356. Thus, the widow cannot take advantage of the conversion (directed for a special purpose) to claim the land in order to make up a deficiency in her statutory share of the personal

property. *Estate of Collard*, 42 N. Y. St. Rep. 131. The conversion of land under an express charge of incumbrances, coupled with a power of sale, will extend only so far as the payment of the incumbrances. *Matter of Dodge*, 40 Hun 443. So, in general, wherever the purposes fail, *Reed v. Williams*, 125 N. Y. 560; *Harker v. Reilly*, 4 Del. Ch. 72; or are otherwise accomplished, *Sweeney v. Warren*, 127 N. Y. 426; *Chamberlain v. Taylor*, 105 N. Y. 185; or fail in part. *Betts v. Betts*, 4 Abb. N. C. 317. So, if the purposes are wholly or partly invalid, the conversion fails *pro tanto*, *Giraud v. Giraud*, 58 How. Pr. 175; *Will of Vedder*, 40 N. Y. St. Rep. 119; *Kearney v. Missionary Society*, 10 Abb. N. C. 274; or if the intended gift lapses by the death of the beneficiary, *Parker v. Linden*, 113 N. Y. 28; or by its legal incapacity to take (as an unincorporated society). *Rizer v. Perry*, 58 Md. 112. But its incapacity to take the unconverted real estate will not affect its capacity to take the proceeds under the conversion directed. *Church Extension v. Smith*, 56 Md. 362.

“*Out and out*” conversion. As to “out and out” conversion, where there is a general and positive direction to sell, see *Story Eq. Jur.* § 790; 1 *Rop. on Leg.* 501; 3 *Redf. on Wills* 139; *Hawkins on Wills* 97; *Bispham Eq.* § 317; *Tazewell v. Smith*, 1 *Rand.* 313; *Mathis v. Guffin*, 8 *Rich. Eq.* 79; *Wilkins v. Taylor*, *Id.* 291. See also, *Sharpley v. Townsend*, 4 *Harring.* 336; *Henderson v. Wilson*, 1 *Dev. Eq.* 313; *Wurts v. Page*, 4 *C. E. Gr.* 365, which was a trust to invest for children and pay their shares in a certain way; *Smith v. First Church*, 11 *C. E. Gr.* 132, where the direction was to sell and pay debts and funeral expenses out of the proceeds, and the personal property proving insufficient for debts or legacies, it was held that an “out and out” con-

version was intended and the surplus of proceeds of real estate after payment of debts was applied toward the legacies; *Arnold v. Gilbert*, 5 *Barb.* 190, reversing 3 *Sandf. Ch.*, 531, where there was an apparent general intent to convert, with a direction to sell for particular purposes; *Marsh v. Wheeler*, 2 *Edw.* 156, where the direction was to sell and divide among the children; so *Bogert v. Hertell*, 4 *Hill* 492; *King v. Woodhull*, 3 *Edw.* 79.

*When conversion effected.* The general rule is that the conversion directed by the will is considered as taking place at the testator's death. *Fluke v. Fluke*, 1 *C. E. Gr.* 488; *Herbert v. Tut-hill*, *Saxt.* 141; *Matter of De Leyer*, 3 *Dem.* 233; *Kearney v. Missionary Society*, 10 *Abb. N. C.* 274; *Dutton v. Pugh*, 18 *Stew. (N. J.)* 426; *Jones v. Jones*, 1 *Dick. (N. J.)* 654; *Caldwell v. Willis*, 57 *Miss.* 555; *Ramsey v. Hanlon*, 33 *Fed. Rep.* 425; *Forsyth v. Rathbone*, 34 *Barb.* 388; *Stagg v. Jack-son*, 1 *N. Y.* 206; *Cook v. Cook*, 5 *C. E. Gr.* 375; *Arnold v. Gilbert*, 5 *Barb.* 190; *Haxtun v. Corse*, 2 *Barb. Ch.* 506; *Marsh v. Wheeler*, 2 *Edw.* 156; *Van Veghten v. Van Veghten*, 8 *Paige* 104; *De Peyster v. Clendinning*, 8 *Paige* 295; *Brink v. Layton*, 2 *Redf.* 79. And where the conversion is imperatively directed, it is regarded as taking place at the time of the testator's death, although the time fixed by him for the sale for that purpose be distant. *Rinehart v. Harrison*, 1 *Baldw. C. C.* 177; *Fairlie v. Kline*, 2 *Pen. (N. J.)* 754; *High v. Worley*, 33 *Ala.* 196; *Hocker v. Gentry*, 3 *Met. (Ky.)* 463; *Burnside v. Wall*, 9 *B. Mon.* 322; *Stagg v. Jack-son*, 1 *N. Y.* 206; *Meakings v. Crom-well*, 5 *N. Y.* 136; *Reading v. Black-well*, 1 *Baldw. C. C.* 160; *Parkinson's Appeal*, 32 *Pa. St.* 455; *Estate of Hebertson*, 3 *Phila.* 436; *McClure's Appeal*, 72 *Pa. St.* 414; *McWilliams' Appeal*, 117 *Pa. St.* 111; *Tickel*

*v. Quinn*, 1 Dem. 425; *Keeler v. Harper*, 64 Md. 74. So, where the sale is to be discretionary as to time within a certain time, *Underwood v. Curtis*, 127 N. Y. 523; or as to the time, in the discretion of the children. *Crane v. Bolles*, 4 Dick. (N. J.) 373. So, where the sale is to take place on the termination of a life estate. *Allen v. Watts* (Ala.), 11 So. Rep. 646.

But see, to the effect that the conversion does not take place until the time of the sale, *Savage v. Burnham*, 17 N. Y. 561; *Moncrief v. Ross*, 50 N. Y. 431; *Manice v. Manice*, 43 N. Y. 303; *Ross v. Roberts*, 2 Hun 90; *Bunce v. Vandergrift*, 8 Paige 37; *Shumway v. Harmon*, 6 N. Y. Super. Ct. (T. & C.) 626; *Brothers v. Cartwright*, 2 Jones Eq. 113; *McClure's Appeal*, 72 Pa. St. 414. So, *Massey v. Modawell*, 23 Ala. 421, where the sale was to take place on the death or marriage of the youngest child. So, where the intermediate income for a definite time was bequeathed to the executrix. *Ogsbury v. Ogsbury*, 115 N. Y. 290. So, where the sale is to take place at the end of a life estate. *Carman v. Brown*, 4 Dem. 96; *Tillman v. Davis*, 95 N. Y. 17; *Vincent v. Newhouse*, 83 N. Y. 505. So, where the sale is to be at the election of the devisee, there will be a conversion at the time of such election, *Washington v. Abraham*, 6 Gratt. 66; and no sooner, *Estate of Machemer*, 140 Pa. St. 544; and if the devisee die after election and before sale, his executor is entitled to have the sale made and to receive the money. *Washington v. Abraham*, 6 Gratt. 66. So, where the time of sale is left in the discretion of an executor or trustee, no conversion takes place until the sale, *Christler v. Meddis*, 6 B. Mon. 35; *Brearley v. Brearley*, 1 Stockt. 21; and, in general, where the conversion is directed to take place upon a contingency, there will be no conversion until the contingency

happens and the sale is made, *Peter v. Beverly*, 10 Pet. 533; *Clay v. Hart*, 7 Dana 11; *Harcum v. Hudnall*, 14 Gratt. 369; *Matter of Ransom*, 30 N. Y. St. Rep. 737; *Watson v. Martin*, 75 Ala. 506; *Gallagher v. Rowan*, 86 Va. 823. So too, where the sale is directed to be by consent of certain persons. *Nagle's Appeal*, 13 Pa. St. 260; *Miller's Appeal*, 60 Pa. St. 404; *Evans v. Kingsbury*, 2 Rand. 120.

*Effect of power of sale.* A mere power of sale does not work a conversion, 2 Jarm. on Wills 183; *Theobald on Wills* 95; *Holland v. Cruft*, 3 Gray, 162; *Holland v. Adams*, 3 Gray 188; *Brearley v. Brearley*, 1 Stockt. 21; *Matter of Fox*, 52 N. Y. 530, affg. 63 Barb. 157; *Fowler v. Depau*, 26 Barb. 224; *Graham v. De Witt*, 3 Bradf. 186; *Slocum v. Slocum*, 4 Edw. 613; *McCarty v. Deming*, 4 Lans. 440; *McCarty v. Terry*, 7 Lans. 236; *Wood v. Keyes*, 8 Paige 365; *Matter of Vandervoort*, 1 Redf. 270; *Cobel v. Cobel*, 8 Pa. St. 342; *Chew v. Nicklin*, 45 Pa. St. 84; *Edwards' Appeal*, 47 Pa. St. 144; *Clift v. Moses*, 116 N. Y. 144; *Canfield v. Crandall*, 4 Dem. 111; *Fraser v. McNaughton*, 58 Hun 30; *Peterson's Appeal*, 88 Pa. St. 397; *Hunt's Appeal*, 105 Pa. St. 128; *Lindsley's Appeal*, 102 Pa. St. 235; *Greenough v. Small*, 137 Pa. St. 128; *Sheridan v. Sheridan*, 136 Pa. St. 14; although the purpose of the sale may be designated, *e. g.*, for the payment of debts, *Clift v. Moses*, 116 N. Y. 144, affg. 44 Hun 312; or for the purposes of a certain trust, *Lindsley's Appeal*, 102 Pa. St. 235; or for distribution. *Matter of Bingham*, 127 N. Y. 296. But see, *contra*, as to a power of sale "for the benefit of the legatees," *Brink v. Masterson*, 4 Dem. 524.

*Direction to sell.* To effect a conversion, the direction to sell must be imperative, or the intention to convert the property must plainly appear. *Dodge*

*v. Pond*, 23 N. Y. 69; *Moncrief v. Ross*, 50 N. Y. 431; *Vail v. Vail*, 7 Barb. 226; *Fowler v. Depau*, 26 Barb. 224; *Phelps v. Phelps*, 28 Barb. 121; *Wright v. Trustees, Hoffm.* Ch. 203; *Bleight v. Manufacturers' Bank*, 10 Pa. St. 131; *Nagle's Appeal*, 13 Pa. St. 260; *Stoner v. Zimmerman*, 21 Pa. St. 394; *Anewalt's Appeal*, 42 Pa. St. 414; *Neely v. Grantham*, 58 Pa. St. 433; *Miller's Appeal*, 60 Pa. St. 404; *Henry v. McCloskey*, 9 Watts 145; *McClure's Appeal*, 72 Pa. St. 414; *Story Eq. Jur.* § 790; 1 *Rop. on Leg.* 501; 3 *Redf. on Wills* 139; *Bispham Eq.* §§ 310, 311; *Mills v. Harris*, 109 N. C. 626. A testamentary disposition of the "proceeds" of the real property is not sufficient to make the power of sale imperative. *Weld v. Strong*, 54 How. Pr. 133. But a power to convert the real property into money and distribute the money has been held sufficient. *Flanagan v. Flanagan*, 8 Abb. N. C. 413.

An imperative direction to sell works a conversion of the land into personal property. *Herbert v. Tuthill*, Saxt. 141; *Carr v. Branch*, 85 Va. 597; *Gallagher v. Rowan*, 86 Va. 823 (on the happening of a designated contingency); *Grant v. Grant*, 3 *Redf.* 283; *Miller v. Commonwealth*, 111 Pa. St. 321; *Betts v. Betts*, 4 Abb. N. C. 317; *Estate of Barry*, 13 Phila. 310; *Hope v. Brewer*, 48 N. Y. St. Rep. 834; *Philadelphia Appeal*, 112 Pa. St. 470; *Roy v. Monroe*, 2 *Dick. (N. J.)* 356; *Perkins v. Caughlan*, 148 Mass. 30; *Abell v. Abell*, 75 Md. 44; *Shaw v. Chambers*, 48 Mich. 355. So, after revoking a devise of the land in question. *Forsyth v. Forsyth*, 1 *Dick. (N. J.)* 400. So, though the sale is not to take place until after the death of the widow, *Pyle's Appeal*, 102 Pa. St. 317; or is not to take place until after the death of the widow, with a provision in the will that the executors need not sell if the heirs agree among them-

selves to divide the property, *Jones v. Caldwell*, 97 Pa. St. 42; or although no sale is to take place within ten years unless the executors deem it advisable, *Roland v. Miller*, 100 Pa. St. 47. So, although the widow is authorized to postpone the sale during her widowhood, *Mellon v. Reed*, 123 Pa. St. 1; or notwithstanding discretion to the executor as to time of sale, *Estate of Laughlin*, 131 Pa. St. 333; or leave to him to convey it to a legatee in satisfaction of his legacy. *Miller v. Commonwealth*, 111 Pa. St. 321. But discretion given to the executor (except as to mere time of sale or minimum price) has been held to defeat conversion even under a direction to sell. *Ford v. Ford*, 70 Wis. 9. But see, *contra*, *Bell v. Bell*, 25 S. C. 149; *Ford v. Ford*, 80 Mich. 42. And a direction to have all testator's property converted into money as soon as practicable after testator's death will not deprive the heirs of the right to sue for the possession of the realty, as such direction does not vest title to the land in the executor. *Estep v. Armstrong*, 91 Cal. 659. If the direction is to buy land for the widow for her life and to sell it at her death it will be a conversion, and, at her death, a reconversion. *De Vaughn v. McLeroy*, 82 Ga. 687. And the application of the direction to sell may be expressly limited to land not otherwise disposed of. *Given v. Hilton*, 95 U. S. 591.

*Implied conversion.* Although a mere power of sale or purchase does not change the nature of the property, yet the circumstance of the clause respecting the sale or purchase being framed in the language of a power will not prevent its producing a constructive conversion if the context of the will shows that it is meant to be imperative or in the nature of a trust. 2 *Jarm. on Wills* 183. This is true where the general scheme of the will requires the conversion and cannot be otherwise carried

out. *Lent v. Howard*, 89 N. Y. 169; *Frazer v. Trustees*, 124 N. Y. 479; *Fahnestock v. Fahnestock* (Pa.), 31 W. N. C. 194; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106. So, if coupled with a devise to the executors in trust, *Matter of Mahan*, 32 Hun 73; *Lyons v. Mahan*, 1 Dem. 180; or with direction for payment of an annuity for the support of minor children and distribution of the residue. *Estate of Wheeler*, 51 N. Y. St. Rep. 513. The ascertained intention of the testator determines both the fact and the extent of the conversion. *King v. King*, 13 R. I. 501. Under a discretionary power to sell with direction to pay legacies out of the proceeds, the executor may sell timber off the land, accounting for the proceeds as a partial conversion. *Keller v. Ogsbury*, 121 N. Y. 362.

In the following cases it has been held that the testator intended a conversion, and it was so decreed: "Whereas no authority has been given to my executors to sell, now it is my will . . . that my executors sell and dispose of all my lands and real estate not devised, . . . and divide the money received therefrom," *Van Ness v. Jacobus*, 2 C. E. Gr. 153; so, a devise in trust for children to be invested, and the shares "to be paid" in a certain manner, *Wurts v. Page*, 4 C. E. Gr. 365; to the widow for life, and at her death to be sold and divided, *Horner's Appeal*, 56 Pa. St. 405; *Dundas' Appeal*, 64 Pa. St. 325; *Allison v. Wilson*, 13 Serg. & R. 332; *Morrow v. Brenizer*, 2 Rawle 188; *Hannah v. Swarner*, 3 Watts & S. 230; *Estate of Sebastian*, 4 Phila. 236, *Stuck v. Mackey*, 4 Watts & S. 196; *Stagg v. Jackson*, 1 N. Y. 206; *Martin v. Sherman*, 2 Sandf. Ch. 341 (but see, *contra*, *Newby v. Skinner*, 1 Dev. & B. Eq. 488); or a power of sale to secure funds for the education of children coupled with an interest, *Estate of Smith*. 4 Phila. 181; or to avoid an escheat.

*Taylor v. Benham*, 5 How. 233. So, to "authorize and request" executor to sell has been held sufficiently imperative to cause a conversion. *Green v. Johnson*, 4 Bush 164. See too, *Gourley v. Campbell*, 66 N. Y. 169, revg. 6 Hun 218. So, to "allow my estate to be sold." *Ramsey v. Hanlon*, 28 Fed. Rep. 425. So, a power of sale with authority to lease and mortgage and invest and re-invest the estate. *Wetmore v. Peck*, 66 How. Pr. 54. So, where the whole estate is treated in the will as personal property, with direction to pay all gifts in money. *Webster v. Morris*, 66 Wis. 366. So, a devise in trust to the executors with direction to set apart a certain sum and invest the residue and apply the income. *Asch v. Asch*, 18 Abb. N. C. 82.

But the intention to effect a conversion must be clearly implied. *Vandewalker v. Rollins*, 63 N. H. 460. Thus, a conversion is not effected or required by a devise of the residue to executors in trust with power to receive rents and profits and to sell and invest rents and proceeds and apply and divide the income to the widow for life with remainder over, stress being also laid in this case on the distinction between the testator's words "give and bequeath" for legacies and "devise and bequeath" in the residuary disposition. *Scholle v. Scholle*, 113 N. Y. 261. So, a devise of the residuary real and personal property to the executors in trust to invest and finally divide is not sufficient, *Hobson v. Hale*, 95 N. Y. 588; nor a devise in trust for the widow for life and remainder to children, with a recommendation that it "be kept in the family and if possible sold to one of the sons," *Harvard v. Peavey*, 128 Ill. 430; nor an authority to the executor to take charge of the entire estate. *Alexander v. Wallace*, 8 Lea 569.

And in an old New York will, made in 1663 under the then prevailing Dutch

law (which did not recognize the English distinction between distribution of real and personal property), a direction to make certain payments out of the proceeds of certain land was held not to work an equitable conversion, the doctrine having then no existence in New York law. *Van Giessen v. Bridgford*, 83 N. Y. 348.

*Discretionary power.* Discretion, allowed as to the exercise of the power to sell, acts like a contingency, suspending the conversion until it actually takes place, *Clay v. Hart*, 7 Dana 11; *Haggard v. Rout*, 6 B. Mon. 247; *Christler v. Meddis*, 6 B. Mon. 35; *Graham v. De Witt*, 3 Bradf. 186; *Cook v. Cook*, 5 C. E. Gr. 375; *Harris v. Clark*, 7 N. Y. 242; *Stagg v. Jackson*, 1 N. Y. 206, affg. 2 Barb. Ch. 86; *White v. Howard*, 46 N. Y. 144, affg. 52 Barb. 294; *Slocum v. Slocum*, 4 Edw. 613; *McCarty v. Deming*, 4 Laus. 440; *Matter of Vandervoort*, 1 Redf. 270; *Estate of Page*, 75 Pa. St. 87; *Estate of Twaddell*, 9 Phila. 316; *Chamberlain v. Taylor*, 105 N. Y. 185; unless the discretion is merely as to the time of sale, *Lent v. Howard*, 89 N. Y. 169; or unless there is a controlling direction as to the proceeds, *e. g.*, for their distribution. *Butler v. Green*, 16 N. Y. Supp. 888. In this case foreign lands were held to be so converted as to bring them for purposes of distribution under the law of testator's domicile, leaving only those of which the proceeds were to be reinvested in the foreign state subject to its laws. But under a devise in trust to pay the income to testator's children for ten years, with a direction to sell within that time if a majority of the children desire it, a partition sale of property of which testator owned an undivided half, on application of the co-tenant, will not work a conversion. *Matter of Chapin*, 148 Mass. 588.

*Disposition of surplus.* The rule is well established that an unexhausted surplus, after carrying out all the purpose for which the conversion was directed, goes to the heir as real estate. *North v. Valk*, Dud. Eq. 212; *Monroe v. Jones*, 8 R. I. 526; *Wharton v. Shaw*, 3 Watts & S. 124; *Wilson v. Hamilton*, 9 Serg. & R. 424; *Bogert v. Hertell*, 4 Hill 492; *Smith v. Kearney*, 2 Barb. Ch. 533; *Winants v. Terhune*, 2 McCart. 185; *Smith v. First Church*, 11 C. E. Gr. 132; *Oberle v. Lerch*, 3 C. E. Gr. 346, affd. Id. 575; *Trippe v. Frazier*, 4 Har. & J. 446; *Hilton v. Hilton*, 2 MacArth. 70; *Rinehart v. Harrison*, Baldw. C. C. 177; *McCarty v. Terry*, 7 Lans. 236. In these cases it is considered that the conversion was only intended so far as there are purposes provided by the will to exhaust the fund. *Wood v. Cone*, 7 Paige 472. A like rule governs cases where only a partial disposition, *e. g.*, of a life interest, is made by the will. *Wood v. Keyes*, 8 Paige 365; *Snowhill v. Snowhill*, 1 Gr. Ch. 39. But in Ohio, where one-third of the estate converted was to go to the wife and the residue to the heir, there being no heir capable of inheriting, the entire interest vested in the wife. *Ferguson v. Stuart*, 14 Ohio 140. To the same effect, see *Will of Bonard*, 16 Abb. Pr. N. S. 128, where the conversion failed, being for the purpose of a bequest to a charitable corporation incapable of taking land, and the direction being to turn the money into real estate; so *Harris v. Clark*, 7 N. Y. 242, for void trusts; so *Lorillard v. Coster*, 5 Paige 172; *Hawley v. James*, 5 Paige 318; S. C. 7 Paige 213; *North v. Valk*, Dud. Eq. 212; but see, *contra*, *Evans' Appeal*, 63 Pa. St. 183, where the conversion took effect under a direction to sell and pay the proceeds to certain charities, though the gift to the charities was void.



## \*CHAPTER THE FIRST.

OF THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR IN THE  
CHATELS REAL OF THE DECEASED.

## SECTION I.

*The executor's or administrator's right to chattels real, generally.*†

The general rule is, that chattels real shall go to the executor or administrator, and not to the heir. Chattels real are <sup>What are chattels real.</sup> such as concern or savor of the realty (*a*); or, in other words, they are chattel interests issuing out of, or annexed to, real estates (*b*). Thus, while the military tenures subsisted, wardship in chivalry was accounted such an interest, and accrued to the executor or administrator, and not to the heir; because it was in respect of a tenure of land or other hereditament, and was for years, *viz.*, during the minority, or till marriage had (*c*).

If one be seised in his natural capacity of an advowson in gross, or in fee appendant to a manor, and the church becomes <sup>Next presentation to a church.</sup> void, the void turn is a chattel personal, like rent due, or any other fruit fallen; and if the patron dies before he presents, the avoidance does not go to the heir, but to the executor (*d*): And the heir in tail shall not have a presentment fallen in the life of the tenant in tail, but his \*executor (*e*). Again, if the patron, whether a natural or politic person, grant the next presentation of a church before avoidance, to D., in this case, if D. dies, his executor shall have it as a chattel, and not the heir (*f*); for it is a chattel real, till a vacancy has happened, and afterward the vacancy turns it into a

† See American note at end of this Section.

(*a*) Co. Litt. 118, *b*.

(*b*) 2 Black. Comm. 386.

(*c*) Godolphin, Pt. 2, c. 13, s. 2. Wentw. Off. Ex. 126, 14th edition. So a villain for years (as by grant for a term from him that had the inheritance) was a chattel real: *Ibid.*

(*d*) F. N. B. 33, P. The Queen and Archbishop of Canterbury's Case, 4 Leo. 109. Co. Litt. 388, *a*. Wats. C. L. 72, 4th edition.

(*e*) F. N. B. 34. Godolph. Pt. 2, c. 13, s. 6.

(*f*) Godolph. Pt. 2, c. 13, s. 3: admitted by Lord Tenterden, in *Rennell v. Bishop of Lincoln*, 7 B. & C. 113, 193.

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chattel personal (*g*). Nor will it differ the case, if the grant is to the grantee *and his heirs*; for where the thing is a chattel, the word "heirs" cannot make it an inheritance (*h*). Likewise, if a man grants the two next presentations of a church, those are chattels, and if the grantee dies, the executor shall have them, and not the heir (*i*). So of an advowson granted to one and his heirs for 100 years (*k*). Again, if a church become void during the life of a husband, who is tenant by the curtesy, and he die before the church is filled, the husband's executor shall have the turn, and not the wife's heir (*l*).

And it is now settled that the executor has the same right, where a person seised of an advowson in a *politic* capacity dies during a vacancy. Thus, in a case in K. B., in error from the Common Pleas, it was held by Littledale, Holroyd, and Bayley, Justices, (Lord Tenterden, C. J., *dissentiente*), that where a prebendary, having an advowson of a rectory in right of his prebend, died while the church was vacant, his personal representative had the right of presentation for that turn; and the judgment of the Court of Common Pleas was reversed (*m*). This decision of the K. B. was afterward affirmed in the House of Lords (*n*).

\*But if the incumbent of a church be also seised in fee of the advowson of the same church and dies, his heir, and not his executor, shall present; for although the advowson does not descend to the heir till after the death of the ancestor, and by his death the church is become void, (so that the presentation in this case may be said to be severed from the advowson before it descends to the heir, and to be vested in the executor), yet both the descent to the heir and this fall of the avoidance happened all in one instant: and where two titles concur, the elder right shall be preferred (*o*). In the case of an advowson of a *donative* benefice where A. B., being seised, the church in his lifetime became void; then A. B. died, and the execu-

(*g*) Wentw. Off. Ex. 131, 132, 14th edition.

(*h*) Bro. Chattels, pl. 6.

(*i*) Bro. Chattels, pl. 20.

(*k*) Wentw. Off. Ex. 136, 14th edition.

(*l*) Wats. C. L. 71, 4th edit.

(*m*) Rennell v. Bishop of Lincoln, 7 B. & C. 113. In the Common Pleas, Gaselee, J., dissented from Burrough and Park, Justices, and Best, C. J.: see 3 Bingh. 223.

(*n*) 8 Bingh. 490. 1 Clark & F. 527.

(*o*) Holt v. Bishop of Winchester, 3 Lev. 47. Where a parson, who had the inheritance of the advowson, devised that his executor should present after his decease, and devised the inheritance to another in fee, it was held that this was a good devise of the next avoidance: Pynchyn v. Harris, Cro. Jac 371.

tors brought a *quare impedit*; after two arguments in C. B., the whole court was clearly of opinion that the right of donation descended to the heir of A. B., and that the executor had no title, as he would have had, if it had been a presentative benefice (*p*). So if the parson of a church ought to present to a vicarage, if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage, and not the executor of the deceased parson, shall present (*q*). And in the case of a bishop, the void turn of a church, the advowson whereof belongs to him in right of his bishopric, by his death does not go to his executor, although the church was void when the bishop died, but the king shall present by reason of his custody of the temporalities (*r*).

\*If the testator presents, and (his clerk not being admitted before his death) then his executors present their clerk, the Ordinary is at his election, which clerk he will receive (*s*).

Every bishop, whether created or translated, was formerly bound, immediately after confirmation, to make a legal conveyance to the archbishop of the next avoidance of one such dignity or benefice belonging to his see as the said archbishop should choose or name, which was, therefore, commonly called an *option* (*t*). And if the archbishop died before the avoidance happened, the right of filling up the vacancy went to his executors or administrators (*u*).

All leases and terms of lands, tenements, and hereditaments, of a chattel quality, are chattels real, and will go to the executor or administrator (*v*);† but he has no interest in

*Estates for years:*

(*p*) *Repington v. Tamworth School*, 2 Wills. 150. No reason is assigned, in the report of this case, for the distinction taken, nor is it easy to suggest one. See the remarks of the judges in *Rennell v. Bishop of Lincoln*, 7 B. & C. 113.

(*q*) 2 Roll. Abr. 346, tit. Presentment (F.), pl. 4. 1 Burn, E. L. 139, 8th edition.

(*r*) 2 Roll. Abr. Presentment, 345 (E.), pl. 4. Co. Litt. 90, a. Co. Litt. 388, a. Wats. C. L. 73, 4th edition.

(*s*) *Smallwood v. Bishop of Lichfield*, 1 Leon. 205. Wats. C. L. 72, 225, 4th edit.

(*t*) 1 Gibbs. Cod. 115. 1 Burn, E. L. 239, 8th edit. But it has been considered that such assignments have been

rendered illegal by reason of the stat. 3 & 4 Vict. c. 113, s. 42, and that the archbishop's options have thus been destroyed: at all events they are now obsolete.

(*u*) *Potter v. Chapman*, Ambl. 98. 1 Burn, E. L. 240, 8th edit.

(*v*) So it is with an option as an incident of a lease. Thus an option by the lessee to purchase the fee-simple of the land demised is attached to the lease and passes with it to the administrator as part of an intestate's personal estate. Re *Adams and Kensington Vestry*, 24 C. D. 199; 27 C. D. 394.

† See American note at end of this Section.

the freehold terms or leases (x). The general rule for distinguishing these two kinds is, that all interests for a shorter period than a life, or more properly speaking, all interests for a *definite* space of time, measured by years, months or days, are deemed chattel interests; in other words, testamentary, and of the nature, for the purposes of succession, of other chattels or personal property (y). Thus not only \*an estate for one's own life, or for the life of another, is deemed a freehold; but if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during the coverture, or as long as the grantee shall dwell in such a house, or so long as he pays 10*l.*, &c., or until the grantee be promoted to a benefice, or for any like *uncertain* time; in all these cases the lessee has an estate of freehold in judgment of law (z); while a lease for 10,000 years is not a freehold, but chattel interest.

If an estate be limited to A. B. and his assigns during C. D.'s life, it is a freehold interest; but if it be limited to A. B. and his assigns for a certain number of years, if C. D. shall so long live, it is a chattel, and will go to his executors or administrators.

If a lessee for years of a carve of land grants to another a rent out of the said carve for the life of the grantee, that is a good charge during the term, if the grantee so long live; but in such a case the grantee hath but a chattel (a).

A. made a lease to B. for life by indenture, in which was a proviso, that if the lessee died before the end of sixty years then next ensuing, his executor should have and enjoy, as in the right and title of the lessee, for term of so many of the years as amounted to the whole number of sixty, so

(x) Estates for years have one quality of real property, *viz.* immobility, but want the other, *viz.* a sufficient legal indeterminate duration, the utmost period for which they can last being fixed and determined: 2 Black. Comm. 386.

(y) 1 Preston on Estates, 203. On the other hand, an estate of freehold may be defined to be "an estate in possession, remainder or reversion, in corporeal or incorporeal hereditaments held for life or for some uncertain interest, created by Will or

by some mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee or of some other person: " See Watk. on Conveyancing, by Morley and Coote, p. 63.

(z) Co. Litt. 42, a. So where A. leases to B., till A. makes J. S. bailiff of his manor; adjudged a freehold: *Ibid.* Hal. MSS. See also Beeson, App., Burton, Resp., 12 C. B. 647.

(a) Butt's Case, 7 Co. 23, a. *Saffery v. Elgood*, 1 A. & E. 191.

that the commencement of the said sixty shall be accounted from the date of the said indenture: The lessee made two executors, and died: One of them entered into the land: And the opinion of the court was, that no lease for years was made by this proviso in the lessee, nor by remainder in his executor; \*because nothing of the said term was limited to the lessee for life as remainder to him and his executors (*b*).

There are certain interests in land, which although of an uncertain duration, and therefore in that respect participating of the nature of freehold, are nevertheless chattels. These are interests created by the statute law, and are securities for the payment of debts, namely, estates by statute merchant, statute staple, and by *elegit*, the possessors of which are said to hold their lands as freehold, but whose interests are really chattel, and will go to their executors and administrators (*c*).

Estates by statute staple, statute merchant, and by *elegit*.

Since an estate of freehold or inheritance cannot be derived out of a term for years, no words of limitation can alter the nature of the latter with respect to the purposes of succession. Thus if a lease for years be made to a man and his heirs, it shall not go to his heirs but his executors (*d*).

A lease for years made to one and his heirs shall go to the executor of the devisee:

So if a lease for years be made to a bishop, parson or other sole corporation and his successors, yet it will go to the executors of the lessee: because a term for years being a chattel, the law allows none but personal representatives to succeed thereto, nor can this mode of succession be altered by any limitation of the party (*e*).

A lease for years made to a sole corporation and his successors will go to his executors:

Again, it is a principle of law, that a limitation of a personal estate to one in tail vests the whole in him. Therefore, where a term for years is devised to one and the heirs of his body, or to the heirs male of his body, the term, at the death \*of the devisee, shall go to the executor and not to the heir (*f*)

lease for years devised to a man in tail shall go to his executors:

(*b*) *Gravener v. Parker*, Anders. 19: *sed quare*; and see *ante*, p. \*557.

(*c*) Co. Litt. 42, *a*. 2 Saund. 68, *f*. note to *Underhill v. Devereux*. Watk. on Conveyancing, by Morley and Coote, 63. See also Wentw. Off. Ex. 133, 4, 5, 14th edition.

(*d*) Co. Litt. 46, *b*. So if a term for years grant a rent out of the land to A. and his heirs, the same shall go to the executor and not to the heir; for being

derived out of a chattel, it must be itself a mere chattel: *Partus sequitur ventrem*: Wentw. 136, 14th edit.

(*e*) Co. Litt. 46, *b*. *Fulwood's Case*, 4 Co. 65, *a*. See *Dollen v. Batt*. 4 C. B., N. S. 760, as to what reservations make a freehold, and what a chattel lease.

(*f*) *Leonard Lovie's Case*, 10 Co. 87, *b*. Wentw. Off. Ex. 136, 14th edit. 1 Prest. on Estates, 32. See *post*, Pt. III. Bk. III. Ch. II. § II. (B.)

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So if a lease for years is given to A. and the heirs male of his body, and for default of such issue, to B. and the heirs male of his body, these words give to A. the absolute property in the whole estate and interest transmissible to his personal representatives (*g*). In a case, where the testator devised his real estates to A. for life, without impeachment, &c., with remainder to trustees to preserve contingent remainders, with remainder to his heirs of the body of A. and by codicil, reciting the after-purchase of a leasehold estate, he devised the same to the trustees named in his will, "for such estate and estates and in such manner and form" as his real estates were given by will: It was held that A., taking an estate tail in the real estates under the will, was nevertheless entitled to the absolute interest in the leasehold bequeathed by the codicil (*h*). .

With respect to the limitation of real estates, where an estate for life is given to the ancestor, followed by a subsequent limitation to his heirs general or special, the subsequent limitation, as in the case just stated, vests in the ancestor, and the heir takes not by purchase. So in the limitation of leasehold estates, generally speaking, if a term for years be devised to one for life, and afterward to the heirs of his body, these words are words of limitation, and the whole vests in the first taker, and is transmissible to his executor.

Thus, in *Theebridge v. Kilburne* (*i*), where a term was limited in trust for S. for life, and immediately from and after her decease, to the heirs of the body of S. lawfully to be begotten, if the term should so long endure, and in default of such issue, then to B.: Lord Hardwicke expressed himself \*of opinion that the whole term vested in S. Again in *Garth v. Baldwyn* (*k*), where real and personal estates were devised to trustees, in trust to pay the profits to G. during his life, and afterward to pay the same to the heirs of his body, Lord Hardwicke held, that the personal estate vested absolutely in G. by this limitation. So in *Verulam v. Bathurst* (*l*), where a testatrix bequeathed a leasehold house and 3,000*l.*, stock to trustees, in trust to permit her daughter to receive the rents and interest for life for her separate use, and, from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of the daughter lawfully begotten, but in case her daughter should happen to die

(*g*) *Leventhorpe v. Ashbre*, 1 Roll. Abr. 611 (L.), pl. 1. *Donn v. Penny*, 1 Meriv. 20.

(*h*) *Brouncker v. Bagot*, 1 Meriv. 271.

(*i*) 2 Ves. Sen. 233.

(*k*) 2 Ves. Sen. 646.

(*l*) 13 Sim. 374.

without any lawful issue living at the time of her decease, she gave the house and the stock over; it was held by Sir L. Shadwell, V.-C., that the daughter took the property absolutely.

However, if there appears any other circumstance or clause in the will, to show the intention that these words should be words of purchase, and not words of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase to the exclusion of his executor (*m*).

The chattels real which go to the executor or administrator are not confined to terms or leases of lands, but extend to chattel interests in incorporeal hereditaments, such as Leases of incorporeal hereditaments. leases for years of commons, tithes, fairs, markets, profits of leets, corodies for years, and the like (*n*).

In the case of a tenancy from year to year as long as both parties please, since the death either of the lessor or lessee does not determine it, the interest of the tenant is transmissible to his executor or administrator (*o*). Estate of tenant from year to year goes to his executor, &c. Therefore due \*notice to quit must be given to the latter before the lessor or his representative can recover in ejectment (*p*); and the executor or administrator of the lessee may maintain ejectment; and it was held no objection that the demise in the declaration was stated to be for seven years (*q*). So where W. H. being tenant from year to year to Lady H., died, leaving his widow in possession; and J. H. some time afterward took out administration to the deceased, but the widow continued in possession, paying rent to Lady H. with the knowledge of J. H., who never objected to such payment or made any demand of rent; it was held, that there was no evidence of a determination of the tenancy from year to year by operation of law, and that the administrator was entitled to recover possession from the widow (*r*).

(*m*) See Fearn, Cont. Rem. 490, *et seq.*, 7th edition. *Doe v. Lyde*, 1 T. R. 593. *Knight v. Ellis*, 2 Bro. C. C. 570. *Ex parte Sterne*, 6 Ves. 156. *Post*, Pt. III. Bk. III. Ch. II. § II.

(*n*) Wentw. Off. Ex. 131, 14th edition. Godolph. Pt. 2, c. 13, s. 3.

(*o*) *Doe v. Porter*, 3 T. R. 13. *James v. Dean*, 11 Ves. 393.

(*p*) *Parker v. Constable*, 3 Wils. 25. But where a tenant from year to year died, and a regular notice to quit was

served on the widow, who remained in possession, it was held by Littledale, J., that the landlord might recover in ejectment, unless it were shown that some other person, and not the widow, was the executor or administrator of the tenant; and that it was not incumbent on the landlord to show that the widow was either executrix or administratrix: *Rees v. Perrot*, 4 C. & P. 230.

(*q*) *Doe v. Porter*, 3 T. R. 13.

(*r*) *Doe v. Wood*, 14 M. & W. 682.

If a lease is made to several for a term of years, and one of the joint tenants dies, his interest accrues to the survivors, and his executors or administrators shall take none (*s*).

Leases held in joint tenancy do not pass to the executor, &c.

Terms for years vest in the executor though specifically devised ;

It may be advisable here to remark, that even when a term for years is specifically devised, it will, in the first instance, vest in the executor, by virtue of his office, for the usual purposes to which the testator's assets shall be applied, and the legatee has no right to enter without the executor's special assent (*t*).

If the testator had a term for years, this vests in the executor or administrator, and he cannot refuse it though it \*be worth nothing; for the executorship or administratorship is entire, and must be renounced *in toto*, or not at all (*u*).

he cannot waive a lease though it be worth nothing.

Generally speaking, the courts of equity follow the rules of law in their construction of equitable interests; and, consequently, the beneficial interests in a term, where the person entitled to it has no higher interest in the estate, is treated as a chattel interest, and is transmissible to the personal representatives in the same manner as the legal estate. For a statement of the

Equitable interests in terms.

interest of an executor or administrator in estates, *pur autre vie*.

*autre vie*, by the common law and the statute 29 Car. II. c. 3, s. 12, and for the cases decided thereunder, the reader is referred to the former editions of this work (*x*). This statute was Stat. 1 Vict. c. 26, repealed by the Wills Act, 1837, 1 Vict. c. 26, s. 3 s. 3. (which, however, does not extend to any will made before January 1, 1838), by which section estates, *pur autre vie*, may be disposed of by will, executed as required by that act, whether there shall or shall not be any special occupant thereof, and of whatever tenure they shall be, and whether the same shall be a corporeal or incorporeal hereditament (*y*).

And with respect to the estate, *pur autre vie*, of any deceased person, *who shall not have died before the 1st day of January, 1838*, the same statute, (after repealing previous statutes relating to estates *pur autre vie*) proceeds to enact, by sect. 6, that if no disposition shall be made thereof by will, and in case

(*s*) Co. Lit. 182, *a*. See *ante*, p. \*570, *et seq*.

(*t*) See *infra*, Pt. III. Bk. III. Ch. IV. § III.

(*u*) *Billingham v. Spearman*, 1 Salk. 297. *Ackland v. Pring*, 2 Mann. & Gr. 937. As to his liability to pay the rent

and perform the covenants of his lease, notwithstanding he has no assets, see *post*, Pt. IV. Bk. II. Ch. I. § II.

(*x*) Pt. II. Bk. II. Ch. I. § I.

(*y*) See this enactment, *verbatim*, in Preface.



there shall be no special occupant thereof, it shall go, (whether freehold or customary freehold, tenant right, customary or copyhold (z), or of any other tenure, *and whether a corporeal or incorporeal hereditament*), to the executor or administrator of the party that had the estate thereof by virtue of the grant;† and if the same shall come to the executor \*or administrator, either by reason of special occupancy, or by virtue of this act, it shall be assets in his hands, and shall go in the same manner as the personal estate (a).

With respect to the title of an executor or administrator of a mortgagee to the mortgaged property, formerly, at <sup>Mortgages :</sup> law, this depended on the fact whether the mortgage was in fee or for years: in the former case the legal estate in the land descended to the heir; and in the latter, it went, like any other term for years, to the executor: But with regard to the money due upon the mortgage, it was fully established in equity, that, in every case, it was to be paid to the executor or administrator of the mortgagee;† by reason of the rule of equity that the satisfaction shall accrue to the fund that sustained the loss (b). Consequently, if the mortgage were in fee, the heir or devisee of the mortgagee was a trustee of the land for the executor or administrator; and would, upon application, be directed to convey to him (c). So if the land became irredeemable in the hands of the heir, either by the length of possession, or by his purchasing the equity of redemption, or foreclosing, it nevertheless belonged to the personal representative, and the heir was considered a trustee for him (f). And now in all cases of death after December 31, 1881, <sup>44 & 45 Vict. c. 41, s. 30.</sup> it is provided by the Conveyancing Act, 1881, sect. 30,

(z) The statute of Car. II. did not extend to copyholds: *Zouch v. Forse*, 7 East, 186.

† See American note at end of this Section.

(a) See this enactment, *verbatim, post*, Pt. IV. Bk. I. Ch. I. In the construction of it, in a case where leasehold estates *pur autre vie* were devised in trust for A., his heirs, sequels in right, executors, administrators, and assigns, and A. survived the deviser, and being illegitimate, died without heirs and intestate, living the *cestui que vie*, it was held that the section applied to equitable estates in land, and that the

devised estates passed under it to A.'s administrator (the nominee of the crown): *Reynolds v. Wright*, 2 De G. F. & J. 590. 25 Beav. 100.

† See American note at end of this Section.

(b) *Thornbrough v. Baker*, 1 Chanc. Cas. 283.

(c) *Ellis v. Guavas*, 2 Chanc. Cas. 50.

(f) *Ibid.* *Canning v. Hicks*, 2 Chanc. Cas. 187. *Tabor v. Grover*, 2 Vern. 367. But it should seem, that if the heir chooses, he may pay off the mortgage money to the executor, and retain the land: *Clerkson v. Bowyer*, 2 Vern. 66.

that all estates vested in any person solely by way of mortgage shall on his death, notwithstanding any testa\*mentary disposition, devolve to and become vested in his personal representatives as if the same were a chattel real, and for the purposes of this section the personal representatives of a deceased person are to be deemed his heirs and assigns within the meaning of all trusts and powers.

But the mortgagee may, as between his real and personal representative, by a manifest declaration of his intent, con-  
in what case the heir entitled : vert the mortgage, as well as any other part of his personal estate, into land, and make it pass accordingly (*g*). So if a man purchase an estate, which afterward proves to be subject to an equity of redemption, and dies, the money will belong to his heir, and not his executor (*h*). Again, if mortgage money be articulated to be laid out in land and settled, the money will be bound by the articles (*i*). So if the mortgagee in his lifetime obtain a release of the equity of redemption, or obtain an absolute decree of foreclosure, and enter into possession, and after his death, the foreclosure shall be opened, or the release set aside, the heir, and not the executor, will be entitled to the money (*k*).

If the mortgagee becomes entitled to the land in fee-simple, as if it  
when a mortgage merges : descends upon, or is devised to him, a question may arise between his heir and executors, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest arises, whether the charge be kept on foot, or not, it will be extinguished in equity upon the presumed intention, unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him (*l*). But if a \*purpose, beneficial to the owner, can be answered by keeping the

(*g*) *Noys v. Mordaunt*, 2 Vern. 581.  
*Ante*, p. \*579.

(*h*) *Cotton v. Iles*, 1 Vern. 271. *Coote on Mortg.*, 5th ed., 1122.

(*i*) *Lawrence v. Beverley*, cited 3 P. Wms. 217, in *Lechmere v. Carlisle*.

(*k*) *Ibid.*

(*l*) 2 Powell Dev. 146, *Jarman's edit. Grice v. Shaw*, 10 Hare, 76. When the owner of an estate has also a charge on it, and there is some intermediate charge or estate between his own

charge and his ownership in fee, it may be reasonable to say that without some special act, no presumption can be made of an intention to merge the charge in fee; for that might be against the interest of the owner by letting in the intermediate estate or incumbrance: But where the intermediate interest is created by the act of the owner himself, this reasoning has no application: *Johnson v. Webster*, 4 De G. M. & G. 474, 488, by Lord Cranworth.

charge on foot, so that the charge would be disposable by him, though the land would not (*m*): or a beneficial use might have been made of it against a subsequent incumbrancer (*n*), or the other creditors of the person from whom the party derived the onerated estate (*o*): in these, and similar cases, equity will consider the charge as subsisting, notwithstanding that it may have been merged at law (*p*): and the rule is adopted in favor of the creditors of the person in whom these interests center (*q*).

Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors or administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate, as the equity of redemption descends to the heir-at-law (*r*).

title of executor of mortgagor in case of a mortgage with power of sale.

At common law, where a man devised land to his executors for payment of his debts, or until his debts were paid, or till a particular sum should be raised out of the rents or profits, the executors took thereby only a chattel interest, *i. e.* an estate for so many years as were necessary to raise the sum required (*s*): and this interest determined when the rents or profits would have raised the sum, although the executors might have misapplied them (*t*). But by stat. 1 Vict. c. 26, s. 30, where \*any real estate, (other than a presentation to a church), shall be devised to any trustee or executor, such devise [if the will be made on or after January 1, 1838] shall pass the fee-simple or other the whole estate of the testator, unless a definite term of years, or an estate of freehold, shall thereby be given to him expressly or by implication (*u*).

Devise of land to executors for payment of debts.

Stat. 1 Vict. c. 26, s. 30.

(*m*) Thomas *v.* Kemeys, 2 Vern. 348.

(*n*) Gwillim *v.* Holland, cited 2 Ves. Jun. 263.

(*o*) Forbes *v.* Moffat, 18 Ves. 384.

(*p*) Powell, Dev. *ubi supra*. Byam *v.* Sutton, 19 Beav. 556.

(*q*) Powell *v.* Morgan, cited 2 Vern. 206. Powell, Dev. *ubi supra*.

(*r*) Wright *v.* Rose, 2 Sim. & Stu. 323. Bourne *v.* Bourne, 2 Hare, 35.

(*s*) Hitchens *v.* Hitchens, 2 Vern.

404. Ackland *v.* Lutley, 9 A. & E.

879. Ackland *v.* Pring, 2 M. & Gr. 937.

(*t*) Carter *v.* Barnadiston, 1 P. Wms. 509, 519. Ackland *v.* Lutley, 9 A. & E. 879.

(*u*) See also 1 Vict. c. 26, s. 31.

† *Leases for years.* All leases for years or estates in land which are for some definite period of time, whether they are for years, months, or days, are chattels real, and as such they go to the

executor or administrator. Thornton *v.* Mehring, 117 Ill. 55; Becker *v.* Walworth, 45 O. St. 169; Murdock *v.* Ratcliff, 7 O. St. 119; Fisher *v.* Fisher, 1 Bradf. 335; Lewis *v.* Ringo, 3 A. K.

Marsh. 247; *Gutzweiler v. Lackman*, 39 Mo. 91; *Payne v. Harris*, 3 Strobb. Eq. 39. This includes a right of renewal contained in the lease. But the lessee's executor will not be chargeable for a failure to renew, if the privilege has been already forfeited in the testator's lifetime by his breach of a covenant in the lease. *Fisher v. Fisher*, 1 Bradf. 335. The next of kin of the deceased get title to the leasehold only by regular administration and distribution of the estate. *Barnitz v. Reddington* (Md.), 24 Atl. Rep. 409. On the other hand, covenants against transfer of the lease, and for the performance of certain personal acts by the lessee, will not extinguish the lease with the lessee's death during the term, nor prevent its devolving on his administrator. *Charles v. Byrd*, 29 S. C. 544.

*Estates pur autre vie.* Estates *pur autre vie* are chattel interests, and go as assets to the executor or administrator of the tenant of such estate, *Mosher v. Yost*, 33 Barb. 277; N. Y. 2 R. S. 83, § 6; in trust for the next of kin after payment of the tenant's debts. *Watson v. Kelty*, 1 Harr. (N. J.) 517.

*Mortgages.* The interest of a mortgagee in real property before foreclosure is personal property, and as such goes to the executor or administrator, and does not descend to the heir. *Smith v. Dyer*, 16 Mass. 17; *Johnson v. Bartlett*, 17 Pick. 477; *Richardson v. Hildreth*, 8 Cush. 225; *Taft v. Stevens*, 3 Gray 504; *Steel v. Steel*, 4 Allen 417; *Coffer v. Wells*, Saxt. 10; *Kenna v. Smith*, 2 Gr. Ch. 14; *Ladd v. Wiggin*, 35 N. H. 421; *Hemmenway v. Lynde*, 79 Me. 296. And the executor's title is superior to that of the mortgagee's widow. *Plummer v. Doughty*, 78 Me. 341. So, an agreement which is in effect a mortgage security passes to the holder's executor. *Miller v. Henderson*, 2 Stockt. 320. And a power of sale given by a mort-

gage to the mortgagee or his executors may be exercised by the latter. *Yount v. Morrison*, 109 N. C. 520.

Where the mortgagee, however, has clearly manifested an intention in his will that his interest should be treated as land, such mortgage should be considered as belonging to the class of real rather than personal assets, as in cases of equitable conversion. *Chase v. Lockerman*, 11 Gill & J. 185. And if the equity of redemption has been foreclosed by the deceased mortgagee, and the mortgaged property bought in by him, its character as personalty is lost, and the title to the mortgaged premises vests in his heirs-at-law. *Osborne v. Tunis*, 1 Dutch. 633. And a mortgage transferred to the owner of the fee and held without merger, as a muniment of title, belongs to the heirs or devisees, and not to the executor, and may be held in equity against the executor. *Brown v. Perris*, 23 Abb. N. C. 226. On the other hand, land bought by an administrator upon foreclosure of a mortgage belonging to the estate is held by him as personal property, and he may convey it without an order of the court. *Stevenson v. Polk*, 71 Iowa 278.

If the heirs of a mortgagee enter upon the mortgaged premises to foreclose and take the rents and profits, they become, by thus intermeddling with the property, executors of their own wrong in respect to what they have received, and the mortgagor may treat them as such. *Haskins v. Hawkes*, 108 Mass. 378. On the other hand, an executor may be personally liable for the payment of the mortgage. Thus, where a mortgage is upon a chattel leasehold which had before testator's death been transferred, subject to it, to A., and by A. transferred, without mention of the mortgage, A. will afterward, upon his becoming executor of the mortgagee, be chargeable with the amount of the

mortgage assumed by him before testator's death. *Zapp v. Miller*, 3 Dem. 266.

*Surplus after sale.* Where the mortgaged premises are sold to satisfy the mortgage and a surplus remains after the sale, it will be personal property and go as such to the mortgagor's personal representatives, if the sale take place in his lifetime, *Bogert v. Furman*, 10 Paige 496; but will go as realty to his heirs, if the property was sold after his death, *Cox v. McBurney*, 2 Sandf.

561; *Dunning v. Ocean Bank*, 61 N. Y. 497. In like manner, a surplus on a sale of land made after the owner's death under an execution upon a judgment recovered in his lifetime. *Garlick v. Patterson*, Cheves 27. But in Delaware, where judgment is recovered against the executors and land of the decedent sold on an execution issued against the executors, the surplus goes to them as personal property. *Vincent v. Platt*, 5 Harring. 164.

## SECTION II.

*Right of executors and administrators to chattels real, with relation to husband and wife.†*

Before quitting the inquiry as to the interest which executors and administrators have in the chattels real of the deceased, it is proper to consider the subject as it bears on the relation of husband and wife. It is therefore proposed to investigate, 1st, when the wife survives, the rights of the executor or administrator of the husband to her chattels real: 2nd, when the husband survives, the rights of the administrator of the wife to the same.

This subject has, however, become of much less practical importance than formerly by reason of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

By section 1 (1) of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it is enacted that "a married woman shall in accordance with the provisions of this Act be capable of acquiring, holding, and disposing by Will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee" (x).

† See American note at end of this Section.

(x) Notwithstanding the wide terms of this sub-section, it would seem that the devolution of the chattels real of the wife is unaltered, and that the effect of the act is merely, 1. That the husband is deprived of the power of divesting his wife of her chattels real during coverture, and 2. That if the wife do not alien her chattels real in her lifetime, or by her will, and the husband survive her, he will take such chattels real as are affected by the act, not as a marital right, but as the administrator of his wife. In other words, this enactment does not affect the devolution of the wife's property but only the "*jus mariti*," and it would seem, therefore, that, although under each of the above mentioned sections (2 and 5) the married woman is entitled to have and to hold the property as her separate prop-

erty, and to dispose of it "in manner aforesaid," *i. e.*, "as if she were a *feme sole*" (sect. 1 (1)), the statute only means that she is to have the legal estate in the property, and that, therefore, if she dies without having aliened or disposed of it by will her husband will have no right to it "*jure mariti*," because it never was his, yet he will still have the right (continued to him by the Statute of Frauds notwithstanding the Statute of Distributions) to administration and enjoyment of his wife's assets. The question, however, remains whether the M. W. P. A., 1882, affects property acquired before 1 Jan., 1883, by a woman married before that date. The only section that could operate upon such property would seem to be section 1, sub-s. (1), above set out. The scope of this sub-section seems to be to declare the *status* of a married woman. The act nowhere contains any provision divesting the husband of the

By section 2 of the Married Women's Property Act, 1882, every woman who marries *after* the commencement of that \*act [viz. January 1, 1883], is entitled to have and to hold as her separate property, and to dispose of by will, or otherwise, in the same manner as if she were a *feme sole*, all real and personal property belonging to her at the time of marriage, \*or acquired by, or devolving on, her after marriage, and by sect. 5 every woman married *before* the commencement of the act [viz. January 1, 1883], is entitled to have and to hold, and to dispose of by will, or otherwise, in the same manner as if she were a *feme sole*, as her separate property all real and personal property, her title to which, whether vested, or contingent, and whether in possession, reversion, or remainder accrues after the commencement of the act (*y*).

The effect of this act is, it seems, to extend the power which before the act a married woman possessed to dispose of such chattels real as were settled to her separate use, and to give the same power to a woman married before January 1, 1883, in respect of any chattels real, her title to which accrues to her after that date, and to a woman married on, or after January 1, 1883, in respect of all chattels real, whensoever and howsoever her title to them may accrue.

It follows that if the wife survive her husband his executor or administrator has no right whatever to such chattels, as by the statute are made the separate property of the wife, but the property in them remains in, and survives to, the wife.

And, if the husband survive the wife, it would seem that in respect

qualified interest in his wife's chattels real vested in him before the passing of the act. As to undisposed of separate property accrued to a married woman before the act, it has been held by Stirling, J., in *Re Lambert*, 39 C. D. 626, that the husband's right to such property is unaffected by sect. 1 (1) of the M. W. P. Act, 1882. The learned judge points out that, even before the act, a married woman might always dispose of her separate property by will, but that, to the extent that she did not, the husband's right accrued on her death. This right he held to be unaffected by the act. The result as to chattels real acquired before 1 Jan. 1883, by a woman married before that act, would

seem to be that letters of administration are unnecessary in cases where the husband survives the wife, unless indeed the interest of the wife consists of a mere right of action. See *Re Bellamy*, 25 C. D. 620. *Surman v. Wharton*, [1891], 1 Q. B. 491.

(*y*) Women, however, married before 1 Jan., 1883, in addition to the powers conferred on them by this act still retain the same power to dispose of chattels real settled to their "separate use," or (if married on or after 9 Aug., 1870) of chattels real acquired by them as next of kin of an intestate, as they possessed at the commencement of this act: see sects. 19 and 22.

of those chattels real over which a wife by the statute has a complete power of disposal as if she were a *feme sole*, if she die intestate without disposing of them, her husband has a right to them as her administrator, and to establish his title he must take out administration to her.

Having regard to the numerous cases which must arise in the case of chattels real of the wife not affected by the Married Women's Property Act, 1882, it is considered convenient to \*reprint the text as it existed in the last edition of this work prior to the passing of that act.

*Law as to chattels real of the wife not affected by the Married Women's Property Act, 1882.*

As to the law previous to the passing of the Married Women's Property Act, 1882, the common law gives a qualified interest to the husband in the chattels real of which the wife is, or may be, possessed during marriage, viz., an interest in his wife's right with a power of divesting her property during the coverture.

1. The right of the husband's executor, &c., to the wife's chattels real :

if they remain *in statu quo*, and she survive, she will be entitled, and not her husband's executors :

what amounts to a disposition of the wife's chattels real by the husband, so as to bar

1. If therefore he so disposes of his wife's terms, or other chattels real, by a complete act in his lifetime, her right by survivorship will be defeated (a): but if he leave them *in statu quo*, and the wife be the survivor, she will be entitled to them, to the exclusion of the executors or administrators of her husband (b).

It becomes, therefore, necessary to inquire what shall amount to such a disposition of the wife's chattels real by the husband, as will exclude her title by survivorship: and as the object of this treatise is

(a) And since the same rule of property must prevail in equity as in law, if the wife in a case not affected by the M. W. P. Acts be entitled to a term for years, held *in trust* for her benefit, the assignment or alienation of it by her husband will bind her surviving him: *Bates v. Dandy*, 2 Atk. 207. 1 Bacon, Abr. Baron and Feme (C. 2). 1 Roper, Husb. and Wife, 177, 2nd edit.; unless the husband, before marriage, consent to the settlement of the term for her benefit: *Sir Edw. Turner's Case*, 1 Vern. 7. (See as to trusts for her separate use, *post*, Pt. II. Bk. II. Ch. II. § III.) So,

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apart from the M. W. P. Acts, the contingent reversionary interest of the wife in the trust of a term for years may be sold by the husband; and the wife surviving will be bound by such sale though the husband dies before the contingency is determined or the reversion falls into possession: *Donne v. Hart*, 2 Russ. & M. 360. *Secus*, where the interest cannot possibly vest during the coverture: *Duberley v. Day*, 16 Beav. 33.

(b) 1 Roper, Husb. and Wife, 173, 2nd edit.



merely to show what interest the executor or administrator of the husband takes by the \*defeat of the wife's claim, the instances selected will be confined to cases where the question is between her and the executor or administrator, and not between her and an aliepee. The general principle is, that the transaction must be of a description to effect a complete alteration in the nature of the joint interest of the husband and wife in the wife's chattels real.

The will of the husband cannot dispose of the chattels real of the wife, against her surviving him; for as that does not take effect till *after* his death, the law takes precedence, and vests the term in the wife immediately upon his decease (c).

If the husband and wife be ejected of a term which he enjoyed in her right, and he commences an action of ejectment *in his own name*, and obtains judgment, the recovery will change the wife's property in the term, and vest it in the husband (d).

It seems that if there is a dispute between the husband, claiming a term of years in right of his wife, and another person, relative to the title, and they refer the matter to arbitration, and an award is made of the term to the husband, the property in it will be changed by the arbitrament, so as to amount to a reduction of the term into possession which will defeat the wife's right by survivorship (e).

If the wife, at the time of her marriage, were a lessee for years, and her husband purchases or takes a lease of the lands for both their lives, that act will amount to a dis\*position of the term: because, by the acceptance of the second lease the term is surrendered by operation of law, which surrender the husband is enabled to make under his general authority to dispose of the wife's leases in possession (f).

(c) 2 Black. Comm. 434. 1 Roper, Husband and Wife, 174, 2nd edit.

(d) Co. Lit. 46, b. Com. Dig. Baron and Feme (E. 2). Bacon, Abr. tit. Baron and Feme (C. 2); but see Brett v. Cumberland, 1 Roll. Rep. 359, in which Coke, C. J., says, "A man hath a term in right of his wife; he is ousted of it, and brings his action, and recovers the same again, and hath his judgment; he

shall have it *in statu quo*." See also note (6) to Co. Lit. 46, b. Hol. MSS.

(e) 1 Roll. Abr. 245, Arbitrament (D.): but see Mr. Roper's note, vol. i. 185, 2nd edit., and Hunter v. Rice, 15 East, 100.

(f) 2 Roll. Abr. Surrender (F.), p. 495, pl. 8. 1 Roper, Husband and Wife, 183, 2nd edit.

If the husband alone assign a term of which he is possessed in right of his wife, *subject to a condition*, and enter for the condition broken during the coverture, the husband will be again possessed in right of his wife as before; and the wife being the survivor may be entitled (*g*).

But if the husband die before the condition broken, his executors or administrators must enter for the breach of the condition, and will hold discharged of the title of the wife (*h*).

If the husband mortgages the wife's term, and by payment of the money at the day, the estate of the mortgagee ceases, it seems that the interest of the wife in the term will not be affected (*i*). If the money be not paid at the day, the estate of the mortgagee becomes absolute, and the alienation of the term being complete at law, the wife's legal right by survivorship is defeated; and if the equity of redemption were reserved to the husband alone, it has been said that her right will also be defeated in equity, by analogy to the cases in which it has been held that she is bound by the husband's voluntary assignment of her equitable chattels real (*k*). But if the equity of redemption were reserved to the husband and wife she would be entitled to survivorship (*l*): And \*unless his intention to defeat her right can be collected from the particular instruments of mortgage, it may be doubted whether it will be defeated by the reservation of the equity of redemption to him alone; for that this mere circumstance is not enough to rebut the ordinary presumption that nothing more is intended by the usual mortgage deed than that which is necessary to make the estate a

(*g*) 1 Roll. Abr. 344, l. 45-50. Bac. Abr. tit. Baron and Feme (C. 2). 1 Prest. on Abstr. 345.

(*h*) Co. Lit. 46, b. Bac. Abr. tit. Baron and Feme (C. 2).

(*i*) Young v. Radford, Hob. 3. 1 Roper, Husband and Wife, 184, Jacob's edit.

(*k*) 1 Roper, Husband and Wife, 184, Jacob's edition. 1 Prest. on Abstr. 345. The latter writer adds "*sed quære.*"

(*l*) Pitt v. Pitt, 1 Turn. Chan. Rep. 180: In that case a feme sole made a mortgage of a leasehold house and afterward married; the mortgage was then

transferred; the husband joined in the transfer, and covenanted to pay the money; and the equity of redemption was reserved to the husband and wife, their executors, administrators, and assigns: It was held that the wife's right by survivorship was not affected: But on a bill by the wife to redeem the mortgage, the redemption was decreed on the terms, that the husband's estate should stand in the place of the mortgagee, for sums paid by him out of his property, in reduction of the mortgage debt.

security for the money advanced (*m*). If in any case the husband, after the estate of the mortgagee has become absolute, pays the money, and takes an assignment to himself, the property will be altered, and the term will go to the executors of the husband, to the exclusion of the wife (*n*).

The power which the law gives the husband to divest the whole interest of his wife, in her chattels real, necessarily authorizes him to divest it partially (*o*). If, therefore, the husband be possessed of a term for years in right of his wife, and he alone grants an underlease for a portion of the term reserving rent, he becomes the actual owner, to the extent of the term so granted, and the rent will form part of his executor's estate (*p*); but the residue of the original term will belong to her, as undisposed of by her husband (*q*).

effect of husband making an underlease of the wife's term for years:

Whether the husband's *agreement* to make an underlease of his wife's term for years will produce the same effect as \*an actual lease, has never been expressly decided. The point was discussed in *Druce v. Denison* (*r*), though it became unnecessary to decide it: But Lord Eldon (*s*), intimated an opinion that the agreement would be good against the wife, and that the rent would form part of the husband's estate: He observed, that as to actual leases there was no doubt that, to the extent of the terms granted the husband became owner; as to the agreements for leases his apprehension was, that in a court of equity the husband was to be considered owner of those interests, and he compared it to an assignment of the wife's choses in action, which, though conferring no legal title, is supported in equity: On the case coming on again, his lordship said, that he should wish a search to be made on the point, whether it had ever been decided that an agreement would or would not bind the wife; and if it would, whether the rent was to be paid to her or her husband: If that point was untouched by decision, he thought it would be found, that the analogy to other cases

effect of husband's agreement for an underlease.

(*m*) *Clark v. Burgh*, 2 Coll. 221.

(*n*) 1 Prest. on Abstr. 346.

(*o*) Bac. Abr. tit. Baron and Feme (C, 2).

(*p*) 6 Ves. 394, by Lord Eldon in *Druce v. Denison*. Had the husband and wife joined in the lease, the rent would have been incident to the reversion, as well after the death of the husband as during his life, and would have

belonged to the wife: 1 Prest. on Abs. 345. 1 Roper, Husband and Wife, 174, 175, 2nd edit.

(*q*) Co. Lit. 46, b. See *post*, Pt. II. Bk. III. Ch. I. § III. as to the party entitled to arrears of rent reserved on a lease of the wife's estate.

(*r*) 6 Ves. 385.

(*s*) 6 Ves. 395.

would make out that an assignment in equity was to this purpose as good as an assignment at law, and he referred to *Steed v. Cragh* (t), as stating the principle.

2. The rights of the administrator of the wife to her chattels real when her husband survives. If the husband do not alien them in her lifetime, and he survive her, the law gives them to him, at least all those of which he had possession *jure uxoris* during the coverture, not as the administrator of his wife, but as a marital right (u). No administration to her, therefore, need be taken out by him for this purpose (x).

\*Consequently, should the husband die without exercising his exclusive right of taking out administration to her (y), her chattels real in possession will go to his administrator, and not to the administrator of his wife (z).

But to entitle the husband to the chattels real of the wife which were not vested in his possession in her right in her lifetime, he must make himself her representative, by becoming her administrator: As if a *feme sole* be possessed of a chattel real, and be thereof dispossessed, and then take husband, and die before recovery of possession, this right will not survive to the husband, but go to the personal representative of the wife (a). Therefore if the husband die without obtaining letters of administration, the right will not pass to his administrator, but to the

(t) 9 Mod. 43.

(u) *Secus*, as to a lease whereof the wife and another were joint tenants; for it shall survive to her companion, inasmuch as he has the elder title to that of the husband: Co. Lit. 185, b. *Bracebridge v. Cook*, Plow. 416, 418. And if the husband in his lifetime had granted a rent-charge out of the term the wife survivor should avoid the charge and all other incumbrances, for she being the survivor is remitted to the term which the coverture does not divert out of her: *Bracebridge v. Cook*, Plow. 416, 418.

(x) 1 Roll. Abr. Baron and Feme (H. 8). *Wrotesley v. Adams*, Plowd. 122. *Hauchet's Case*, Dyer, 251, a. Co. Lit. 46, b. *Ibid.* 351, a. Re *Bellamy*, 25

C. D. 620. And the same of an equitable term: *Rex v. Holland*, Aleyn, 15, by Rolle. 1 Prest. on Abst. p. 343.

(y) See *ante*, p. \*346.

(z) *Doe v. Polgrean*, 1 H. Black. 535.

(a) Co. Lit. 351, a. The illustration refers to a mere right of action and not to a case where the wife dies before the interest vested in possession. Thus where a wife is entitled to a term subject to a life estate therein and predeceases her husband during the subsistence of the life estate, it is not necessary for the husband to take out letters of administration in order to complete his title to the leaseholds: Re *Bellamy*, 25 C. D. 620. See also *Doe v. Polgrean*, 1 H. Black. 535.

administrator of his wife (*b*). However, such administrator will be considered in equity as a trustee for the representative of the husband (*c*).

If the husband be seised of an advowson in right of his wife, and the church become vacant during the coverture, the wife shall have the void presentation if she survive him, and the husband if he survive her (*d*), even though, by reason of her not having issue, he be not tenant by the curtesy (*e*): but if the church fell vacant *before* coverture, the husband shall not have the turn (*f*): *i. e.* it may be considered, he shall not have it as a marital right; but still it will go to \*him as her administrator (*g*). It will be observed that the next presentations to vacant churches are not properly chattels real, but chattels personal, and, therefore, in strictness do not belong to this part of the subject of the estate of an executor or administrator.

(*b*) *Ante*, pp. \*349, \*350.

(*c*) *Ante*, p. \*349.

(*d*) Co. Lit. 351, *b*.

(*e*) Wats. C. L. 71, 72.

(*f*) Co. Lit. 351, *b*.

(*g*) See *infra*, Pt. II. Bk. III. Ch. I. § III.

† *Chattels real of wife*. These, like her choses in action, only become the property of the husband on his reducing them to possession. After actual reduction to possession by the husband, securities in which the proceeds of such chattels are invested go to his executor. *Dunn v. Sargent*, 101 Mass. 333. A note and mortgage made to husband and wife for the purchase money of the wife's land go to the surviving wife

and not to the husband's executor, *Draper v. Jackson*, 16 Mass. 480; and as to joint property of husband and wife, see p. \*591, n., *supra*. A wife's interest in her father's property not reduced to possession by the husband (who died before distribution) goes to the wife, and not to the husband's executor, *Hayward v. Hayward*, 20 Pick. 517; and see as to her choses in action, p. \*680, n., *ubi infra*.

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## SECTION III.

*Of the estate of an executor or administrator in chattels real by condition, remainder, or limitation.*

An executor or administrator may become entitled to chattels real by condition. As where a lease for years has been granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts as the testator appointeth, &c., and the condition is not performed after the testator's death, now is the chattel real come back to the executor (*h*). So where the condition is, that the testator or his executor shall pay the money to avoid the grant, as where he mortgaged a lease for years and before the day limited for redemption he dies, his executor is entitled to redeem at the time and place appointed (*i*).

Likewise a chattel real may accrue to an executor or administrator by remainder. Thus a remainder in a term of years, though it never vested in the testator in possession, and though it continue a remainder, shall go to his executor. Where a lease for years is bequeathed by will to A. for life, and afterward to B., who dies before A., although B. never had the term in possession, yet it shall devolve on his executors (*k*).

With respect to contingent and executory interests, it is established, that contingent and executory estates, and possibilities in chattels real, accompanied by an interest, are transmissible to the personal representative of a person dying before the contingency upon which they depend takes effect (*l*). Thus, in the case above put, where a lease for years is bequeathed to A. for life, and after his death to B. for the residue of the term, B. has only an executory interest during the life of A.; but this interest is transmissible to B.'s executors or administrators (*m*).

Lord Coke says, that "if a man make a lease for life to one, the remainder to his executors for twenty-one years, the term of years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance (as if an estate for

Contingent and executory interests.  
Lease for life remainder to the executors of lessee.

(*h*) Wentw. Off. Ex. 181, 14th edit.

(*i*) Wentw. Off. Ex. 181, 14th edit.

Toller, 164.

(*k*) Wentw. Off. Ex. 189, 14th edit.

(*l*) Fearn, 554. 2 Saund. 388, *n*.

note (9), to *Purefoy v. Rogers*. See *post*, Pt. II. Bk. II. Ch. III.

(*m*) *Manning's Case*, 8 Co. 95. *Lampet's Case*, 10 Co. 46: and see Mr. Fraser's notes in his edition of Coke's Reports.

life be made to A., the remainder to B. in tail, the remainder to the right heirs of A., the fee vested in A., as it had been limited to him and his heirs), even so are the testators and executors *correlativa* as to any chattel. And, therefore, if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors (*n*).

\*It has been several times laid down, that if a remainder be limited to a man's *executors and assigns*, as purchasers, there his administrator cannot take as assignee (*o*).

Administrator  
cannot take as assignee by purchase.

(*n*) Co. Lit. 54, *b*. In the former editions of this work reference was made at length to the cases of *Sparke v. Sparke* (Cro. Eliz. 663); *Sparke v. Sparke* (Cro. Eliz. 840); *Cranmer's Case* (Dyer, 309); *Finch v. Finch* (Moor. 339); and *Remington v. Savage* (Moor. 745), together with the MS. note by Mr. Sergeant Hill in his copy of *Viner* in Lincoln's Inn Library, with a view to reconcile the conflicting decisions on this subject. It is not thought desirable to do more in the present edition than to cite the conclusion arrived at by Mr. Sergeant Hill in his MS. note above referred to in which he says: "On the whole the difference seems to be this, that if a lease be made for life or years,

with a remainder to the executors of the lessee, it shall be a vested interest in the lessee, and, consequently, if he dies intestate shall go to his administrator. But if there be a lease for ninety-nine years, if the lessee lives so long, with a proviso that if he die within the term it should be to his executors for forty years, this last term shall not vest in the lessee but in his executors by purchase, because it is a conditional limitation and a mere possibility to vest, for this is the point agreed in *Cro. Eliz.* 841. *Quære tamen* whether it would not now be considered as more than a possibility. See *Fearne*, 1617."

(*o*) See *Sparke v. Sparke*, *Owen*, 125. *Sparke v. Sparke*, *Cro. Eliz.* 840, 841.

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## \*CHAPTER THE SECOND.

### OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR IN THE CHATELS PERSONAL OF THE DECEASED IN POSSESSION.

Chattels personal are, properly and strictly speaking, things *movable*; which may be annexed to, or attendant on, the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, <sup>What are chattels personal.</sup> jewels, corn, garments, and everything else that can be properly put in motion, and transferred from place to place (*a*). All these, and other things of the same nature, generally speaking, belong to the estate of the executor or administrator.

It is proposed to consider this subject in the usual divisions;

1. Chattels animate. 2. Chattels vegetable. 3. Chattels inanimate.

#### SECTION I.

#### *Of the estate of an executor or administrator in chattels animate.*†

Chattels animate may be subdivided into such as are domestic and such as are *feræ naturæ*. In such as are of a nature tame and domestic (as horses, dogs, kine, sheep, poultry, and the like), a man may have an absolute property, and they are therefore capable of being transmitted, like any other personal chattel, to his executor or administrator (*b*). In those of a wild nature, *i. e.*, such as are usually found at

(*a*) 2 Black. Comm. 387, 388.

† See American note at end of this Section.

(*b*) 4 Burn, E. L. 297. It is said, indeed, in Swinburne, Pt. 7, s. 10, pl. 8, p. 929, 7th edit., and in Noy's Maxims, p. 107, that hawks and hounds shall go to the heir with the estate. But it seems clear at this day, that they would go to the executor or administrator as chattels personal. "And why not?" says the author of the Office of

Executor (supposed to be Mr. Justice Doddridge), "for although hounds, greyhounds, and spaniels be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as instruments of music, both tending to delight and exhilarate the spirits: a cry of hounds hath, to my sense, more spirit and vivacity than any other." Wentw. Off. Ex. 148, 14th edit.



\*liberty and wandering at large, generally speaking, a man can have no property transmissible to his representatives (c).

But a qualified property may subsist in animals of the latter class, *per industriam hominis*, by a man's reclaiming them and making them tame by art, industry, or education, property *per industriam* in animals *feræ naturæ* goes to executors : or by so confining them within his own immediate power, that they cannot escape and use their natural liberty (d), and the animals so reclaimed or confined belong to the executor or administrator. Thus, if the deceased have any tame pigeons, deer, rabbits, pheasants or partridges, they shall go to his executors or administrators: So, though they were not tame, yet if they were kept alive, in any room, cage or such like place; as fish in a trunk (e). But if at any time they regain their natural liberty, the property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning (f). A qualified property may also subsist in animals *feræ naturæ* property *propter impotentiam* in them. *propter impotentiam*; as in young pigeons, who though not tame, being in the dovehouse, are not able to fly out; and they shall go to the executors or administrators (g).

The animals which a man has *ratione privilegii* are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator. Thus deer in a park (h) (i. e., as it should seem, in a park properly so called which must be either by grant or prescription) (i), conies in \*a warren, doves in a dovehouse, will not go to the executor or administrator (k). And the reason assigned by Lord Coke, is, because, without them, the inheritance would be incomplete. Another and more obvious reason mentioned by Lord Coke in the same case, is, that the deceased had not any property in them (l).

What animals are incident to the inheritance and shall not go to the executor :

Deer in a park :

Conies in a warren :

Doves in a dovehouse :

(c) 2 Black. Comm. 390, 391.

(d) 2 Black. Comm. 390.

(e) Wentw. Off. Ex. 143, 14th edit.

(f) 2 Black. Comm. 392.

(g) Wentw. Off. Ex. 143, 14th edit.

(h) Co. Lit. 8, a. Wentw. Off. Ex. 127, 14th edition.

(i) Davis v. Powell, Willes, 46, in which case it was held, that deer in an inclosed ground, in which deer had been usually kept, and which was therefore called a park, might be distrained

for rent, And it has been lately held that deer in an ancient and *legal* park may be so tame and reclaimed from their natural wild state as to pass to executors as personal property: Morgan v. Earl of Abergavenny, 8 C. B. 768. Ford v. Tynte, 2 John. & H. 150.

(k) Com. Dig. Biens (B.), Wentw. Off. Ex. 127, 14th edition.

(l) The case of Swans, 7 Co. 17, b. But though animals *feræ naturæ* are not, while living, the personal chattels of the

So, if a man buys fish, as carps, bream, tenches, &c., and puts them into his pond, and dies, in this case the heir who  
 Fish: has the water shall have them, and not the executors; but they shall go with the inheritance; because they were at liberty and could not be gotten without industry, as by nets and other engines (*m*), otherwise (as it has already been said) (*n*), if they are in a trunk, or in a net, or the like; for then they are severed from the soil (*o*).

But if the deceased has only a term for years in the lands in which the park, warren, dovehouse, or pond is situate, the  
 but if the deceased was termor for years, the deer, fish, &c., go to the executor: deer, conies, doves, and fish will go to the executor or administrator as accessory chattels, following the estate of their principal, *viz.*, the park, warren, dovehouse, or pond (*p*). It must, however, be understood, that the executor or administrator can have no further interest than the deceased \*had in them, *i. e.* a right to take to his own use as many as he pleases, during his term, provided he leaves enough for the stores; for if a lessee for years of a park, vivary, warren, or dovehouse, kills so many of the deer, fish, game, or doves, that there is not sufficient left for the stores, it is waste (*q*), and will be equally waste in his executor or administrator.

owner of the soil, yet if they are found and killed on the land by a trespasser, the qualified property in them *ratione soli* becomes absolute in the owner of the soil: *Blades v. Higgs*, 12 C. B., N. S. 501. 13 C. B., N. S. 844: Affirmed in Dom. Proc., 11 Jurist, N. S. 701. As to Bees, see 2 Black. Comm. 393. In *Hannam v. Mockett*, 2 B. & C. 944, Bayley, J., says, that bees are property, and are the subject of larceny. The reader is also referred on these matters generally, to the treatise on the Law of Fix-

tures, &c., p. 167, *et seq.*, by Messrs. Amos and Ferard, from which excellent work the author has derived great assistance in compiling this and the following part of the present Book.

(*m*) Co. Lit. 8, *a*.

(*n*) *Ante*, p. \*618.

(*o*) Bac. Abr. tit. Executors (H. 3), vol. iii. 64.

(*p*) Wentw. Off. Ex. 127, 14th lit. Godolph. Pt. 2, c. 13, s. 4.

(*q*) Co. Lit. 53, *a*.

† An administrator must account for lambs and sheep belonging to the estate which were born after intestate's death, and for wool shorn from the sheep, and for the net proceeds of the sale of milk from cows, since intestate's death. *Merchant's Case*, 12 Stew.

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(N. J.) 506. As for the right to bring an action of trespass for oysters removed, see *Fleet v. Hegeman*, 14 Wend. 42; *Lowndes v. Dickerson*, 34 Barb. 586; and for bees, *Gillet v. Mason*, 7 Johns. 16; *Goff v. Kilts*, 15 Wend. 550.

## SECTION II.

*Of the estate of an executor or administrator in chattels vegetable.†*

Personal effects of a vegetable nature are the fruit or other parts of a plant or tree, when severed from the body of it, or the whole plant or tree itself, when severed from the ground (r). But unless they have been severed, trees, and the fruit and produce of them, from their intimate connection with the soil, follow the nature of their principal, and therefore, when the owner of the land dies, they descend to his heir, and do not pass to his executor or administrator (s). Hence apples, pears, and other fruits, if hanging on the trees at the time of the death of the ancestor, shall go to his heir, and not to his executor or administrator (t). So it is of hedges, bushes, &c.; for all these are the natural or permanent profit of the earth, and are reputed parcel of the ground whereon they grow.

Some cases, however, exist, where even growing timber trees, are, owing to special circumstances, considered as chattels, and as such will pass to the executor or administrator. Thus, if tenant in fee-simple grants away the trees they are absolutely passed from the grantor and his heirs, and vested in the grantee; and if the latter should die before they are felled, they will go to his executor or administrator: for \*in consideration of law, they are divided as chattels from the freehold (u). So where tenant in fee-simple sells the land and reserves the trees from the sale, the trees are in property divided from the land, although, in fact, they remain annexed to it, and will pass to the executors or administrators of the vendor (x). But if the person so entitled to the trees distinct from the land, afterward purchases the inheritance, the trees will be reunited to the freehold in property, as they are *de facto*, and descend to the heir (y). Yet if the tenant in fee-simple lease the land for years, excepting the trees, and afterward grants the trees to the lessee, they are not by this means re-annexed to the inheritance,

What growing things shall go to the heir:

Trees and fruit not severed:

certain cases where growing trees go to the executor:

† See American note at end of this Section.

(r) 2 Black. Comm. 389.

(s) Swinb. Pt. 7, s. 10, pl. 8. Re Ainslie, 30 C. D. 485.

(t) Swinb. Pt. 7, s. 10, pl. 8. Wentw. Off. Ex. 146, 147, 14th edit. Rodwell v. Phillips, 9 M. & W. 501.

(u) Stukeley v. Butler, Hob. 173. Wentw. Off. Ex. 148, 14th edit. Com. Dig. Biens (H).

(x) Herlakenden's Case, 4 Co. 63, b. Wentw. *ubi supra*.

(y) 4 Co. 63, b. Anon. Owen. 49.

but the lessee has an absolute property in them, which will go to his executors or administrators (z).

So if tenant in tail sells the trees to another, they are a chattel in the vendee, and his executors or administrators shall have them; and in such case also, *fictione juris*, they are severed from the land; but if the tenant in tail dies *before actual severance*, as to the issue in tail, they are part of his inheritance, and shall go with it, and the vendee or his executor cannot take them (a). The law, it may be presumed, is the same with respect to the vendee of a tenant in tail after possibility of issue extinct, or a tenant for life without impeachment of waste (b). And it seems that equity would not afford relief (c).

With respect to the property in trees and bushes when severed, there seems to be a material difference between such trees as, by the general law of the land, or by the custom of the country where they grow, are timber, and such as are not. For if tenant in dower, or by the curtesy, or tenant for life or years, unless he be so without impeachment of waste, cuts down timber trees, or a stranger does so, or the wind blows them down, the trees so severed shall not go to the tenant, or to his executor, but to the owner of the first estate of inheritance in the land (d). On the other hand, if such a tenant cuts down hedges or trees, not timber, or they are severed by the act of God, the tenant shall have them (e): and, consequently, his executor or administrator. So if

when trees, &c.,  
that are severed go  
to the executor.

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(z) 4 Co. 63, b.

(a) Liford's Case, 11 Co. 50, a: for, it was said, timber trees cannot be felled with a goose quill.

(b) Pyne v. Dor, 1 T. R. 55. Bishop of London v. Webb, 1 P. Wms. 528.

(c) See Treat. on Equity, B. 1, c. 4, s. 19, that no act of tenant in tail shall be carried into execution in a court of equity, any further than at law: for this would be to repeal the statute *de donis*.

(d) Herlakenden's Case, 4 Co. 63, a. Bewick v. Whitfield, 3 P. Wms. 268; in which case Lord Chancellor Talbot said, that this was so decreed upon the occasion of the great windfall of timber on the Cavendish estate. So if tenant for life without impeachment of waste commits equitable waste by cutting

ornamental timber: Lushington v. Boldero, 15 Beav. 1 Ormonde v. Kynnersley, *ibid.* 10. But a tenant for life, though subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber trees cut by order of the Court of Chancery, on account of their being in a decaying state, by reason of standing too thickly: Tooker v. Annesley, 5 Sim. 235. Consett v. Bell, 1 Y. & Coll. C. C. 569.

(e) Com. Dig. Biens (H). Berryman v. Peacock, 9 Bingh. 384. A testator devised estates on which there were plantations of larch trees. At the time of his death a great number of the larch trees had been more or less blown down by extraordinary gales. The Court of Appeal held that, having regard to the

trees are blown down, which are in their nature timber, but are dotards without any timber in them (*f*), or if such are wrongfully severed by the lessor, they belong to the tenant, and will pass to his executors (*g*).

There are, however, certain vegetable products of the earth, which, although they are annexed to and growing upon the land at the time of the occupier's death, yet, as \*be-<sup>Emblements :</sup> tween the executor or administrator of the person seised of the inheritance, and the heir, in some cases, and between the executor or administrator of the tenant for life, and the remainderman or reversioner, in others, are considered by the law as chattels (*h*), and will pass as such. These are usually called emblements.

The vegetable chattels so named, are the corn and other growth of the earth, which are produced annually, not spontaneously, but by labor and industry, and thence are called *fructus industriales*. When the occupier of the land, whether he be the owner of the inheritance or of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature and dies before harvest time, the law gives to his executors or administrators the profits of the crop *Emblavence de bled*, or Emblements, to compensate for the labor and expense of tilling, manuring, and sowing

*maxim quidquid plantatur solo, solo cedit*, the principle applicable was that, if a tree was attached to the soil, it was real estate, and if severed, personalty : that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree : Re Ainslie, 30 C. D. 485.

(*f*) Herlakenden's Case, 4 Co. 63, *a. b.* Countess of Cumberland's Case, Moore, 812.

(*g*) Channon v. Patch, 5 B. & C. 897.

(*h*) They are in fact not only in this respect, but in most others looked upon as chattels : for the rule seems now to be established, that all those vegetables which go to the executor, and not to the heir are for most purposes considered

mere chattels. They may consequently be seized and sold under a *fi fieri facias* ; and the sale of them while growing is not a contract, or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the 4th section of the Statute of Frauds : but a sale of goods, wares, and merchandise, within the 17th section : See the judgments of Bayley and Littledale, Justices, in Evans v. Roberts, 5 B. & C. 829 ; and of Hullock, B., in Scorell v. Boxall, 1 Young & Jerv. 398. See also Jones v. Flint, 10 A. & E. 753. In the case of Brantom v. Griffiths, 1 C. P. D. 349, it was held that growing crops are not personal chattels within the Bills of Sale Act, 1854. Growing crops, however, if separately assigned are personal chattels within the Bills of Sale Acts, 1878 and 1882.

the land (*i*). The rule is established as well for the encouragement of husbandry and the public benefit (*k*), as on the consideration, in the case of tenant for life, that the estate is determined by act of God, and that the maxim of law is, *actus Dei nemini facit injuriam* (*l*).

\*The doctrine of emblements extends not only to corn and grain of all kinds, but to everything of an artificial and annual profit, that is produced by labor and manurance (*m*): as hemp, flax, saffron, and the like (*n*); and melons of all kinds (*o*); and hops also, although they spring from old roots, because they are annually manured, and require cultivation (*p*); and so of potatoes (*q*).

But the rule does not apply (as it has already appeared), to fruit growing on trees (*r*); nor to the plantation of trees: for the general rule is, *quidquid plantatur solo, solo cedit*; and when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to him in future, and to future successions of tenants (*s*). Therefore, if a man sow the land with acorns, or plant young fruit trees, or oak, elm, ash, or other trees, these cannot be comprehended under emblements (*t*). The case of trees, shrubs, and other produce of their grounds planted by gardeners and nurserymen, with an express

(*i*) Swinb. Pt. 7, s. 10, pl. 8.

(*k*) 2 Black. Comm. 122.

(*l*) By Lord Hardwicke, in *Lawton v. Lawton*, 3 Atk. 16.

(*m*) Co. Lit. 55, *b*.

(*n*) *Ibid.* Wentw. Off. Ex. 147, 14th edition.

(*o*) Wentw. Off. Ex. 153, 14th edit. The author of that book expresses his opinion, that artichokes go to the heir, as they have not that yearly setting or manurance as should sever them in interest from the soil: *Ibid. sed quære*.

(*p*) The authorities, however, do not prove that the person who *planted* the young hops, or his personal representatives, will be entitled to the first crop, whenever produced: *Graves v. Weld*, 5 B. & Adol. 105, 120. As to Teazles, see *Kingsbury v. Collins*, 4 Bing. 202.

(*q*) *Evans v. Roberts*, 5 B. & C. 832, by Bayley, J. It is said in *Godolphin*, Pt. 2, c. 14, s. 1, that things under ground, whether in gardens or elsewhere, as carrots, parsnips, turnips, or skerrets, shall go to the heir; and the same is said in Wentw. Off. Ex. 152, 14th edit., on the principle that the executors could not reach them without digging and breaking the soil. But Lord Coke says, that if the tenant plant *roots*, his executors shall have that year's crop: Co. Lit. 55, *b*.: and probably at this day it would be so holden. See 2 Black. Comm. 123.

(*r*) *Ante*, p. \*620.

(*s*) *Gilb. Ev.* 210. 2 Black. Comm. 123.

(*t*) Co. Lit. 55 *b*.

view to sale, may be mentioned as an exception; for they are removable by them or their executors, as emblements are (*u*).

\*The growing crop of grass, even if sown from seed, and though ready to be cut for hay, cannot be taken as emblements; because, as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation (*x*). It seems, however, that the artificial grasses, such as clover, saint-foin, and the like, by reason of the greater care and labor necessary for their production, are within the rule of emblements (*y*). grass :  
artificial grasses :

But the doctrine of emblements extends to a crop of that species only which ordinarily repays the labor, by which it is produced, within the year in which that labor is bestowed, though the crop may in extraordinary seasons be delayed beyond that period (*z*). In *Graves v. Weld* (*a*), the tenant for a term determinable upon a life sowed the land in spring, first with barley and soon after with clover: The life expired in the following summer: In the autumn the tenant mowed the barley, together with a little of the clover plant, which had sprung up: The clover so taken made the barley straw more valuable, by being mixed with it: but the increase of the value did not compensate for the \*expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown: The reversioner came into possession in the winter, and took two crops of the same clover, after more than a year had elapsed from the sowing: It was held that

(*u*) *Penton v. Robart*, 2 East, 90, in Lord Kenyon's judgment; *Lee v. Risdon*, 7 Taunt. 191, in the judgment of Gibbs, C. J.: and see the remark of Lawrence, J., in 3 East, 44, note (*c*). But where a tenant, not being a nurseryman by trade, makes a nursery for fruit trees, for the purpose of transplanting to the orchards, he has no right to sell them: by Heath, J., in *Wyndham v. Way*, 4 Taunt. 316. Lord Ellenborough held at Nisi Prius, that it was waste for an outgoing tenant of garden ground to plow up strawberry beds in full bearing, although when he came in he paid for them at a valuation: *Wetherell v. Howells*, 1 Campb. 227. And it was held in *Empson v.*

*Soden*, 4 B. & Adol. 655, that a tenant (not a gardener by trade) cannot remove a border of box planted by himself on the demised premises: And in this case Littledale, J., denied that the tenant could remove flowers which he had planted.

(*x*) Gilb. Ev. 215, 216. See also *Evans v. Roberts*, 5 B. & C. 829, 832, in the judgment of Bayley, J.

(*y*) 4 Burn, E. L. 299. No case seems to have occurred where these matters have come in question. The general right seems to have been admitted in *Graves v. Weld*, *ubi supra*.

(*z*) *Graves v. Weld*, 5 B. & Adol. 105, 118.

(*a*) 5 B. & Adol. 105.

[\*625]                      [\*626]

the tenant was not entitled to emblements of either of these two crops: first, because emblements can be claimed only in a crop of a species which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed; and, secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the *cesser* of his interest, this had been already taken by him at the time of cutting the barley.

It remains to consider in what cases the executor or administrator is entitled to emblements. Where the deceased was seised in fee-simple of the land, his personal representatives are entitled to emblements as against the heir (*b*): as against the heir: though not as against a dowress (*c*). So if the deceased was seised in fee-tail, his executor or administrator is entitled to the privilege as against the heir in tail (*d*). But where a man is seised of the soil as joint tenant, and dies, the corn, &c., sown, goes to the survivor, and the moiety shall not go to the executors or administrators of the deceased (*e*): Yet if a joint tenant agree that his companion shall occupy and sow all the land, who sows and dies before severance, his executors shall have the emblements (*f*).

It must be observed, however, that if a man seised in fee sows the land and then conveys it away, and dies before severance, the crops will not go to the executor of him who has conveyed away the land, but will pass with the soil as appertaining to it (*g*).

\*In like manner, the executor of a tenant in fee does not enjoy the right to emblements as against a devisee; for if the land itself is devised, the growing crops pass to the devisee, and the executor is excluded (*h*). And though the devise was made before sowing, and the deviser afterward sows, and dies before severance, the devisee shall have them, and not the executor (*i*). So, if the testator, being seised in fee, sows the land, and devises it to A. for life, (without any remainders over), and the testator and A. both die before severance, the executors of A. shall have the crop, though A. did not sow (*k*). This rule is founded upon a

(*b*) *Lawton v. Lawton*, 3 Atk. 16.

(*c*) See *post*, pp. \*630, \*631.

(*d*) *Wentw. Off. Ex.* 145, 14th edit.

(*e*) The reason for this is that joint tenants are supposed to carry on the cultivation of the soil by a joint stock, and in all joint stock, except merchants', there is a survivorship: *Gilb.*

*Ev.* 212, 213; but see *ante*, pp. \*570, *et seq.*

(*f*) *James v. Portman*, *Owen*, 102.

(*g*) *Gilb. Ev.* 214.

(*h*) *Cooper v. Woolftt*, 2 H. & N. 122.

(*i*) *Com. Dig. Biens* (G. 2).

(*k*) *Spencer's Case*, *Winch.* 51. *Co. Lit.* 55, *b.* note (2), from *Hal. MSS.*



presumption that it is the will of the testator, that he who takes the land should take the crops which belong to it; because every man's donation shall be taken most strongly against himself (l).

However, this distinction between the heir and devisee, though fully established, is mentioned by Lord Ellenborough, in *West v. Moore* (m) as capricious enough. And the presumption may be rebutted by words in the will, that show an intent that the executor shall have the emblements (n). Thus where the testator devised certain estates to A. in fee, and to his executors all his money, &c., stock upon his farm, with the implements of husbandry, and all other his personal estate of what nature or kind soever, in trust, to pay debts and legacies, &c., it was held that the devise of the *stock upon his farm* carried the standing crops of corn growing there at the time of his death from the devisee of the land to the executors; although there were assets sufficient to pay all the debts and legacies without that aid (o). So where \*there is expressly a legatee of the growing crops, or any specific bequest in the will which can apply to emble-

(l) Gilb. Ev. 214. On the same ground, if a man seised in fee sows copyhold lands, and surrenders them to the use of his wife, and dies before the severance, the wife shall have the corn, and not the executors of the husband: for this is a disposition of the corn, being appurtenant to the land: 1 Roll. Abr. 727, pl. 18. Gilb. Ev. 214.

(m) 8 East, 339, 343.

(n) 8 East, 343, by Lord Ellenborough.

(o) *West v. Moore*, 8 East, 339. *Cox v. Godsalve*, 6 East, 604, note. *Blake v. Gibbs*, 5 Russ. 13, *in notis*. *Rudge v. Winnall*, 12 Beav. 357. *Re Roose*, 17 C. D. 696. See also *Godolphin*, Pt. 3, c. 21, s. 14, that by a bequest of "Movables" the industrial fruits of the ground will pass. But in *Vaisey v. Reynolds*, 5 Russ. 12, Sir John Leach, M. R., held that a gift of "all farming stock" will not pass crops on the ground as between a particular and residuary legatee, and that learned judge observed that in *Cox v. Godsalve* and *West v. Moore*, the devisee was ex-

cluded rather because the executor was plainly meant to take the whole personal estate than from the mere force of the words "stock on my farm." This case has, however, been lately fully discussed by Sir George Jessel, M. R., in his judgment in *Re Roose*, *ubi sup.*, and disapproved by him. After citing the older cases he comments upon the distinction drawn by Sir J. Leach between *Vaisey v. Reynolds* and those older cases and says: "All I can say is, having read the case before Lord Ellenborough" (*West v. Moore*), "I think Sir John Leach made a mistake. Lord Ellenborough says 'stock upon my farm' in so many words passes the growing crops, showing that those were the words he relied upon. I am, therefore, of opinion that the distinction taken by Sir John Leach between those two cases" (*West v. Moore* and *Cox v. Godsalve*), "and the case before him" (*Vaisey v. Reynolds*), "is quite untenable."

ments, they will vest in the executor, and after his assent, in the specific legatee (*p*).

The privilege of taking the emblements is by no means confined to the case of the representatives of a person seised of the inheritance, as against the heir; but the rule is general, that everyone who has an uncertain estate or interest, if his estate determines by the act of God before severance of the crop, shall have the emblements, or they shall

Right of executor  
of tenant for life  
to emblements.

go to his executor or administrator (*q*). Therefore, the executor or administrator of a tenant for life is entitled to emblements to the exclusion of the remainderman or reversioner: because in this case the estate of the tenant is determined by the act of God (*r*). So if tenant for years, *si \*tamdiu vixerit*, sows, and dies before severance, his executor shall have the corn, for the uncertainty of the determination of his estate (*s*).

But there may be a case where the executor of the tenant for life has no right to emblements, on account of the deceased not having been the actual party who sowed the land, and the consequent failure of the reason upon which the right is founded. Thus if A., seised of land, sows it and then conveys it or devises it to B. for life, remainder to C. for life, and B. dies before the corn is reaped, in this case B.'s executors shall not have the emblements, but they shall go with the land to C. (*t*). And if A. seised in fee, sows land and conveys it to B. for

(*p*) Cox *v.* Godsolve, 6 East, 604, note to Crosby *v.* Wadsworth.

(*q*) Com. Dig. Biens (G. 2).

(*r*) Co. Lit. 55, *b*. Where the *land-lord* is tenant for life, and by his death the estate of his tenant at rackrent is determined, it is enacted by stat. 14 & 15 Vict. c. 25, s. 1, that "instead of claims to emblements, the tenant shall continue to hold till the end of the then current year, and the new owner of the land shall be entitled to a proportion of the rent." Where H. held, as tenant from year to year, of A., tenant for life, a cottage with about an acre of land, which was partly cultivated as a garden, and partly sown with corn and planted with potatoes, and A. died in the middle of a year of H.'s tenancy, and M. thereupon became entitled to the reversion; and at the expiration of the then current year of H.'s tenancy, distrained

for the proportion of the rent due since the death of A., it was held that the act applied to all tenancies in respect of which there might be a claim to emblements; that, but for the act, there might have been a substantial claim to emblements here, and that the premises were, therefore, "a farm or lands" within section 1; and it was also held that that section gave a right to distrain for the rent, as well as to recover it by action: *Haines v. Welch*, L. R., 4 C. P. 91.

(*s*) 1 Roll. Abr. Emblements (A.) pl. 12, p. 727.

(*t*) *Grantham v. Hawley*, Hob. 135. So if a man sows land and lets it for life, and the lessee for life dies before the corn is severed, his executor shall not have it, but he in reversion. So if tenant for life sows the land, and grants over his estate, and the grantee dies

life, remainder to C. for life, and both B. and C. die before severance, the crop shall not go to the executors of either B. or C., but revert to A. (u).

\*If a disseisor sow the land of tenant for life, and the tenant for life die, the executors of the tenant for life shall have the corn, and not the disseisor, nor he in reversion (x).

The executors or administrators of the incumbent of a benefice would probably at common law be entitled to the emblements of the glebe lands; for the deceased had an uncertain interest in the land, which was determined by the act of God. The right, however, is fully established by the statute 28 Hen. VIII. c. 11, which provides and enacts, that in case any incumbent happens to die, and before his death hath caused any of his glebe lands to be manured and sown at his own proper costs and charges with any corn or grain, that then in that case every such incumbent may make his testament of all the profits of the corn growing upon the said glebe so manured and sown (y).

Right of executors  
of clergy to emble-  
ments of the glebe.

If the successor be inducted before the severance of the emblements from the ground, the successor shall have the tithe thereof; for although the executor represents the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted (z): Otherwise, if the parson dies after severance from the ground, and before the corn is carried off (a).

If the husband sows the ground, and dies, and the heir assigns the land sown to the wife for her dower, she shall have the crop, and not the executors of the husband: for she shall be in *de optima possessione viri*, above the title of the

Dowress and her  
executors, when  
entitled to emble-  
ments.

before the corn is severed, *his* executor shall not have it: by Popham and Gawdy, Justices in *Knevett v. Pool*, Cro. Eliz. 464. But if the devise be to B. for life, without remainders over, and B. dies before severance, the executor of B. shall have the corn, though B. did not sow: Winch. 51 Co. Litt. 55, b. note (2), from Hal. MSS. *Ante*, p. \*627.

(u) Hobart, 132, in *margin*. Gilb. Ev. 215: but see the preceding note.

(x) *Knevett v. Pool*, Gouldsb. 146, by Popham and Fenner.

(y) This statute has been repealed but the repeal probably does not affect the

rights of the representative of an incumbent. A person who resigns his living is not entitled to emblements: *Bulwer v. Bulwer*, 2 B. & A. 470. The general rule of law is, that the tenant shall not have emblements when the tenancy is determined by his own act; as where the lessee surrenders, or a woman who is tenant *durante viduitate* marries, or the estate determines by forfeitures, condition broken, &c.: Com. Dig. Biens (G. 2). *Davis v. Eyton*, 7 Bingh. 154.

(z) 1 Roll. Abr. 655.

(a) Wats. C. L. 513, 4th edit. 3 Burn, El. 415, 8th edition.

executor (b). It was with reference to this especial privilege of a dowress, that at common law she could not, \*according to the more general opinion, devise corn which she herself had sown, nor did it go to her executors or administrators (c): but by the statute of Merton, 20 Hen. III. c. 2, the representatives of a tenant in dower, like those of any other tenant for life, are entitled to emblements (d).

If tenant in dower sows the land, and takes husband, who dies before severance of the corn, the dowress shall have the crops, and not the executor of the husband.

With respect to the executor of a man seised in right of his wife, the rule is, that if he sow and die before severance, his executors shall have the emblements (e). And if husband and wife are joint tenants for life, and the husband sows, and the land survives to the wife, it is also said that she shall have the corn (f).

The executor or administrator of a jointress, like a tenant in dower, is entitled to emblements of the estate settled in jointure; but she is not entitled to them at her husband's death to the exclusion of her husband's executors, as a dowress is (g).

Upon the death of a tenant by the curtesy, like any other tenant for life, the emblements of the estate held by the curtesy will go to his executors or administrators (h).

A tenancy at will (in the strict sense of the expression) is \*determined by the death of the lessee,

(b) 2 Inst. 81.

(c) Bract. lib. 2 fol. 96. 2 Inst. 81.

(d) See Com. Dig. Biens (G. 2), that the statute was only in affirmance of the common law. If two be tenants in common of land in fee, and one of them takes a wife, and dies, and the wife is endowed, &c., and she and the other tenant in common sow the land, &c., and afterward she makes her executors, and dies, the corn not being severed, now her executors shall have the corn in common with him who held in common with the tenant in dower: Perk. s. 523.

(e) Co. Lit. 55, b. Swinb. Pt. 3, s. 6,

[\*631] [\*632]

pl. 11, 253, 7th edition. All questions, however, of the right of the executor of a husband to the emblements of his wife's land are comparatively unimportant since the passing of the Married Women's Property Act, 1882: for since that act a husband can in no case be entitled in right of his wife except where the marriage took place and the title to the property accrued before Jan. 1st, 1883.

(f) Co. Litt. 55, b.

(g) Fisher v. Forbes, 9 Vin. Abr. tit. Emblements, pl. 82, p. 373.

(h) 1 Roper, Husband and Wife, 35, 2nd edit.

and his executor or administrator will be entitled to emblements (i).

When there is a right to emblements, the law gives a free entry, egress, and regress, as much as is necessary, in order to cut and carry them away (k). But the emblements do not give a title to exclusive occupation; and it is doubted in Plowden's queries (l), whether the executors of a lessee for life shall not pay rent for the land till the corn is ripe: though, perhaps, says that author, the executors of tenant in fee-simple shall have the corn without paying for it.

Under the Agricultural Holdings Act, 1883, the executors of a landlord tenant for life, who have been compelled under the act to pay compensation for improvements to an outgoing tenant who had claimed compensation, and whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they have so paid (ll).

Entry, egress, and regress, to take the emblements.

Right of executors of tenant for life to charge holding with compensation paid under 46 & 47 Vict. c. 61 s. 29.

(i) Co. Lit. 55, b.

(l) 239th Query.

(k) Co. Lit. 56, a. See Hayling v. Okey, 8 Exch. 531, 545.

(ll) Gough v. Gough [1891], 2 Q. B. 665.

† *Trees, timber, &c.* In Alabama, the statute gives an administrator the right to sue in trespass for cutting and removing timber even though the heir may have a like action. *Leatherwood v. Sullivan*, 81 Ala. 458. As to nursery trees and shrubs, see *Maples v. Milton*, 31 Conn. 598; *Price v. Brayton*, 19 Iowa 309. In both of these cases, the question was between mortgagor and mortgagee of the land. Growing grass and fruit do not go to the administrator, but to the heir, *Kain v. Fisher*, 6 N. Y. 597; or devisee, *Evans v. Inglehart*, 6 Gill & J. 171. In like manner, the devisee takes the unharvested crops. *Dennett v. Hopkinson*, 63 Me. 350; *Kidwell v. Kidwell*, 84 Ind. 224; *Budd v. Hiler*, 3 Dutch. 43; *Grubb's Appeal*, 4 Yeates 23; *Pratte v. Coffman*, 27 Mo. 424;

especially if sown by him. *Fetrow v. Fetrow*, 50 Pa. St. 253. So, the widow in possession before assignment of dower. *Blair v. Murphree*, 81 Ala. 454. But see, as to the executor's right to the crops as against the heir-at-law, *Singleton v. Singleton*, 5 Dana 92; *Waring v. Purcell*, 1 Hill Ch. 193; *Budd v. Hiler*, 3 Dutch. 43; *Green v. Cutright*, *Wright* (Ohio) 738; *Ohio* (1890 R. S. §§ 6026, 6027, 6074), *New York* (2 R. S. 86, § 6; 1889 R. S. 8th ed. p. 2556. § 6, sub-sections 5, 6).

*Emblements.* The life tenant's way-going crop is his personal property and goes to his administrator. *Thornton v. Burch*, 20 Ga. 791. But this only applies to crops sown in his lifetime. *Thompson v. Thompson*, 6 Munf. 514; *Rodman v. Rodman*, 54 Ind. 444.

## SECTION III.

*Of the estate of an executor or administrator in chattels personal inanimate.*

As to chattels personal inanimate: All these pass to the executor and administrator: and although any one of them should be specifically bequeathed to a legatee, it will not vest in him till the executor has assented.

It is necessary to attend to three instances in which the right of the executor or administrator to the chattels personal inanimate of the deceased is barred, to some extent, in favor of certain special claimants: 1. Heirlooms, and things in the nature thereof, in respect of the heir or successor. 2. Fixtures, in respect of the heir or devisee, or in respect of the remainderman or reversioner. 3. Paraphernalia and the like, in respect of the widow.

\*1. *Heirlooms and things in the nature thereof.*†

It is proposed to consider, 1, Heirlooms and things of the same nature, from which the executor or administrator is excluded in favor of the heir or successor. Heirlooms are such goods and personal chattels as shall go *by special custom* to the heir along with the inheritance, and not to the executor or administrator of the last proprietor. The termination "loom" is of Saxon original, in which language it signifies a limb or member: so that heirloom is nothing else but a limb or member of the inheritance (*m*). An heirloom is also called "principalium," a chief or principal, and "hæreditarium" (*n*).

Brooke says (*o*), that heirlooms are those things which have continually gone with the capital messuage, by *custom*, which is the best thing of every sort, as of beds, tables, pots, pans, and such like of dead chattels movable. And Lord Coke

† Heirlooms are practically unknown in American law.

(*m*) 2 Black. Comm. 427. But in *Byng v. Byng*, 10 H. of L. 171, Lord Cranworth, on the authority of Johnson and Webster, said, he believed the more correct explanation of the word is, that it is an old Anglo-Saxon word signifying goods or chattels. Accord-

ing to either derivation, it must mean something which, though not by its own nature heritable, is to have a heritable character impressed on it; an interpretation hardly to be reconciled with an absolute gift to several persons as joint tenants: 10 H. of L. 183.

(*n*) Bro. Discent. pl. 43. Co. Lit. 18, b.

(*o*) Discent. pl. 43.

says (*p*), that heirlooms are due by *custom*, and not by the common law, and that the heir may have an action for them at common law, and shall not sue for them in the Ecclesiastical Court. Also in Spelman's Glossary (*q*), an heirloom is defined to be "*omne utensile robustius quod ab ædibus non facile revellitur, ideoque ex more quorundam locorum ad hæredem transit tanquam membrum hæreditatis.*" And in Les Termes de la Ley (*r*), (a book of great antiquity and accuracy) (*s*), an heirloom is described to be "any piece \*of household stuff (ascun parcell des utensils d'un mease), which, *by the custom* of some countries, having belonged to a house for certain descents, goes with the house (after the death of the owner) unto the heir and not to the executors." Hence it seems to follow, that an heirloom, in the strict sense of the word, <sup>must go to the heir by custom :</sup> can only go to the heir by force of a custom, and that in its nature it is a chattel distinct from the freehold. Yet Blackstone (*t*) says that heirlooms are "generally such things as cannot be taken away without damaging or dismembering the freehold;" and Lord Holt is reported to have said at Nisi Prius, that goods in gross cannot be an heirloom, but they must be things fixed to the freehold, as old tables, benches, &c. (*u*); which proposition is not only adverse to the authorities above cited, with regard to an heirloom being a detached chattel, but is also liable to the objection that the heir would not then take it by custom, but as a thing annexed to the freehold at common law. Moreover, in the report of Lord <sup>seemle, must be of a ponderous nature.</sup> Petre *v.* Heneage, by Lord Raymond (*x*), Lord Holt merely says, "a jewel cannot be an heirloom, but only things ponderous, as carts, tables, &c." (*y*), which agrees with the above definition by Spelman, "*omne utensile robustius.*"

The custom which entitles the heir must be strictly proved (*z*).

The ancient jewels of the Crown are heirlooms, and <sup>Crown jewels.</sup> shall descend to the next successor (*a*).

If a man, says Lord Coke (*b*), be seised of a house, and possessed

(*p*) Co. Lit. 18, *b*.

(*q*) *Voce*, Heirloom.

(*r*) See Treat. on Fixtures, 162.

(*s*) *Per* Bayley, J., in *Hewlins v. Shippam*, 5 B. & C. 229.

(*t*) 2 Comm. 427.

(*u*) Lord Petre *v.* Heneage, 12 Mod. 520.

(*x*) Vol. i. p. 728.

(*y*) And Blackstone, in an earlier part

of his Commentaries, vol. ii. p. 17, says, "an heirloom or implement of furniture, which by custom descends to the heir together with a house, is neither land nor tenements, but a mere movable."

(*z*) 2 Black. Comm. 428.

(*a*) Co. Lit. 18, *b*.

(*b*) Co. Lit. 185, *b*.

of divers heirlooms that, by custom have gone with the house from heir to heir, and by his will deviseth away the heirlooms, this devise is void; for Littleton says, \**"the will takes effect after his death, and by his death the heirlooms, by ancient custom, are vested in the heir, and the law prefers the custom before the devise."* And Lord Coke, in another place observes, that the ancient jewels of the Crown, being heirlooms, are not devisable by testament (c). So Lord Macclesfield in *Tipping v. Tipping* (d), said, "I take it, *bona paraphernalia* are not devisable by the husband from the wife, any more than heirlooms from the heir" (e). Yet, during his life, the owner may sell or dispose of them, as he may of the timber of the estate (f).

Besides heirlooms, properly so called, there are other instances of inanimate personal chattels, which the law gives to the heir, as part of his inheritance, and which may be considered as chattels in the nature of heirlooms. Thus monuments, coat-armor, the sword, pennons, and other ensigns of honor set up in memory of the deceased, shall go to the heir of the deceased, as heirlooms in the manner of an inheritance (g); and it matters not that they are annexed to the freehold, albeit that is in the parson (h). But the property of the shroud and coffin remains in the executors or other person who was at the charge of the funeral: and it may be laid to be theirs, in an indictment for stealing them (i).

\*So though a testator devise all his jewels, &c., to his wife, yet his garter and collar of S. S. shall go to his heir, in the way of heirlooms (k). So where land is held by the tenure

(c) Co. Lit. 18, b.

(d) 1 P. Wms. 730.

(e) See also to the same effect, 2 Black. Comm. 420. Com. Dig. Biens (B.).

(f) 2 Black. Comm. 429. So the king may dispose of the ancient crown jewels by patent: Lord Hastings v. Sir Archibald Douglas, Cro. Car. 344, by Berkeley and Jones.

(g) Corven's Case, 12 Co. 105. See Stubs v. Stubs, 1 Hurlst. & C. 257, as to the heir's right to a grant of arms from the Herald's College.

(h) Co. Lit. 18, b. 1 Gibs. Cod. 544. 2 Black. Comm. 429.

(i) 2 Russell on Crimes, 5th edit. 256. If the executor lays a gravestone on the testator in the church, and sets up coat-armor, and the vicar or parson removes them or carries them away, an action on the case lies for either the executor or the heir: Godb. 200, by Coke: i. e. (*semble*) if they were originally set up with a faculty: Seager v. Bowle, 1 Add. 541: and see Spooner v. Brewster, 3 Bingh. 136.

(k) Earl of Northumberland's Case, Owen, 124.

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of cornage, an ancient horn may go along with the inheritance, as an heirloom (*l*).

In the case of *Upton v. Lord Ferrers* (*m*), a question was raised, whether the executor, or the heir-at-law of a peer of Parliament having succeeded to the peerage, was entitled to the Journals of the House of Lords, which are delivered to peers; The Master of the Rolls (Sir R. P. Arden) did not determine the point; but intimated an opinion that the heir-at-law was entitled, observing, that a bishop gives a receipt for the journals of his see: and upon the death of a peer, the subsequent volumes only are delivered to the next lord.

Charters or deeds relating to the inheritance, are considered so much to savor of the realty, that the law for some purposes does not account them to be chattels (*n*), but provides, that they shall follow the land to which they relate, and shall vest in the heir, as incident to the estate, to the exclusion of the executor or administrator (*o*). So far has the doctrine of charters and other written assurances concerning the realty not being chattels been carried, that larceny could not have been committed of them at common law, the taking of them being considered, (as of other things which were part of the freehold), merely as a trespass and not a felony (*p*). The very box or chest which has usually been employed for keeping them partakes of their nature, and goes <sup>so of the box in which they are kept:</sup> to the heir, and not to the executor (*q*); and of that also, at common law, no larceny could have been committed (*r*). Some writers have taken a difference, that the executor shall have the chest unless it be shut or sealed (*s*). But the weight of authorities seems

(*l*) *Pusey v. Pusey*, 1 Vern. 273.

(*m*) 5 Ves. 801.

(*n*) By a grant of *omnia bona et catta*, charters concerning the land shall not pass: Perk. s. 115. Touchst. 97, 98.

(*o*) Godolph. Pt. 2, c. 14, s. 1. Wentw. Off. Ex. 153, 14th edition. Co. Lit. 6, *a*, where Lord Coke calls them the *sinews* of the land.

(*p*) 2 Russell on Crimes, 141. But this defect of the common law was remedied by stat. 7 & 8 Geo. IV. c. 29, s. 23, which, however, has been repealed: and now by stat. 24 & 25 Vict.

c. 97, s. 28, whosoever shall steal or for any fraudulent purpose destroy, cancel, obliterate or conceal the whole or any part of any document of title to lands, shall be guilty of felony: 2 Russell, 5th edit. 220.

(*q*) Godolph. Pt. 2, c. 14, s. 1. Wentw. Off. Ex. 156, 14th edit. Com. Dig. Biens (B.).

(*r*) An action will, however, lie at common law for detinue or trover of title deeds.

(*s*) Swinb. Pt. 6, s. 7, pl. 5.

against any such distinction, and in favor of the heir's general right (*t*).

But this rule applies to those deeds and writings only which relate to the freehold and inheritance; for such as regard terms for years, goods, chattels, or debts, belong to the executor or administrator (*u*).

Personal property may also be devised or limited in strict settlement to one for life, with remainder to sons and daughters in tail, so as to be transmissible like heirlooms (*x*).

Thus a testator may devise or limit in strict settlement an estate and capital mansion, together with personal property, as the plate, pictures, library, furniture, &c., therein, such plate, &c. to be enjoyed, together with the house and estate, unalienable by the devisees in succession, as far as the law will allow. But the chattels, whether trustees be interposed or not, will be the absolute property of the first person seised in tail, and on his death devolve on his executors or administrators; and be conformable to all the other rules concerning executory devisees, so that the property cannot be rendered unalienable longer than lives in being and twenty-one years afterward (*y*).

If the chattels, therefore, which are intended to go as \*heirlooms, are merely subject to the same limitations as the real estate limited in strict settlement, they will vest absolutely in the first tenant in tail, though he should die within an hour after his birth, and will go to his personal representative: Hence as the real estate in that event passes over to the next remainderman, a separation between the two properties ensues. It has been a subject of much discussion whether this will be obviated by a mere direction that the chattels shall go together with the land, "for so long a time as the rules of law and equity will permit." But the point, it should seem, must now be considered as settled, that this must be treated as a direct and not as an executory gift, and that, consequently, the absolute interest in the chattels will nevertheless vest in the first tenant in tail (*z*). And

(*t*) Godolph. Pt. 2, c. 14, s. 1. Wentw. Off. Ex. 156.

(*u*) Wentw. Off. Ex. 153, 14th edit. Bac. Abr. tit. Exors. (H. 3). If the writings of an estate are pawned or pledged for money, they are considered as chattels in the hands of the creditor, and in case of his decease, they will go to his personal representatives as the

party entitled to the benefit accruing from the loan: Touchst. 469.

(*x*) Co. Lit. 18, *b*, note (109), by Hargrave.

(*y*) *Ibid.* Carr. v. Lord Errol, 14 Ves. 478.

(*z*) Scarsdale v. Curzon, 1 John & Hem. 40. Harrington v. Harrington, L. R., 3 Ch. 564; L. R., 5 H. L. 87.

accordingly in the case of *Rowland v. Morgan* (a), it was ruled by Sir James Wigram, V.-C., and afterward Lord Cottenham, C., on appeal that a direction annexed to a bequest of chattels that they shall go as heirlooms, although accompanied by a direction to the executors to make an inventory of them, does not render such bequest executory, or give to a court of equity any power to modify the legal effect of the bequest. In order, therefore, to prevent the separation, it is usual, after subjecting the chattels to the same limitations as the freehold which they are to accompany as heirlooms, to add a declaration, that they shall not vest absolutely in the tenant in tail by purchase until twenty-one, or death under that age, leaving issue inheritable under the entail (b).

\*Lord Eldon, in *Clarke v. Lord Ormonde* (c), said that heirlooms are a kind of property that are rather favorites of the court:—and that, although no testator can in any way exempt any part of his personal estate from applica-  
Executors ought not to apply them unnecessarily to the payment of debts.  
 bility to the payment of his debts, nor can he put into the hands of his executors the means of defending themselves at law; yet where a testator makes a will, providing that certain portions of his effects shall be treated as heirlooms, it is the duty of the executors, as far as possible, to preserve those parts of his property, and unless compelled, they ought not to apply them to the payment of debts (d).

In the case of a corporation sole, as a bishop or parson, the general rule is, that chattels cannot go in succession: and there has already been occasion to point out a strong instance of this doctrine, *viz.*, that though a lease for years be made to a bishop and *his successors*, yet it will go to  
Chattels which go to the successor of a corporation sole in the manner of heirlooms.

*Christie v. Gosling*, L. R., 1 H. L. 279.  
*Holmesdale v. West*, L. R., 3 Eq. 474.  
*Holloway v. Webber*, L. R., 6 Eq. 523.  
*Shelley v. Shelley*, L. R., 6 Eq. 540.  
*Re Exmouth*, 23 C. D. 158. *Re Cresswell*, 24 C. D. 102. *Re Johnston*, 26 C. D. 538. *Re Cornwallis*, 32 C. D. 388. In the case of *Shelley v. Shelley*, *ubi sup.*, it was held by Wood, V.-C., that the objection, if any, to limiting personal estate as heirlooms where there is no real estate to guide the limitations does not apply to the case of family jewels.

(a) 6 Hare, 463.

(b) 2 Jarman on Wills, 548, 3rd edit.  
*Boydell v. Golightly*, 14 Sim. 346, *per* Shadwell, V.-C. See also *Potts v. Potts*, 1 H. of L. 671, for an example of a limitation of chattels under which they do not vest in the tenant in tail on his birth. See further the observations of Wood, V.-C., on this case in his judgment in *Lord Scarsdale v. Curzon* (*ubi supra*), where all the previous cases are fully and most ably reviewed.

(c) 1 Jacob, 114, 115.

(d) 1 Jacob, 108.

his executors (*e*). But there are some exceptions (not only in cases of choses in action, which will hereafter be examined, but) in cases of chattels personal, which shall go to the successor of a corporation sole in the manner of heirlooms. Thus it has been held, that the ornaments of the chapel of a preceding bishop belong to the succeeding bishop, and are merely in succession (*f*). So if an incumbent enter upon a parsonage house in which are hangings, grates, iron backs to chimneys, and such like, not put up there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but they shall continue in the nature of heirlooms; but if the last incumbent fixed them there only for his own convenience, it seems they shall be deemed as furniture, or household goods, and shall go to his executor (*g*).

(*e*) *Ante*, p. \*597.

(*g*) 4 Burn, E. L. 304, 8th edit.

(*f*) *Corven's Case*, 12 Co. 105, 106

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2. *Fixtures.*†

II. Fixtures, from which the executor or administrator is excluded in respect of the heir or devisee, or in respect of the remainderman or reversioner. When personal inanimate chattels are affixed to the freehold, they are usually denominated fixtures (*h*); and the questions concerning them, which form the present subject of inquiry, have arisen in the nature of exception to the general rule of law with regard to chattels in their condition, *viz.*, *quicquid plantatur solo, solo cedit, i. e.*, whatever is affixed to the realty is thereby made parcel of it, and partakes of all its incidents and properties (*i*).

Fixtures.

General rule, *quicquid plantatur solo, solo cedit.*

It will perhaps be convenient to consider in the first place, what is such an annexation to the freehold as will bring a chattel within the general rule: and then to proceed to inquire, in what cases the rule is relaxed with respect to an executor or administrator.—In order to constitute such an annexation it is necessary that the article should be let into or united to the land, or to substances previously connected \*therewith.† It is not enough that it has been laid upon the land, and brought into contact with it: The rule requires something more than mere juxtaposition; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground (*k*). As an illustration may be mentioned the case of *Culling v. Tuffnall* (*l*) before Treby, C. J., at Nisi Prius, where it was holden that the tenant, who

What is an annexation of a chattel to the freehold:

† See American note at end of this Sub-section at p. \*659.

(*h*) The word “fixture” is here used to convey the idea simply of annexation to the freehold: which sense of the term is the most easy of adaptation to the present treatise. For general purposes, the definition given in the work of Messrs. Amos and Ferard (3rd edit. by Ferard & Roberts, p. 2) is certainly the most convenient and scientific, *viz.*, “fixtures are those personal chattels which have been annexed to land and which may be afterward severed and removed by the party who has annexed them against the will of the owner of the freehold.” The general question of

the origin and extent of the doctrine of “Fixtures” was fully discussed in the case of *Bishop v. Elliott*, 10 Exch. 496, S. C. in Cam. Scacc. 11 Exch. 119.

(*i*) See the judgment of Lord Hardwicke, C., in *Dudley v. Warde*, Ambl. 113, and of Lord Ellenborough, in *Elwes v. Maw*, 3 East, 51. S. C. 2 Smith’s Leading Cases. This rule is always open to variation by agreement of parties: *Wood v. Hewett*, 8 Q. B. 913.

† See American note at end of this Sub-section at p. \*659.

(*k*) Amos & Ferard on Fixtures, 3rd edit. p. 3. *Wilde v. Waters*, 16 C. B. 637.

(*l*) Bull. N. P. 34.

had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not *fixed it in or to the ground*, might take it away at the end of his term (*m*). On the other hand, where the tenant had erected a veranda, the lower part of which was attached to posts which were fixed in the ground, Abbot, J., held that the tenant could not remove any part of it (*n*). In the case of *R. v. Londonthorpe* (*o*), where a tenant had built on part of the land a post windmill constructed upon cross traces, laid upon brick pillars, but not attached or affixed thereto; the court held, that the windmill was a mere chattel, and not to be considered as connected with the land (*p*). And generally, where the buildings are \*not let into the soil, but merely rest upon blocks or pattens, they continue mere chattels (*q*). It is obvious that, in similar cases, where it is a conclusion of fact that the connection with the soil does not amount to an actual annexation, the property continues in every respect a mere chattel, and will pass as such to the executors and administrators.

Moreover, the object and purpose of the annexation must be

(*m*) In *Buller*, it is said to have been holden, that he might do so by the custom of the country; but Lord Ellenborough, in adverting to the case (in *Elwes v. Maw*, 3 East, 55), observes, that the tenant might have done so without any custom; for the terms of the statement exclude the things from being considered as fixtures.

(*n*) *Penry v. Brown*, 2 Stark. N. P. C. 403. In this case the tenant had covenanted to repair and keep in repair the premises, and all the erections, buildings, and improvements, which might be erected thereon during the terms and yield up the same in good and sufficient repair.

(*o*) 6 T. R. 377.

(*p*) So in *R. v. Otley*, Suffolk, 1 B. & A. 161, a pauper rented a windmill, and a brick-built cottage and garden, at the rent of 30*l.* per annum for six years, and during that time held and occupied the same, and actually paid that rent, and was rated to and paid the rates for the relief of the poor: The cottage and garden, with the mill, were together

of more than the annual value of 10*l.*, but exclusive of the mill, they were not of that annual value: The mill was of wood, and had a foundation of brick; but the woodwork was not inserted in the brick foundation, but rested upon it by its own weight alone: No part of the machinery of the mill touched the ground or any part of the foundation: It was held that the windmill, not being affixed to the freehold, nor to anything connected with it, was not parcel of a tenement, and, consequently, that the pauper gained no settlement. Again in *Wansbrough v. Maton*, 4 A. & E. 884, it was held that a tenant was entitled, at the expiration of his term, to remove a barn which he had erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by its weight alone; and that he might maintain trover for such a barn. See also *Wiltshire v. Cottrell*, 1 E. & B. 674.

(*q*) *Naylor v. Collinge*, 1 Taunt. 21.

regarded: For if a chattel be fixed to a building, merely for the more complete enjoyment and use of it *as a chattel*, it still, it should seem, remains a chattel, notwithstanding it is annexed to the freehold; and is never a part of it, any more than a carpet which is attached to the floor by nails for the purpose of keeping it stretched out: And on this principle, it was held, that cotton spinning machines, screwed into, and fixed firmly to, the floor, were chattels and distrainable for rent (*r*).

But there may be a sort of constructive annexation of a chattel not actually affixed to the freehold: as if a man has a mill, and the miller takes a stone out of the mill, to the constructive annexation. \*intent to pick it, to grind the better; although it is actually severed from the mill, yet it remains parcel of the mill, and will go to the heir: The same law of keys, and (in some sort) of doors, windows, rings, &c., which, although they are distinct things, shall go with the inheritance of the house (*s*). So the sails of a windmill are parcel of the freehold, and shall go to the heir, and not to the executor (*t*).

It has been laid down, that dung in a heap is a chattel, and goes to the executors; but if it lies scattered upon the ground, so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold (*u*).

The second branch of the inquiry respecting fixtures remains to be investigated, *viz.*, when chattels personal have been affixed to the freehold, and have thus lost their chattel character, under what circumstances the executor or administrator of the person who affixed them is entitled to sever them, and reduce them again to a state of personalty, so as to form part of the estate of the personal representative.

1. The subject will first be considered as between the executor or administrator, and the heir of tenant in fee. In this case, the old rule of law above mentioned, "*quicquid plantatur solo, solo cedit*," still obtains with some rigor

In what cases executors are entitled to sever fixtures:

1. Right of the executor of tenant in fee to fixtures as against the heir.

(*r*) *Hellawell v. Eastwood*, 6 Exch. 295. *Elliott v. Bishop*, 10 Exch. 508, 520. For cases in which chattels annexed to the freehold passed with the freehold, see *Longbottom v. Berry*, L. R., 5 Q. B. 123. *Turner v. Cameron*, L. R., 5 Q. B. 306. *Mather v. Fraser*, 2 Kay & J. 549. *Walmsley v. Milne*, 7 C. B., N. S. 115. *Climie v. Wood*, L. R., 4 Ex. 328. *Ex parte Astbury*, L.

R., 4 Ch. 630. *Sheffield & South Yorkshire Permanent Benefit Building Society v. Harrison*, 15 Q. B. D. 358.

(*s*) *Walmsley v. Milne*, 7 C. B., N. S. 138, *per* Crowder, J.

(*t*) *R. v. Crosse*, 1 Sid. 207, by Clench and Fenner, Justices.

(*u*) *Yearworth v. Pierce*, Aleyn, 32. See *Higgon v. Mortimer*, 5 C. & P. 616.

in favor of the inheritance, and against the right to disannex therefrom, and consider as a personal chattel, anything which has been affixed thereto; whereas, in the case as between the executors of tenant for life or in tail, and the remainderman or reversioner, the right to the fixtures is considered more favorably for the executors; and in the case as between landlord and tenant (which, although foreign to this treatise, it will be necessary in some measure to contemplate) still greater latitude and indulgence has been allowed in favor of the tenant (*x*). It must, therefore, \*carefully be observed, that an instance of the right allowed to a tenant as against his landlord, is no authority for its allowance to an executor as against the heir, or the remainderman or reversioner; nor does it follow, because the executor of tenant for life or in tail is entitled to certain fixtures, that the executor of tenant in fee will also be entitled.

The rule as anciently established, between the executor and heir of tenant in fee seems to have had no exceptions; what-  
Old rule between the executor and heir of tenant in fee. ever was affixed to the freehold descended to the heir as parcel of the inheritance. "The law is the same," says Godolphin (*y*), "*concerning all things fastened to the freehold, or to the ground by mortar or stone, as tables, dormants, leads, mangers, millstones, anvils, doors, keys, glass windows, and the like; for none of these be chattels, but parcels of the freehold, and, therefore, belonging to the heir, not the executor.*" So it is said in Touchstone (*z*), "the incidents of a house, as glass windows annexed with nails or otherwise to the windows, the wainscot fixed by nails, screws, or irons put through the posts or walls, tables, dormants, furnaces of lead and brass, and vats in a brew and dyehouse standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house (although fastened to no wall), a copper or lead, fixed to the house, the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house." So it is laid down in Noy's Maxims (*a*), "all chattels shall go to the executors as vats and furnaces fixed in a brewhouse or dyehouse by the lessee; but if they be fixed by *tenant in fee*, the heir shall have them" (*b*).

(*x*) *Elwes v. Maw*, 3 East, 51, in Lord Ellenborough's judgment. See also Lord Kenyon's judgment in *Penton v. Robart*, 2 East, 90, 91.

(*y*) Pt. 2, c. 14, s. 1.

(*z*) P. 470.

(*a*) P. 51.

(*b*) See also Swinb. Pt. 6, s. 7, pl. 5. Wentw. Off. Ex. 149, 150, 151, 14th edit. Herlakenden's Case, 4 Co. 64, a.



But in modern times some relaxations of the rule have \*obtained; which may be considered, 1st, with respect to fixtures put up by the tenant in fee for the purposes of trade; and 2ndly, with respect to fixtures put up by him for ornament or domestic convenience. As to trade fixtures, the first instance of departure from the old rigor was in the case of a cider mill, before C. B. Comyns, at the assizes, at Worcester, where, upon an action of trover brought by the executor against the heir, the cider mill, though deep in the ground, and certainly affixed to the freehold, was held to be personal estate, and the jury were directed to find for the executor (c). This, in fact, is the only expressly decided case in favor of the right of the executor of tenant in fee to trade fixtures: although Lord Hardwicke, in *Lawton v. Lawton* (d), alluding to fire engines set up in a colliery, said, "I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir:" and Lord Ellenborough, in his judgment in *Elwes v. Maw* (e), recognizes the principle of C. B. Comyn's decision. Its authority, however, has been denied in the House of Lords in *Fisher v. Dixon* (f); unless on the supposition that the cider mill in question was not annexed to the freehold (which it has always been assumed to have been in all the previous judicial discussions of the case).—The case of *Fisher v. Dixon* has also negatived the doubt suggested by the *dictum* of Lord Hardwicke above cited: For it was there held by the House of Lords, that machinery affixed to the freehold by the owner in fee of certain land (purchased by himself) consisting of steam engines, rails, and other fixtures, erected and used by him in the course of trade, for the purpose of working coal and iron mines in the land, went to his heir as part of his real estate. And \*several learned peers laid down that the principle on which a departure has been made from the old rule in favor of trade has no application to a case between the heir and the executor (g).

Relaxations with respect to executor's right, as against the heir, to trade fixtures.

This decision is in accordance with that of *Lawton v. Salmon* (h).

(c) *Ex relatione* Wilbraham, in 3 Atk. 14, *Lawton v. Lawton*. The decision was recognized by Lord Hardwicke in that case, and in *Lord Dudley v. Lord Warde*, Amb. 114, and by Lord Ellenborough in *Elwes v. Maw*, 3 East, 54.

(d) 3 Atk. 15.

(e) 3 East, 54.

(f) 12 Cl. & F. 312, 325, 329, 331.

(g) See *post*, p. \*653. *Mather v. Fraser*, 2 K. and J. 536. *Walmsley v. Milne*, 7 C. B., N. S. 115. *Bain v. Brand*, 1 App. Cas. 762.

(h) 1 H. Black. 259, in a note to *Fitzherbert v. Shaw*.

In *Trappes v. Harter* (i), the question was, whether the machinery, which was the subject of the action, passed to the mortgagee under a mortgage deed, or vested in the assignees under a commission of bankruptcy: Lord Lyndhurst, C. B., in delivering the judgment of the court, observed that it was clear, as between landlord and tenant, it might be removed by the tenant, if put there by him: as between heir and executor, it would pass to the executor. His lordship proceeded to observe, that, applying the authorities of *Lawton v. Lawton* and *Lawton v. Salmon*, to the present case, the court thought that this machinery, erected for the purposes of trade, in a neighborhood where machinery of such description was commonly removed, and which was capable of removal without injury to the freehold, was not to be considered as belonging to the inheritance, but as part of the personal estate.

It seems to have been held, that the custom of the country may extend the rights of the executor beyond the rules above stated (k).

As to the right of the executor of tenant in fee to fixtures set up for ornament or domestic convenience, the first infringement of the strict rule in favor of the heir, with respect to fixtures of this sort, appears to be in *Squire v. Mayer*, Trin. Term, 1701, where it was held by Lord Keeper Wright, that a furnace, though fixed to the freehold and purchased with the house, and also the hangings nailed \*to the walls, should go to the executor and not to the heir; and so determined, says the report, contrary to *Herlakenden's Case* (l).

The next case on the subject was *Cave v. Cave* (m), decided by the same judge, in Trin. Term. 1705. The Lord Keeper was there of opinion, that "although pictures and pier-glasses: glasses, generally speaking, are part of the personal estate, yet, if put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir: The house ought not to come to the heir maimed and disfigured: *Herlakenden's Case*: Wainscot put up with screws shall remain with the freehold."

But in *Beck v. Rebow* (n), determined in the subsequent year, a bill was filed in chancery, upon a covenant made by a testator, to convey a house *and all things affixed to the freehold thereof*: The bill alleged

(i) 2 Crompt. and Mees. 153.

(l) 2 Eq. Cas. Abr. 430.

(k) Viner's Abr. tit. Executors (U.).

(m) 2 Vern. 508.

74. See also *Davis v. Jones*, 2 B. & A. 165.

(n) 1 P. Wms. 94.

that the defendant, the devisee in trust of the house, had taken away, among other things, the pier-glasses, hangings, and chimney-glasses; and it was urged for the plaintiff, that these hangings, pier-glasses, and chimney-glasses, were as wainscot, being fixed with nails and screws to the freehold: that there was no wainscot under them; and as they would have gone to the heir and not the executor, *a fortiori*, they would go to the plaintiff who was as a purchaser of the house; and *Cave v. Cave* was cited: But Lord Keeper Cowper was of a different opinion; saying that hangings and looking-glasses were only matters of ornament and furniture, and not to be taken as part of the house or freehold (o).

Perhaps a deduction may be made from these cases, which may reconcile their apparent discrepancies, *viz.*, that, generally, pictures and looking-glasses shall go to the executor \*as personal estate, although strictly speaking, they may be so fixed by nails and screws to the walls as to be attached to the freehold:—but that if they are *let into the wainscot*, so as to take the place of panels of it, they shall go to the heir; because they could not be removed by the executor without disfiguring the house. The true reason, why they have been held to be removable, probably is that, on the principle already stated (*ante*, p. \*642), they were never part of the freehold.

Lord Hardwicke in *Lord. Dudley v. Lord Warde* (p), speaking of marble chimney-pieces, says, that as between landlord and tenant, they are removable by the latter, if erected <sup>ornamental chimney-pieces:</sup> by him, but this does not hold between the heir and the executor. They are removable, it should seem, not because they are marble, but because they are ornamental (q).

The cases of relaxation were followed by *Harvey v. Harvey* (r), in which it was held by C. J. Lee, at Nisi Prius, in trover <sup>tapestry:</sup> by an executor against the heir, that hangings, tapestry, <sup>iron backs to</sup> and iron backs to chimneys, belonged to the executor, <sup>chimneys:</sup> who recovered accordingly against the heir.

The inference drawn from these decisions, by a writer of considerable accuracy (s), is this: The law seems now to be held not so strict as formerly, and if these things can <sup>tables, ovens, jacks, clock-cases.</sup>

(o) In the case of *Birch v. Dawson*, 2 Ad. & Ell. 37, looking-glasses standing on chimney-pieces and nailed to the wall and a bookcase standing on, but not fastened to, brackets and screwed

to the wall, passed under a bequest of “fixtures and fixed furniture.”

(p) Ambl. 113.

(q) *Bishop v. Elliott*, 11 M. & W. 113.

(r) 2 Stra. 1141.

(s) 4 Burn, E. L. 301, 8th edit.

[\*648]

be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them: as tables, although fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock-cases, and such like, although fixed to the freehold by nails or otherwise.

On the other hand, the common law judges have, in several modern instances, incidentally stated the old rule as existing with scarcely any relaxation, between the executor and the heir. Thus, in *Winn v. Ingilby* (*t*), the question was, whether the sheriff had a right to take in execution, under a *fieri facias*, some fixtures, in a house which was \*the plaintiff's

freehold, consisting of set pots, ovens, and ranges: set pots, ovens, ranges:

The court decided that the sheriff had no right: For these were fixtures which would go to the heir, and not the executor, and they were not liable to be taken as goods and chattels under an execution (*u*). So in *Colegrave v. Dias Santos* (*x*), which was trover for articles of three classes; the first admitted to be clearly annexed to

the inheritance:—the second, consisting of stoves, cooling ing coppers, and blinds: stoves, cooling coppers, blinds:

all; Bayley, J., said, "The general rule relating to the right of fixtures, is that between the heir and the executor; and as between them, the second class of articles would belong to the heir." In the same case, Abbott, C. J., said, "The rule of law is most strict between the heir and the executor: According to that rule, the articles in the two first classes would be considered as a parcel of the freehold."

And in *The King v. St. Dunstan* (*y*), where in a settlement case, the question was whether certain fixtures, consisting of a stove, cupboards, and grates, (the stove and grates fixed with brickwork in the chimney-places, and the cupboards standing on the ground, and supported by holdfasts, and all removable without doing any injury to the freehold, except leaving a few marks of nails) were parcel of a demised tenement; the court held that they were, and Bayley, J. said, "Although these fixtures, if they belonged to the tenant, might have been removed by him during the term, yet, as they actually belonged to the landlord, they were parcel of the freehold, and would have gone to his heir, and not to his executor."

From these cases, it should seem, that the law is by no means

(*t*) 5 B. & A. 625.

(*x*) 2 B. & C. 76.

(*u*) See *Mather v. Fraser*, 2 Kay & J.

(*y*) 4 B. & C. 686.

550, *per* Wood, V.-C.

clearly settled respecting the right of the executor of tenant in fee to fixtures set up for ornament or domestic convenience.

2. It is now proper to view the subject of Fixtures as between the executor and the devisee of a tenant in fee.† \*The general rule is, that a devisee shall take the land in the same condition as it would have descended to the heir: and consequently he will be entitled to all articles that are affixed to the land, whether the annexation takes place before, or subsequent to the date of the devise: and as to those fixtures which the executor may claim against the heir, he would be equally entitled against a devisee (2). However, it will be recollected that in the analogous case of Emblements, while the heir is excluded in favor of the executor, the devisee has been held to be entitled to them upon the presumed intention of the testator (a).

2. To what fixtures an executor is entitled as against a devisee of tenant in fee.

There seems no doubt but that if, from the nature or condition of the property devised, it is apparent that the intention was that the fixtures should go along with the freehold to the devisee, they will pass to him, although they are of such a sort that the executor might have been entitled to them as against the heir. Thus, where the devise was of the testator's copyhold estates, which consisted, *inter alia*, of a brewhouse and malthouse, let on lease, together with the plant and utensils, it was held that the plant passed with the brewhouse, on the ground that the testator intended to devise the plant as well as the shell of the brewhouse; that without the plant, the walls would be of no use: and that it was material that the whole was, at the time of making the will, in lease together (b).

† See American note at end of this Sub-section at p. \*659.

(2) Amos & Ferard on Fixtures, 3rd edit., 323.

(a) See *ante*, p. \*627.

(b) Wood v. Gaynon, 1 Ambl. 395. In the case of a conveyance of land by way of mortgage, as well as in that of a conveyance of any other description, all things annexed so as to become fixtures pass with the mortgaged premises as part of the mortgage security, and that though the deed contains no mention of fixtures. The Conveyancing

and Law of Property Act, 1881, sect. 6, enacts that a conveyance of land made after the commencement of the act [1 Jan., 1882], "shall be deemed to include and shall by virtue of the Act operate to convey with the land all . . . fixtures." This was the law as established by decided cases. These cases, which since the above act have become less material (except as to mortgages executed before 1 Jan., 1882) are set out in the 8th edition of this work, p. 746, note (2).

\*3. The subject now proceeds to the right to fixtures of the executor of tenant for life or in tail, as against the reversioner or remainderman:† and the division employed in considering the right of the executor of tenant in fee will here be resorted to: *viz.* 1. The claim to fixtures set up by the particular tenant for purposes of trade. 2. The claim to fixtures set up by him for ornament or domestic convenience.

Since the law is more indulgent in this respect to the executor of the particular tenant, than to the executor of the tenant in fee, it is clear that the authorities already mentioned which are in favor of the executor's right as against the heir are equally so in favor of it as against the remainderman or reversioner. In addition to these, there are cases, with respect to trade fixtures, in which the rights of the personal representatives of the tenant for life or in tail have been expressly considered. In *Lawton v. Lawton (c)*, it was held that a fire engine, set up for the benefit of a colliery, by the tenant for life, should be considered part of his personal estate, and go to his executor for the increase of assets in favor of creditors: And Lord Hardwicke, in giving his judgment, said, "It appears in evidence that, in its own nature, the fire engine is a personal movable chattel, taken either in part, or in gross, before it is put up; but then it has been insisted, that fixing it, in order to make it work, is properly an annexation to the freehold.

"To be sure, in the old cases, they go a great way upon the annexation to the freehold; and so long ago as Henry the Seventh's time, the Courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the Courts have gone upon, of relaxing the strict construction of law, is, that it is for the *benefit of the public* to encourage tenants for life to do what is advantageous to the estate during their term."

\*In another part of his judgment, his lordship observed, "It is true the old rules of law have indeed been relaxed, chiefly between landlord and tenant, and not so frequently between an ancestor and heir-at-law, or tenant for life and remainderman. But, even in these cases it does admit the consideration of *public convenience* for determining the question.

"One reason that weighs with me is, its being a mixed case, between enjoying the profits of the land and carrying on a species of

† See American note at end of this Sub-section at p. \*659. (c) 3 Atk. 13.

trade; and, considering it in this light, it comes very near the instances in brewhouses, &c., of furnaces and coppers."

The judgment concludes with these observations, "It is very well known that little profit can be made of coal mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainderman, when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion."

The decision was followed by the case of Lord Dudley *v.* Lord Warde (*d*), which came before Lord Hardwicke a few years after *Lawton v. Lawton*, and was very similar in its circumstances. A bill was brought by the executor of tenant for life (or tenant in tail, for it did not appear which the testator was) against the remainderman of the estate, to have a fire engine, which had been erected by the testator for a colliery, delivered up as part of the personal estate: and it was adjudged in favor of the executor: And his lordship, in reference to the point decided in *Lawton v. Lawton*, says, "If it is so in the case of a tenant for life, *query*, how would it be in cases of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than tenant for life. In the reason of the thing there is no \*material difference: The determinations have been from a consideration of the benefit of trade. A colliery is not only the enjoyment of the estate, but in part carrying on a trade. The reason of emblements going to the executor of a particular tenant holds here, to encourage agriculture. Suppose a man of indifferent health, he would not erect such an engine, at a vast expense, unless it would go to his family."

There appears to be no other express case in the books upon this part of the subject: but these decisions of Lord Hardwicke have been frequently recognized in the common law courts, *viz.*, by Lord Mansfield, in *Lawton v. Salmon* (*e*), by Lord Kenyon, in *Penton v. Robart* (*f*), and by Lord Ellenborough, in *Elwes v. Maw* (*g*).

It will be observed, that none of the arguments employed by Lord Hardwicke respecting the benefit of the public, and the encouragement of trade, appear to have any application to the question as between heir and executor, where the owner of the fee, being the absolute owner of the land as well as the personal property which has been affixed to the freehold for the purposes of his trade, may dispose of the one as well as the other as he shall think fit for the benefit of his

(*d*) 1 Ambl. 113.

(*f*) 2 East, 91.

(*e*) 1 H. Black. 260, *in notis*.

(*g*) 3 East, 54.

family, and where, consequently, it is not at all necessary, in order to encourage the erection of such works, to make any departure, in his favor, from the old rule of law (*h*).

With respect to the right of the executor of tenant for life, as against the remainderman or reversioner, to fixtures set up for ornament, or domestic convenience; it is somewhat singular, that not a single case is to be found in the books relating expressly to this subject. Nevertheless, upon the ground that the law is more favorable in this respect to the executor of tenant for life than to the executor of tenant in fee, it is clear, *a fortiori*, that all the cases which support the right of the latter to hangings, pier-glasses, tapestry, pictures, iron backs to chimneys, furnaces, grates, &c., are express authorities in favor of the right of the former; and further, that the strong expressions of judges in favor of the heir, which, in the recent cases heretofore mentioned, somewhat weaken the effect of the determinations in favor of the claims of the executor of tenant in fee, do not affect them with relation to those of the executor of tenant for life or in tail.

4. With respect to the decisions between landlord and tenant,† it has been so repeatedly laid down by the highest authorities that the right to fixtures is considered more favorably to the tenant, as against his landlord, than to the executors of tenant for life, or in tail (*i*), as against the remainderman or reversioner, that it would be wrong to conclude that a fixture set up for ornament or domestic convenience, by a tenant for life, &c., may be claimed as personalty by his executor, from the fact that it has been decided to be a removable fixture, as between landlord and tenant. However, it is asserted in a work, in which this subject has been very fully and ably treated (*k*), that it cannot, upon authority, be affirmed of any specific article, that it is removable as between landlord and tenant, but that it is *not* removable as between the tenant for life and the remainderman. And Lord Hardwicke seems to treat the two classes much in the same light, considering their claims to be

(*h*) See the observations of Lord Cottenham in *Fisher v. Dixon*, 12 Cl. & F. 328, of Lord Campbell, *ib.* 330, 331, and of Lord Brougham, *ibid.* 332. See also the able and elaborate judgment of Wood, V.-C., in *Mather v. Fraser*, 2 Kay & J. 536; and *Walmsley v. Milne*, 7 C. B., N. S. 115.

† See American note at end of this Sub-section at p.\*659.

(*i*) *Penton v. Robart*, 2 East, 91. *Elwes v. Maw*, 2 East, 51. *Grymes v. Boweren*, 6 Bingh. 439, 440.

(*k*) *Amos & Ferard on Fixtures*, 3rd edit., 175.



founded on similar reasons: And although he says, that the case of a tenant for life is not quite so strong as that of a common tenant, yet many of his arguments are drawn from a close analogy between them (l).

\*But this is perfectly clear with regard to the decisions, as to fixtures, between landlord and tenant, that wherever it has been decided that fixtures are not removable by a common tenant, *a fortiori*, they are not removable by the executor of tenant for life or in tail, or the executor of tenant in fee. It will, therefore, be useful to point out some cases where the decisions have been against the right of removal by a common tenant.

It was decided in a celebrated case, after much deliberation, that the privilege established in favor of tenants in trade, does not extend to agricultural tenants, so as to entitle them to remove things which they have erected for the purposes of husbandry. In that case it was held that a tenant could not remove a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, nor fold-yard wall, erected for the use of his farm, *even though he left the premises exactly in the same state as he found them on his entry* (m). Hence it followed that the executors of tenants for life or in tail, or in fee, were not entitled to remove, as trade fixtures, things erected for the purposes of agriculture.

Executors are in no case entitled to fixtures set up for agriculture.

But by the stat. 14 & 15 Vict. c. 25, s. 3, it is enacted that if any tenant shall with the consent in writing of the landlord, erect any farm building or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture, they shall be the property of the tenant and removable by him after giving the landlord a month's notice in writing, unless the landlord elects to purchase them, in which case the value shall be ascertained by arbitration, as prescribed by the act.

Stat. 14 & 15 Vict. c. 25, s. 3.

And this provision has been further extended to cases to which the Agricultural Holdings Acts, 1875 and 1883, respectively apply. The language of these acts [38 & 39 Vict. c. 92, s. 53, and 46 & 47 Vict. c. 61, s. 34] is almost identical, and by them it is provided, that "where after the commencement of this Act a tenant affixes to his holding any \*engine, machinery, *fencing*, or other fixture, or *erects any building* (n), for which he is not

Stats. 38 & 39 Vict. c. 92, s. 53, and 46 & 47 Vict. c. 61, s. 34.

(l) *Ibid.*

(m) *Elwes v. Maw*, 3 East, 28.

(n) The words in italics are those

which appear in sect. 34 of the Agricultural Holdings Act, 1883, but which do not appear in the corresponding section

[\*655]

[\*656]

under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant *before or within a reasonable time after the termination of the tenancy.*" Then follow certain provisos as to (1) payment of all rent due before removal: (2) the avoidance of or making good damage: (3) the giving of one month's previous notice in writing to the landlord: and (4) the option in the landlord to purchase such fixtures.

In the act of 1875 (sect. 53), there was also a proviso that "nothing in such section shall apply to a steam engine erected by the tenant if before erecting it the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord by notice in writing given to the tenant has objected to the erection thereof."

This proviso does not appear in the act of 1883.

In *Buckland v. Butterfield* (o), a question arose whether a tenant for years had a right to remove a conservatory and pinery: The conservatory, which had been purchased by the tenant and brought from a distance, was by him erected on a brick foundation, fifteen inches deep; upon that was bedded a sill, over which was framework, covered with slate; the framework was eight or nine feet high at the end, and about two in front: This conservatory was attached to the dwelling house by eight cantilevers let nine inches into the wall, which cantilevers supported the rafters of the conservatory: Resting on the cantilevers was a balcony with iron rails: The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlor chimney by a flue: Two windows were opened from the dwelling house into the conservatory, one out of the dining room, another out of the library: A folding door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house to which it had been attached became exposed to the weather: Surveyors who were called, stated that the house was worth 50*l.* a year less after the conservatory and pinery had been removed: Dallas, C. J., in delivering the judgment of the Court of Common Pleas, said, "Allowing that matters of ornament may or may not be removable, and that whether they are so or not, must depend on the particular case, we are of opinion that

(53) of the act of 1875, which act the affixed before 1 Jan., 1884. (Sect. 62, *d.*)  
 act of 1883 repeals, reserving, how-  
 ever, any right in respect of fixtures (o) 2 Brod. & Bingh. 54.

no case has extended the right to remove nearly so far as it would be extended, if such right were to be established in the present instance ; and we agree with the learned judge who tried the cause (Mr. Baron Graham), in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste" (*p*). This case, therefore, is an authority that the executors of tenant for life, or in tail, or in fee, are not entitled to remove a conservatory such as described above (*q*).

In the case of *Grymes v. Boweren* (*r*), the question was \*respecting a tenant's right to remove a pump which he had erected Pumps. on the demised premises at his own expense : It was attached to a stout perpendicular plank : this plank rested on the ground at one end, and at the other was fastened by an iron bolt or pin to an adjacent wall, from which it was distant about four inches : The pin, which had a head at one end, and a screw at the other, passed entirely through the wall : The tube of the pump passed through a brick flooring into a well beneath : This well had originally been open, but the tenant had arched it over when he erected the pump : And in withdrawing the tube, four or five of the floor bricks were displaced, but the iron pin which attached the perpendicular plank to the wall was left in the wall when the plank was removed : Under these circumstances the Court of Common Pleas was of opinion, that the pump was removable as a tenant's fixture.

It may be observed that it has been decided, that a tenant must use his privilege in removing fixtures, *during the continuance of his term*: for if he forbears to do so within this The fixtures must be removed before the tenancy expires : period the law presumes that he voluntarily relinquishes his claim in favor of his landlord (*s*). Hence it follows, that if a

\*(*p*) See also *Accord. Jenkins v. Gething*, 2 Johns. and H. 520 ; in which case, Wood, V.-C., held that though greenhouses could not be removed, nor the boiler put into the masonry, the pipes connected with screws were removable. It is expressly said by Lord Kenyon, in *Penton v. Robart*, 2 East, 90, that where hothouses and greenhouses, and the like, have been put up by nurserymen and gardeners at their own expense, such things might be taken away at the end of the term : but Lord Ellenborough, in *Elwes v. Maw*, speaking of that *dictum*, said, that there

certainly existed no decided case, and he believed, no recognized opinion or practice on either side of Westminster Hall, to warrant such an extension : And Dallas, C. J., in the above case of *Buckland v. Butterfield*, seems to approve Lord Ellenborough's observation.

(*q*) See also *West v. Blakeway*, 2 M. & G. 729.

(*r*) 6 Bingh. 437.

(*s*) *Lyde v. Russell*, 1 B. & A. 394. The tenant's right has been defined to continue during his original term, and such further period of possession by

tenant from year to year of a house dies, and his executor or administrator gives a notice to quit, he should take care to \*remove the fixtures, or dispose of the right of the deceased to them, before such notice expires. In the case of a tenant for life, or in tail, his executor must, it should seem, remove the fixtures to which he is entitled within a reasonable time after the death of the testator.

In conclusion of the subject of the right of executors to fixtures generally, it may be observed, that, after all, the question whether fixtures be removable or not in a great measure depends on the individual circumstances of each particular case, with reference to the nature of the article, and the mode in which it is fixed (*t*).

him, as he holds the premises under a right still to consider himself a tenant : *Mackintosh v. Trotter*, 3 M. & W. 186. In the absence of special contract, tenant's fixtures cannot be removed after the termination of the lease, and this rule applies, whether the lease determines by effluxion of time, or by re-entry on forfeiture. *Pugh v. Arton*, L. R., 8 Eq. 626.

In cases within the Agricultural Holdings Act, 1883, a tenant has a *reasonable time after the termination of the tenancy* to remove any engine, machinery, fenc-

ing, or other fixture affixed by him or any building erected by him, if he is not under the act, or otherwise, entitled to compensation therefor, or if he has not affixed or erected such fixture, or building, in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord.

(*t*) By *Tindal, C. J.*, in *Grymes v. Boweren*, 6 Bingh. 439. See also *Avery v. Cheslyn*, 3 A. & E. 75. *Walmsley v. Milne*, 7 C. B., N. S. 115.

† *Fixtures*. "Fixtures are things associated with, or more or less essential to, the occupation of lands or houses or either thereof, and with regard to which the question most frequently arising is that of their removability by the person claiming to remove them." *Brown on Fixtures*, p. 2. The tests by which it is determined whether a fixture belongs to the realty or is removable as personalty are : 1. The method of annexation. 2. The intention of the parties. 3. Its adaptability to the use of the freehold ; and 4. The relation of the parties.

The annexation may be either actual or constructive. If the part annexed is essential to the completeness of the property, so that its removal would

injure the premises, it becomes part of the realty. *Friedlander v. Ryder*, 30 Neb. 783. When the article is separated from the premises it goes as personalty to the executor. *Park v. Baker*, 7 Allen 78. Thus, stone, if separated from the land, is a chattel. *Woodman v. Pease*, 17 N. H. 282. So, fence rails in stacks go to the administrator. *Clark v. Burnside*, 15 Ill. 62 ; *Robertson v. Phillip*, 3 Greene (Ia.) 220. Building materials do not pass with the sale of the land upon which they are. *Cook v. Whiting*, 16 Ill. 480. Rails not detached from fences pass by a conveyance of the land, *Goodrich v. Jones*, 2 Hill 142 ; also hop poles stacked for the winter. *Bishop v. Bishop*, 11 N. Y. 123.

Between parties to a contract, *e. g.*, mortgagor and mortgagee, the intention of the parties is the most important criterion. *Hill v. Wentworth*, 28 Vt. 428. So, where an agreement existed between landlord and tenant that a saw mill and steam engine should retain their personal character, they were held to be personal property. *Brearley v. Cox*, 4 Zab. 287. The intention to be regarded, however, is the legal presumable intention, such as will be determined by the law from the facts, and not the secret intention of the party putting in the machine. *Snedeker v. Warring*, 12 N. Y. 170. An agreement may be implied. *Howard v. Fessenden*, 14 Allen 124. The manner of annexation may also indicate the intention. *Quimby v. Manhattan Cloth Co.*, 9 C. E. Gr. 260; *Winslow v. Merchants' Insurance Co.*, 4 Met. 306; *Walker v. Sherman*, 20 Wend. 636; *Capen v. Peckham*, 35 Conn. 81; *Bainway v. Cobb*, 99 Mass. 458. Articles affixed by a tenant for carrying on his business are personalty as between him and the landlord, although they are firmly affixed. *Cook v. Champlain Transportation Co.*, 1 Dem. 91. A chattel mortgage given on property indicates an intention that it shall remain personalty when it can be removed without injury to the freehold. *Ford v. Cobb*, 20 N. Y. 344. Articles needed for repairs lying in open view warrant the inference that they will be used for such, when the building is then in the course of repairs. *Wadleigh v. Janvrin*, 41 N. H. 503.

The adaptability of the article to the use of the freehold aids a determination as to what its true character really is. And between mortgagor and mortgagee the appropriateness of the article and not annexation has been held to be controlling. *Brennan v. Whittaker*, 15 O. St. 446.

The common-law rule that the heir

should take the property on the presumption that it was meant to be permanent has been changed by statute in New York, and things annexed to the freehold or to any building for purposes of trade or manufacture and not fixed into the wall so as to be essential to its support, pass to the executor or administrator. *New York* (1889 R. S. 8th ed. p. 2556, §§ 3, 6). As between executor and devisee the rule is construed more strictly in favor of the devisee and against the executor. "It is presumed that the testator intended to grant the full enjoyment of the land devised, and therefore, if there is any question, the presumption is in favor of the devisee." *Croswell on Exrs.* § 353. As between the executor of the tenant for life and the reversioner or remainderman, the rule is relaxed in favor of the executor. *Miller v. Plumb*, 6 Cow. 665.

Between landlord and tenant the common-law rule that whatever was annexed to the soil became a part of it and passed with it, is now relaxed in favor of the tenant. 1. Trade fixtures may be removed by the tenant. *Morse v. Smith*, 24 Ill. 513. 2. Agricultural fixtures may be taken away by the tenant. 3. Fixtures for domestic use and convenience may be removed by the tenant. *Main v. Schwarzwaelder*, 4 E. D. Sm. 273. But they must be removable without damaging the freehold. Thus, a stove which cannot be removed without injury to the premises, is fixed to the land. *Tuttle v. Robinson*, 33 N. H. 119. Marble slabs do not pass to the vendee. *Weston v. Weston*, 102 Mass. 514. If a tenant wish to remove fixtures he must do so before the end of his term. *Bliss v. Whitney*, 7 Allen 114. But if the tenant remains after the expiration of his term, even against his landlord's wishes, so long as he is in possession of the property he can take fixtures away with him.

Lewis *v.* Ocean Navigation &c. Co., 125 N. Y. 341 ; Thorn *v.* Sutherland, 133 N. Y. 206 ; Duffus *v.* Bangs, 122 N. Y. 423. Manure is generally considered personalty, but on the sale of land where it is in heaps it passes with the land. Conner *v.* Coffin, 22 N. H.

538. And even manure accumulated by the tenant in the course of husbandry belongs (unless there is a contract to the contrary) to the farm, and will go back with it to the lessor. Plumer *v.* Plumer, 30 N. H. 558 ; Lassell *v.* Reed, 6 Me. 222.

3. *Separate property, paraphernalia, and other rights of the widow.*†

3. Personal chattels inanimate in possession from which the executor or administrator is excluded in favor of the widow.

By reason of the provisions of the Married Women's Property Act, 1882, all gifts made to a married woman on or after January 1, 1883, become her separate property as if she were a *feme sole*. But inasmuch as questions may arise as to gifts to the wife, and separate property accruing to her before that date, it seems convenient to preserve in this edition the statement of the law on this subject in the shape in which it appeared in the earlier editions.

Marriage was formerly an absolute gift to the husband, as well of all the chattels of which the wife was actually and beneficially possessed at the time he married her (*u*), as also \*of such as came to her during marriage, whether she survived him or not (*x*). And consequently, though his wife outlived \*him, they went to his executor, if he made a will, or to his administrator if he died intestate.

† See American note at end of this Sub-section, p. \*680.

(*u*) Co. Lit. 351, *b*. And there was no distinction in this respect between property to which the wife was entitled at equity, and property to which she was entitled at law: *Osborn v. Morgan*, 9 Hare, 432.

(*x*) These rules of law, however, had been considerably modified by the Married Women's Property Act (33 & 34 Vict. c. 93), which came into operation on the 9th day of August, 1870. By that act (which, save in respect of accrued rights and liabilities, is repealed by the Married Women's Property Act, 1882), any married woman became absolutely entitled, independent of her husband, to—

- a.* Her earnings, made separately from her husband, and investments thereof (s. 1).
- b.* Government annuities and deposits in savings banks in her own name, whether before or after marriage (s. 2).
- c.* Sums invested in certain securities,

companies, or societies (ss. 3, 4, 5), in respect of which the married woman had obtained the statutory order required by the act.

- d.* Policies of insurance, and all benefits thereof, effected by her on her own life or her husband's for her separate use, if so expressed on the face of the policy (s. 10).
- e.* Any property hers before marriage, which her husband, by writing under his hand, had agreed with her should be her separate property after marriage (s. 11). And if married on or after the 9th of August, 1870, to—
- f.* Any personal property to which a woman shall become entitled during her marriage as next of kin or one of the next of kin of an intestate, or any sum not exceeding £200 to which she shall after her marriage become entitled by deed or will (sect. 7). Rents and profits of real property descending on any woman married after the passing of the act as heiress or coheiress of an intestate (sect. 8).

In *Johnson v. Johnson*, 35 C. D. 345,

[\*660]

[\*661]

But by conveying her property to trustees before marriage, the wife might, independently of the Married Women's Property Acts, preserve it, in cases clear of fraud, <sup>Separate property.</sup> separate from her husband, and those claiming from or through him, both at law and in equity : for wherever the trust can be supported in equity, the trustee will be entitled at law (*y*). So that if personal property was bequeathed to, or settled upon, a married woman for her separate use, even without the precaution of the intervention of trustees, the wife's separate interest was protected in equity by the conversion of her husband into a trustee for her (*z*) ; and consequently, upon his death, the property did not form a part of the beneficial estate of his executors or administrators (*a*).

These rules will still govern all those cases which do not \*fall within the Married Women's Property Act, 1882. The Law since M. W. P. Act, 1882. Married Women's Property Act, 1882 (45 & 46 Vict. Stat. 45 & 46 Vict. c. 75, s. 1. c. 75), by section 1, sub-s. (1), enacts that, "a married woman shall in accordance with the provisions of this

it was decided that the 8th section of the act does not enable a woman to pass by an unacknowledged deed the fee-simple of real estate descended upon her. The words "shall become entitled" in these sections of this act apply to a reversion falling in after marriage. *Lane v. Oakes*, 30 L. T. N. S. 726. *Howard v. Bank of England*, L. R., 19 Eq. 295. It is otherwise under the words of section 5 of the act of 1882. *Reid v. Reid*, 31 C. D. 402. See *post*, p. \*662 (*b*). All the act does is to create a statutory separate use. It does not give a legal separate property, nor give, excepting under the 11th section as between husband and wife, a remedy to the wife except through a court of equity. Her separate earnings, therefore, are under this act equitable assets, distributable amongst all her creditors, and not legal assets out of which her executor is entitled to retain his own debt. *Re Poole's Estate*, 6 C. D. 739. This act, it will be observed, contains no section like section 1 of the act of 1882 affecting the ca-

capacity of a married woman to acquire, hold, and dispose by will or otherwise of all real or personal property as if she were a *feme sole*.

(*y*) By *Lord Mansfield*, in *Haselinton v. Gill*, 3 T. R. 620.

(*z*) *Parker v. Brooke*, 9 Ves. 583. *Rich v. Cockell*, *ibid.* 375, in *Lord Eldon's* judgment. Where there is sufficient evidence to show an intention on the part of the wife that the husband shall employ the money for his own use, or for the family expenditure, as he might think proper, the assent of the wife to such application of the money puts an end to the trust for her separate use: *Gardner v. Gardner*, 1 Giff. 126.

(*a*) Thus, according to the equitable doctrine of separate use, if the husband survives and the wife dies in actual possession of her separate property without having expressed her right of disposing of it by deed or will, the quality of separate property ceases at her death, and the fund belongs to the husband in his marital right, so that he



Act be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee."

By section 2 it is enacted, that "every woman who marries after the commencement of this Act" [January 1, 1883], s. 2. "shall be entitled to have and to hold, as her separate property, and to dispose of, in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

And by section 5 (b), it is enacted that "every woman married before the commencement of this Act shall be entitled to have and to hold, and to dispose of, in manner aforesaid, as her separate property, all real and personal \*property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid." s. 5.

And further, by section 19, it is enacted, "that nothing in this Act contained shall interfere with, or affect, any settlement, s. 19. or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any mar-

need not become her administrator in order to entitle himself to it: *Molony v. Kennedy*, 10 Sim. 254. See also *Carne v. Brice*, 7 M. & W. 183. *Messenger v. Clarke*, 5 Exch. 388. *Bird v. Peagrum*, 13 C. B. 639. *Bourne v. Fosbrook*, 18 C. B., N. S. 515. The appointment by a married woman of executors is not a disposition by her of her separate estate so as to deprive her husband of separate estate undisposed of by her will. *Re Lambert's Estate*, 39 C. D. 626.

(b) It is to be observed that in *Reid v. Reid*, 31 C. D. 402, following *Re Tucker*, 54 L. J. Ch. 874, and *Re Adames Trusts*, 54 L. J. Ch. 878, and

overruling *Re Dixon*, 54 L. J. Ch. 964, *Baynton v. Collins*, 27 C. D. 604, *Thompson v. Curzon*, 29 C. D. 177, it was decided that if a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the act acquired a title whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate estate by sect. 5 (1) of the act though it fall into possession after the commencement of the act. On the other hand, sect. 7 of the act of 1870, in which the words are "to which she shall become entitled" was held to include property to which the

ried woman, or shall interfere with, or render inoperative, any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument : but no restriction against anticipation contained in any settlement, or agreement for a settlement, of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and no settlement, or agreement for a settlement, shall have any greater force or validity against creditors of such woman than a like settlement, or agreement for a settlement, made, or entered into, by a man would have against his creditors" (c).

The scope of section 1 seems to be to declare the status of a married woman, and not to deal with the kinds of property affected by the act, which latter are dealt with by sections 2 and 5.

For it can hardly be that the statute intended to make all \*property possessed, or acquired by, a married woman in her own right her separate property, irrespective of the date of her marriage and the date of the acquisition of that property : otherwise section 2, sub-s. 1, and section 5 would be unnecessary. And there seems to be no property to which section 1 can apply besides the subject-matter of sections 2 and 5. It cannot apply to property which is separate property by marriage settlement, because this is excluded from the operation of the act by section 19, nor to *choses in action* not reduced into possession, because the Married Women's Property Act does not affect devolution, nor to property which has become the separate property of the wife by virtue of the act of 1870, because the interest given to the wife under that act is merely a beneficial interest, and the act of 1882 does not amend the act of 1870, but repeals it, and provides that such repeal shall not affect any act done or right acquired while the act of 1870 was in force (cc).

married woman had a reversionary title before marriage but which fell into possession afterward. *Lane v. Oakes*, 30 L. T., N. S. 726. *Howard v. Bank of England*, L. R. 19 Eq. 295, 300.

(c) It may be observed that section 19 excludes from the operation of section 5 and the other sections, property the subject of any settlement, which would have bound it if the act had not passed, even though such property may accrue

to the wife after the commencement of the act. *Re Stonor's Trusts*, 24 C. D. 195. *Re Whitaker*, 34 C. D. 227. *Hancock v. Hancock*, 38 C. D. 78. See also *Re Queade's Trusts*, 54 L. J. Ch. 788, which seems to have been disapproved of by the Court of Appeal in *Hancock v. Hancock*, *ubi sup.*

(cc) This seems to be the view also taken in *Re Cuno*, 43 C. D. 12.

The Married Women's Property Act, 1882, unlike the 25th section of 20 & 21 Vict. c. 85, does not affect the devolution of property undisposed of by the married woman (*d*).

The inquiry as to what words are sufficient according to the equitable doctrine to give the wife an interest separate from her husband appears to belong more properly to the general law of husband and wife, than to a work on the law of executors and administrators; and it is not, therefore, deemed requisite to pursue it at any length in this treatise: However, it is to be observed that questions as to the construction of settlements on married women or women about to be married may still not unfrequently arise, notwithstanding the Married Women's Property Act, 1882, because section 19 of that act excludes such settlements from the operation of it. Independently of the Married Women's Property Acts, a gift to the separate use of an unmarried woman excludes \*the executors of a future husband (*e*), and an ante-nuptial settlement of money or jewels, furniture, or other movables, made by the husband himself of his own property upon the wife, will be valid, as well against the husband himself and volunteer claimants from him, as also against his creditors. Nor will it differ the case that the husband was indebted at the time of making the settlement, and that his future wife knew it: nor that the husband had the joint possession, as long as he lived, of the furniture, &c. (*f*); nor that the wife brought him no portion.

What words will give a separate estate:

Ante-nuptial settlement of money, jewels, &c., by the husband.

(*d*) *Re Lambert's Estate*, 39 C. D. 626.

(*e*) *Tullett v. Armstrong*, 4 Mylne & Cr. 377.

(*f*) *Campion v. Cotton*, 17 Ves. 264. But where the husband, with the knowledge of the wife, had committed an act of bankruptcy before the execution of the settlement, and an adjudication of bankruptcy followed within twelve months, the settlement, though ante-nuptial, was, while such act of bankruptcy was available for adjudication, held invalid;—for, by relation, the property had ceased to be the property of the bankrupt before the settlement was executed: *Fraser v. Thompson*, 4 De G. & J. 659. In the case of *Bulmer v. Hunter*, L. R., 8 Eq. 46, a man executed an ante-nuptial settle-

ment and married a woman with whom he had previously cohabited with intent to defraud his creditors, the wife being implicated in the transaction, and it was held that the settlement was fraudulent and void as against creditors. And by section 47 (2) of the Bankruptcy Act, 1883, it is provided that "any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife shall on his becoming bankrupt before the property or money has been actually

The same principle of equity which secures the interest of the wife in the case of a settlement or bequest, will protect it when the husband *agrees* before marriage, by writing, that his wife shall be entitled to specific parts of her personal estate to her separate use, although the legal title becomes vested in him by the subsequent marriage : \*In such a case the husband will be a trustee for the wife's separate use, and the trust will bind his executors and administrators (*g*).

Ante-nuptial  
agreement in  
writing.

Likewise a *post-nuptial* settlement of property by the husband on the wife is obligatory upon himself and all persons claiming as volunteers from or through him (*h*). And such a settlement will protect the property even against creditors, unless it can be considered, from the circumstances under which it was made, fraudulent as against them (*i*).

Post-nuptial set-  
tlement.

transferred or paid pursuant to the contract or covenant be void against the trustee in the bankruptcy."

(*g*) But the agreement must be in writing, by reason of the 4th section of the Statute of Frauds, enacting that no action shall be brought whereby to charge any person upon any *agreement made in consideration of marriage*, unless some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized : *Randall v. Morgan*, 12 Ves. 74. *Warden v. Jones*, 23 Beav. 487. S. C. 2 De G. & J. 76. *Goldcutt v. Townshend*, 28 Beav. 445. These and other authorities have overruled *Dundas v. Duters*, 1 Ves. 199. But if a man, on his marriage with a woman enters into a mere parol agreement with her, that a sum of money shall be transferred to trustees upon trust for himself, his intended wife, and the children of the marriage, and the money is, before the marriage, actually transferred to the trustees, who hold it solely upon the trusts agreed upon, the fact that the instrument declaring the trusts is executed by them subsequently to the marriage, does not make it a voluntary

instrument, and enable creditors to set it aside : *Cooper v. Wormald*, 27 Beav. 270. Indeed, if the non-reduction into writing be owing to the fraudulent conduct of the husband, equity will relieve : *Lady Montacute v. Maxwell*, 1 P. Wms. 620.

(*h*) See *Curtis v. Price*, 12 Ves. 89.

(*i*) The questions of the avoidance of settlements as against creditors under stat. 13 Eliz. c. 5, and the avoidance of voluntary settlements of lands, &c., as against purchasers under stat. 27 Eliz. c. 4, are so wide, and the authorities upon them so numerous, that it is considered better to refer the reader to the text-books which deal exclusively with the subject, and not to undertake a detailed examination of the law on a point which is but distantly connected with the subject-matter of this work. See *May on Fraudulent and Voluntary Dispositions of Property*, 2nd ed.

As to the effect of the bankruptcy of a person making a post-nuptial settlement upon such settlement, see section 47 (1) of the Bankruptcy Act, 1883, by which "any settlement of property not being a settlement made before and in consideration of marriage, or made in favor of a purchaser or incumbrancer

\*Besides the means already described of the acquirement "according to the Equitable doctrine" of separate property, by a wife, she, even before the Married Women's Property Acts, might also do so by carrying on trade apart from her husband, on her separate account, either in consequence of an express agreement between her and her husband before marriage, or by his permission after marriage (*k*). There was an important distinction, with respect to the estate of the executor of the husband, between the wife's right to property acquired in the two cases. When the agreement was made previously to marriage, since the consideration was valuable, the transaction was not only to be obligatory upon the husband and his executors, but also binding upon his creditors; when the agreement originated during the marriage, it was void against his creditors, but good against himself (*l*).

Separate property  
acquired by wife's  
separate trading.

The savings arising from the separate property of the wife will not form a part of the estate of her husband's executor: for "the sprout is to savor of the root and go the same \*way" (*m*). And so jewels, or other things, bought by the wife, with money arising out of her separate property, will not be assets liable to the husband's debts (*n*). But as she is entitled to

Savings, &c.,  
from wife's separate  
property:

in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement be void against the trustee in the bankruptcy, and shall if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property has passed to the trustee of such settlement on the execution thereof."

As to post-nuptial settlements, see also Reed's Bills of Sale Act, 7th ed., p. 53.

(*k*) See *Haddon v. Fladgate*, 1 Sw. & Tr. 48, *ante*, p. \*54, note (*f*). An agreement with, or permission from, her husband has not been necessary, since the Married Women's Property Acts, 1870 and 1882. See *ante*, p. \*660, n. (*x*).

(*l*) 2 Rop. 165, 2nd edition.

(*m*) *Gore v. Knight*, 2 Vern. 535. So as to her savings out of her alimony: *Moore v. Barber*, 34 L. J., Ch. 667.

(*n*) *Duncan v. Cashin*, L. R. 10 C. P. 554. Accordingly in *Brooke v. Brooke*, 25 Beav. 342, husband and wife had for many years lived, and were still living separate: He remitted money for her maintenance and support: She saved a considerable portion:—And it was held by Romilly, M. R., that the husband could not recover back these savings; for that the remittances must, as against the husband, be treated as her separate estate.

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[\*668]

deal with her separate estate as she pleases, if she directly authorizes any moneys which form a part of it, or the savings arising from it, to be paid to her husband, he is entitled to receive them, and she can never recall them (o).

The general rule of law, before the Married Women's Property Act, derived from the unity of person, was that gifts gifts from the husband to the wife: from the husband to the wife were void: "But in Courts of Equity," Lord Hardwicke says in *Lucas v. Lucas* (p), "gifts between husband and wife have often been supported, though the law does not allow the property to pass."

For though the property did not pass at law, yet in equity a husband, being the owner at law, might become a trustee for his wife, and if by clear and irrevocable acts he made himself such trustee the gift to his wife was conclusive (q).

Thus in *Lucas v. Lucas* (r), Lord Hardwicke decreed that the defendant in the cause, a widow, was entitled to £1,000 South Sea Annuities transferred by her husband, in his lifetime, into the name of his wife, as a valid gift against the husband and his representatives.

\*So stock purchased by a man in the names of himself and his wife, stock, &c., purchased by husband in the names of himself and wife, or in her name: was, on his death, held by the vice-chancellor (Sir John Leach) to go to her as the survivor (s). And in a similar case, Lord Eldon, C., said it was *prima facie* a gift to herself in the event of her surviving, unless evidence of contemporaneous acts, showing a contrary intention, were produced (t). So where the husband lends out money upon securities taken in the names of himself and wife, and dies, the wife is entitled by survivorship, if there are sufficient assets without this money to pay debts (u). And, generally, where a husband purchases personal property in the name of his wife, or in their joint names, it will be presumed, in a case clear of fraud, to have been intended as an advancement and provision for the wife, and on surviving her hus-

(o) *Caton v. Rideout*, 1 Mac. & G. 599. But see also *Darkin v. Darkin*, 17 Beav. 578.

(p) 1 Atk. 271. *Graham v. Londonderry*, 3 Atk. 393.

(q) *Mews v. Mews*, 15 Beav. 533. *Grant v. Grant*, 34 L. J. Ch. 641. See *post*, p. \*670, as to imperfect gifts by husband to wife.

(r) 1 Atk. 271.

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(s) *Lorimer v. Lorimer*, MSS. Mr. Beames, n. (46), to *Rider v. Kidder*, 10 Ves. 367, 2nd edit.

(t) *Wilde v. Wilde*, MS. 1 Rop. Husband and Wife, by Jacob, 54. *Vance v. Vance*, 1 Beav. 605. *Williams v. Davies*, 33 L. J., P. & M. 127. *Re Elkin's Trusts*, 6 C. D. 115.

(u) *Christ's Hospital v. Budgin*, 2 Vern. 683.

band she will be entitled, unless he has aliened the property in his lifetime (*x*).

But where the widow seeks to establish a gift from her husband in his lifetime, she must adduce evidence beyond suspicion (*y*) ; and nothing less will do than a clear irrevocable gift, either to some person as trustee, or by some clear and distinct act of his, by which he divested himself of the property, and engaged to hold it as trustee for the separate use of his wife (*z*).

what is sufficient evidence of a gift by husband to wife.

(*x*) *Kingdon v. Bridges*, 2 Vern. 67. *Glaister v. Hewer*, 8. Ves. 129. But the presumption may be rebutted : *Marshal v. Crutwell*, L. R., 20 Eq. 328. So where a man from time to time gave his wife sums of money, part of which accumulated as stock in his name, and he received the dividends and paid them to her, and in every way treated the stock as her separate property : it was held by Sir Cresswell Cresswell, that the wife had acquired a separate estate, of which the husband had considered himself trustee for her, and to which the *jus disponendi* attached : In the Goods of Smith, 1 Sw. & Tr. 125.

(*y*) *Walter v. Hodge*, 2 Swanst. 92. *Re Whittaker*, 21 C. D. 657. The wife making such a claim comes within the well-established rule, that a person, making a claim against the estate of a dead man, cannot sustain that claim by his or her own deposition : there must be some corroboration of it.

(*z*) *M'Lean v. Longlands*, 5 Ves. 79, by Lord Alvanley. See also 2 Swanst. 104. *Mews v. Mews*, 15 Beav. 329. *Hoyes v. Kindersley*, 2 Sm. & G. 195. *Lloyd v. Pughe*, L. R., 8 Ch. 88. *Parker v. Lechmere*, 12 C. D. 256. In *Lloyd v. Pughe*, an account in the name of the wife was held to be a mere agency account of the husband, and on his death the credit balance was held to be part of his estate though the wife survived him. In *Parker v. Lechmere*,

the opening of an account with money coming to the wife in her own right, in the name of the wife, was held to be evidence of the gift to the wife. If the husband makes an imperfect gift to the wife the court will not in the case of a husband and wife, any more than in any other case, hold that the intending donor is a trustee for the wife. *Re Breton*, 17 C. D. 416. *Moore v. Moore*, L. R., 18 Eq. 474. See, however, the cases to the contrary cited by Hall, V.-C., in his judgment in *Re Breton*, which the learned judge seems to have declined to follow. *Grant v. Grant*, 34 L. J. Ch. 641. *Fox v. Hawks*, 13 C. D. 822. *Baddeley v. Baddeley*, 9 C. D. 113, in which imperfect gifts by a husband to a wife seem to have been treated as not governed by the rule, applying to imperfect gifts to a stranger, laid down in *Milroy v. Lord*, 4 De G. F. & J. 264. *Richards v. Delbridge*, L. R., 18 Eq. 11. Cases of imperfect gifts of a husband to a wife will be less likely to arise now that the wife can take a gift as if she were a *feme sole* (M. W. P. Act, 1882), but of course may arise where the form of instrument is not applicable to transfer the property in question. The ground for supporting, as a declaration of trust, an instrument prior to the M. W. P. Act, 1882, purporting to transfer property to the wife directly, seems to have been that the husband, if he knew the law, could not have intended the

\*In a case, however, where a husband gave directions to his bankers to invest a sum of money in the funds, in the joint names of himself and wife, and their brokers accordingly made the purchase: Lord Langdale, M. R., held that the wife was entitled to the stock by survivorship, although the husband died after the contract, but before the transfer had been completed (a).

Those gifts of money by the husband to the wife for clothes, or to purchase ornaments, or for her separate expenditure, which are usually called pin-money (b), will be good in equity as against the husband, and all volunteer claimants through him (c).

Similar allowances have been supported in equity; as where the husband voluntarily allowed the wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from a farm (over and besides what was used by the family) for her own separate use, called it her pin-money; out of which the wife saved 100*l.*; which the

instrument to operate as a transfer, and if the gift is intended to be taken by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. It must be remembered that, to constitute a gift, there must be either a transfer of property or a declaration of trust, for there is no equity to perfect an imperfect gift. See *Milroy v. Lord*, 4 De G. F. & J. 264, 274. *Richards v. Delbridge*, L. R., 18 Eq. 11. *Moore v. Moore*, *ibid.* 474, and *conf. Richardson v. Richardson*, L. R., 3 Eq. 686, and *Morgan v. Malleson*, L. R., 10 Eq. 475, disapproved in *Richards v. Delbridge* (*vide supra*), but approved by Bacon, V.-C., in *Fox v. Hawks*, 13 C. D. 822. As to what is necessary to constitute a declaration of trust, see *Warriner v. Rogers*, L. R., 16 Eq. 340, 348, where Bacon, V.-C., says, "the one thing necessary to give validity to a declaration of trust I take to be, that the donor or grantor should have

absolutely parted with that interest which had been his up to the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest," and in *Moore v. Moore*, L. R. 18 Eq. 474, 481, Hall, V.-C., says, "Though the case is one of husband and wife, the *onus probandi* rests upon the plaintiff to make out a satisfactory case to entitle her to relief in respect of these sums of stock founded on the alleged gift, and the case must be tried and determined exactly in the same way as it would have been tried and determined if a bill had been filed by the next friend of the wife in the lifetime of the husband against the husband."

(a) *Vance v. Vance*, 1 Beav. 605.

(b) As to the nature of pin-money, see the elaborate observations of Lord Brougham, C., in *Howard v. Digby*, 2 Cl. & Fin. 634.

(c) 2 Roper, Husband and Wife, 132, 2nd edit.



husband borrowed, and died ; Lord Chan\*cellor Talbot decreed, that *there being no deficiency of assets to pay debts*, the widow should come in as a creditor for the 100*l.*; and the court mentioned the case of *Calmady v. Calmady*, where there was a like agreement made betwixt husband and wife, that upon every renewal of a lease by a husband, two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money (*d*).

See also in *Mangey v. Hungerford* (*e*), the wife had saved a considerable sum of money out of housekeeping, and in a suit instituted against her for a discovery of what she had saved, she insisted by answer that she was not bound to make such a discovery ; and upon exceptions to the answer, it was held sufficient by Lord King.

There has already (*f*) been occasion to show that, under the Divorce Act, 1857, s. 25, property acquired by a wife, after obtaining a protection order, may be disposed of by her in all respects as a *feme sole*, and will devolve on her death as if her husband were then dead.

property acquired by wife after a protection order under Divorce Act :

It often happens that pin-money is settled on the wife by agreement previous to marriage ; in which case it falls under a different consideration : and upon the principles already explained, the savings by the wife out of it will be protected as her separate property, not only against the husband and volunteer claimants through him, but also from his creditors. But if the wife, by good management, effect savings out of her pin-money or other allowance made by the husband, *not* in pursuance of an ante-nuptial contract, such savings, as well as jewels so purchased by the wife out of them, will not, it should seem, be exempt from the husband's debts, but will be assets for the purpose of satisfying them, in the hands of his executor (*g*), although protected from voluntary claims.

savings out of pin-money and other allowances, when liable to husband's debts :

\*If pin-money be in arrear, and the husband dies, the wife may claim the arrears against her husband's representatives : though such claim cannot, generally speaking, be carried further back than one year's income (*h*) : Which restriction appears to have been founded partly on a supposed satisfaction by acquiescence, on the notion of the consent of the wife, to make it a common fund for the expense of the family (*i*) ; and partly on the

Arrears of pin-money, what recoverable.

(*d*) *Slanning v. Style*, 3 P. Wms. 339.

(*e*) 2 Eq. Cas. Abr. 156, *in margine*.

(*f*) *Ante*, p. \*55.

(*g*) *Willson v. Pack*, Prec. Chan. 297.

(*h*) *Peacock v. Monk*, 2 Ves. Sen. 190.

*Thrupp v. Harman*, 3 M. & K. 513.

(*i*) *Brodie v. Barry*, 2 V. & B. 36.

consideration, that the money is meant for the dress and ornament of the wife, in a mode suitable to the degree of the husband, so as to maintain his dignity, and not for the accumulation of the fund ; so that if the wife does not choose to expend the money for the purpose to which it was appropriated, viz., to support his and her rank in society, she cannot justly claim the arrears of it (*k*). Again, if pin-money be in arrear, and the wife dies, her representatives cannot sustain any claim for it whatever ; the ground of which rule is, that the pin-money was not meant for the sustentation of the wife, but for her dress and ornament in a station suitable to the degree of her husband : The authorities connected with this subject, and the nature of pin-money in general, were fully discussed, and commented on in the arguments of counsel and the judgment of Lord Brougham in a case relating to the arrears of the pin-money of the Duchess of Norfolk (*l*).†

Another instance where the wife may acquire a property in her husband's personal chattels, by gift from him, so as to exclude his executors or administrators, is to be found in her paraphernalia. The term is borrowed from the civil law, and is derived from the Greek, *παρά φερνή*, *i. e.*, something to which she is entitled over and above dower. Our law uses it to signify the apparel and ornaments of \*the wife suitable to her rank and degree (*m*). What are to be so considered, are questions to be decided by the court, and will depend upon the rank and fortunes of the parties (*n*).

Pearls and jewels, whether usually worn by the wife, or only on birthdays, and other public occasions, are to be considered paraphernalia (*o*). In the reign of Queen Elizabeth, the executors of Viscount Bindon brought detinue against the widow of the deceased viscount,

(*k*) *Howard v. Digby*, 2 Cl. & Fin. 634, 657.

(*l*) *Ibid.* 634. See also *Jodrell v. Jodrell*, 9 Beav. 45.

† See American note at end of this Sub-section, p. \*680.

(*m*) 2 Black. Comm. 436. A bed is also in some authors enumerated among the paraphernalia : Com. Dig. Baron and Feme (F. 3). Noy enumerates "all her apparel, her bed, her copher, her chains, borders, and jewels." Max.

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c. 49. And Swinburne mentions the ancient and general custom, as to widows, of the province of York, as extending "not only to their apparel, and a convenient bed, but a coffer with divers things therein necessary for their own persons." Pt. 6, s. 7, pl. 5.

(*n*) 2 Rop. Husband and Wife, 141, 2nd edit.

(*o*) *Graham v. Londonderry*, 3 Atk. 394, by Lord Hardwicke.

and declared upon the detainer of certain jewels: The defendant justified the detainer of them as her paraphernalia: It was said by Manwood, Chief Baron, that paraphernalia ought to be allowed to a widow, having regard to her degree, and in this case the husband of the defendant being a viscount, 500 marks was but a good allowance for such a matter (*p*).

In the reign of Charles I. a chain of diamonds and pearls worth 370*l*., being usually worn by a lady, who was a daughter of an earl of Ireland, and a baron of England, and the wife of a knight and a sergeant-at-law of the king, were considered *bona paraphernalia* (*q*). In the year 1674, Lord Keeper Finch said, he never knew any paraphernalia allowed, but where the party was noble either by birth or marriage (*r*): but in the year 1721, Lord Macclesfield, in the case of *Tipping v. Tipping* (*s*), decreed, that the widow of a commoner should have jewels, &c., to the value of 200*l*. and \*upward, as her *bona paraphernalia*. Lord Talbot afterward allowed the widow of a private gentleman her gold watch, and several gold rings given at the burials of relations (*t*). And in a case where a Mrs. Northey, in the lifetime of her husband, was possessed of jewels to the value of 3,000*l*. and upward, which had been bought partly with her own money, and partly her husband's, and had been worn by her whenever she was dressed; Lord Hardwicke held, that she was entitled to them as paraphernalia, and said, that the value made no alteration in the Court of Chancery (*u*).

The following case, as decided Mich. 5 Geo. I., is reported in Viner's Abridgment (*x*): Mr. Calmady having a crocheat of diamonds, which was his first wife's, in 1695 makes his will, and, amongst other things, devises this crocheat to his eldest son, and that it should go in succession to the heir of his family as an heirloom: Afterward, in 1699, he marries a second wife (the defendant), and turns this crocheat into a necklace, and adds several new diamonds to it to the value of 200*l*., which was more than the value of the crocheat: The plaintiff, as heir to Mr. Calmady (though not the eldest son to whom it was specifically devised), demands this crocheat of the defendant, the widow of Mr. Calmady: Counsel for the defendant insisted that the defendant was entitled to it as part of her paraphernalia, which

(*p*) Viscountess Bindon's Case, 2 Leon. 166, pl. 201.

(*q*) Lord Hastings v. Sir A. Douglas, Cro. Car. 343.

(*r*) Lady Tyrrell's Case, 1 Freem. 304.

(*s*) 1 P. Wms. 729.

(*t*) 2 Eq. Cas. Abr. 156, *in margine*.

(*u*) Northey v. Northey, 2 Atk. 79.

(*x*) Calmady v. Calmady, 11 Vin. Abr. 181, pl. 21.

the husband cannot give away from his wife by will, though he may dispose of it in his lifetime, and the wife shall retain it against the devisee or executor of her husband, unless in the case of creditors, who cannot otherwise have a satisfaction of their debts : Counsel for the plaintiff said, that though formerly it was a doubt whether the husband could devise any part of the paraphernalia of the wife, yet of late it has been holden, that the husband may devise specifically jewels of his own which he permitted his wife to wear, though they shall not go to his executor, or to a general residuary legatee, \*and that, in this case, there being no direct proof of an express gift to the wife, only a permission to wear them, they are well devised to the heir as an heirloom and that the altering and turning the crocheat into a necklace, and permitting his wife to wear them, was no revocation of the devise : Parker, C., seemed to doubt at first, that turning the crocheat into a necklace, adding new diamonds to it, and permitting his wife to wear it, was a revocation of the devise, but at last ordered the Master to examine and separate the old diamonds from the new, and decreed the diamonds of the crocheat to the plaintiff as heir-at-law, and specifically devised to him as an heirloom.

On the authority of this case it was ruled by Lord Romilly in *Jervoise v. Jervoise* (y), that family jewels, which have been handed down from father to son, do not constitute paraphernalia, notwithstanding they may have been worn by the wife at court and on other full-dress occasions, but that jewels presented to a wife during coverture by a third person, or by her husband for the purpose of ordinary use as befitting her station in life, are properly paraphernalia.

By the custom of London, a citizen's widow may retain some part of her jewels as paraphernalia, but not all (z).

It will make no difference as to the widow's right, that the jewels, &c., were in the custody of the husband, if the wife occasionally wore them (a).

There is an important distinction between gifts of the husband to the wife for her separate use, and gifts by him to her as paraphernalia ; for she may dispose absolutely of the things given to her for her separate use ; but where the husband gives them to her expressly for the ornament of her person, she cannot, according to our law, dispose of them by

the wife cannot dispose of them by gift or will during her husband's life ;

(y) 17 Beav. 566. But as to those presented to her by a third person, see *post*, p. \*679, *contra*.

(z) 11 Vin. Abr. 180, pl. 17.

(a) *Northey v. Northey*, 2 Atk. 79.

gift or will during his life (b) : although by the civil law, the wife had such an absolute property in them that \*she might alien them *in vita mariti, invito marito* (c). But the husband may sell them or give them away in his lifetime (d), although he cannot dispose of them by will during her life (e).

the husband may sell them or give them away : but he cannot devise them :

By the civil law, *bona paraphernalia* in all cases go to the wife, to the exclusion of the executor, nor are they subject to the payment of the husband's debts (f). But by our law they are clearly liable to his creditors, and, therefore, the widow will not be entitled to them (except as far as her necessary apparel) (g) in case of a deficiency of assets (h). Nor are they to be allowed to her, where there are not assets at the time of her husband's death, though contingent assets afterward fall in ; for the same might not have happened until twenty or thirty years after the death of the testator, nor possibly until after the death of the widow, when the end and design of the widow's wearing her *bona paraphernalia*, in memory of her husband, could not have been answered, and, therefore, it was reasonable that this should be reduced to a certainty, *viz.*, that if there should not be assets real and personal at the testator's death, or, at least, at the time when the jewels were applied to debts, then the jewels should be liable (i).

they are subject to the debts of the husband :

\*But the widow's claim to her paraphernalia is preferred to that of a legatee of her husband, and, therefore, they will not be liable to satisfy the testator's legacies, or any of them (k), either general or specific (l).

but not to his legacies :

(b) *Graham v. Londonderry*, 3 Atk. 394.

(c) *Cro. Car.* 344, by Berkeley and Jones, Justices. 3 Bac. Abr. 66. Executors (H. 4).

(d) *Graham v. Londonderry*, 3 Atk. 394.

(e) *Cary v. Appleton*, 1 Cas. Chan. 240. *Godolph. Pt. 2*, c. 15, s. 1. *Tipping v. Northey*, 1 P. Wms. 730. *Northey v. Northey*, 2 Atk. 78, 79. *Seymour v. Tresilian*, 3 Atk. 358. 2 Black. Comm. 436. This was denied by Richardson, C. J., and Cooke, J., in *Lord Hastings v. Douglas*, *Cro. Car.* 345, though agreed to by Berkeley and Jones Justices ; and Harcourt, C., reserved the consideration of the point in *Wilcox v. Gore*, 11 Vin. Abr. 180, 181.

See also *Calmady v. Calmady*, *ibid.* 181: *ante*, p. \*675, and 3 Bac. Abr. 66. Executors (H. 4), where the husband's power to dispose of them by will is asserted.

(f) *Swinb. Pt. 6*, s. 7, pl. 5. *Godolph. Pt. 2*, c. 15, s. 1.

(g) *Noy's Maxims*, c. 49, 2 Black. Comm. 436.

(h) *Campion v. Cotton*, 17 Ves. 264. "It is not fit," said Lord Keeper Finch, "that the widow should shine in jewels and the creditors starve : " *Lady Tyrrell's Case*, 1 Freem. 304.

(i) *Burton v. Pierpont*, 2 P. Wms. 79.

(k) *Snelson v. Corbet*, 3 Atk. 370.

(l) In *Graham v. Lord Londonderry*,

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Likewise, where a creditor has a double fund, the widow's claim to paraphernalia shall not be disappointed by the effect of his option of resorting to the personal estate (*m*). Therefore, if the personal estate, including the paraphernalia, had been exhausted in payment of specialty creditors, the widow, in equity, stood in their place as to so much upon the real assets of the heir-at-law (*n*). So where there is a real estate, charged with the payment of the husband's debts, the wife may resort to the trust to be reimbursed to the value of her paraphernalia, if the personal estate has been exhausted by her husband's creditors (*o*). So a real estate, charged with payment of debts, in aid of the personal estate, shall be applied before the widow's paraphernalia (*p*).

But whether the widow shall stand in the place of creditors for the amount of her paraphernalia against real assets *devised*, *Quære*, whether against a devisee: unless in trust for payment of debts, appears doubtful (*q*). According to Lord Hardwicke's decisions in *Ridout v. Plymouth* (*r*), and *Probert v. Morgan* (*s*), she is not so entitled; but the case of *Tynt v. Tynt* (*t*) is at variance \*with those decisions. It seems, however, that if the devised estate be subject to a mortgage, or other specific incumbrance, she would have a right to marshal the assets by throwing the charge upon the estate, as a legatee might in such a case (*u*).

It has already appeared that the husband may alien the wife's paraphernalia in his lifetime; but if the alienation be not absolute, but as a pledge or security for money, the wife surviving him will be entitled to have them redeemed by his executors out of her husband's per-

if the husband pawn the paraphernalia, his executors must redeem them for the widow:

3 Atk. 395, Lord Hardwicke said that the right of the wife was superior to that of *any* legatee.

(*m*) *Aldrich v. Cooper*, 8 Ves. 397.

(*n*) *Snelson v. Corbet*, 3 Atk. 369. See also *Tipping v. Tipping*, 1 P. Wms. 729. *Tynt v. Tynt*, 2 P. Wms. 544.

(*o*) *Incedon v. Northcote*, 3 Atk. 438.

(*p*) *Boyntun v. Boyntun*, 1 Cox, 106.

(*q*) See Cox's note to *Tynt v. Tynt*, 3 P. Wms. 544. It has been suggested by an able writer (Joshua Williams on Real Assets, p. 118), that since the stat. 3 & 4 Will. 4, c. 104, she may marshal

the assets in this case also; because she is, as to her paraphernalia, in a position similar to that of a simple contract creditor, who, by force of that statute, may come upon any part of the property of the deceased.

(*r*) 2 Atk. 105.

(*s*) 1 Atk. 440.

(*t*) 2 P. Wms. 542, before the Master of the Rolls, 1729.

(*u*) *Oneal v. Mead*, 1 P. Wms. 693. 2 Roper, Husband and Wife, 146, note: (*a*) by Jacob. See *post*, Pt. IV. Bk. I. Ch. II. §§ I. & II.

sonal estate, if sufficient for that purpose, after payment of his debts (x).

The widow may bar her right to paraphernalia by settlement before marriage : as in *Cholmely v. Cholmely* (y), where the wife by her marriage articles agreed to have no part of her husband's personal estate, but what he should give her by will ; and this was held to bar her of her paraphernalia (z).

the widow barred of her paraphernalia by marriage articles :

If the husband should bequeath to his wife all household goods, furniture, plate, *jewels*, linen, &c., for life or widowhood, with the remainder over, this will not bar her of her paraphernalia (a). But in such a case if the widow does not, by some act in her lifetime, manifest her election to take them by her elder and better title, her executor or administrator cannot lay any claim to them after her decease (b).

by election to take them as legatee.

Paraphernalia are in their nature materially distinct from gift of jewels, &c., to the wife, by third persons, for *her separate use* : as the latter may be aliened by the wife in the lifetime of the husband, and are not liable to his debts. With respect to what shall be considered as given to her separate use ; where some diamonds had been presented to the wife \*by the husband's father, on her marriage with his son, they were considered by Lord Hardwicke as a gift to the separate use of the wife, and to which she was entitled in her own right (c). So where certain pieces of plate were given to the wife immediately after marriage, by the husband's father, Lord Hardwicke decided that they were to be considered as gifts to the wife for her separate use (d). And a present by a stranger to the wife during coverture must be construed as a gift to her separate use : as where the Regent of France delivered to the husband, as a present for his wife, his picture set about with diamonds (e).

Jewels, &c., given for the separate use of the wife by third persons, not liable to husband's debts :

(x) *Graham v. Londonderry*, 3 Atk. 395.

(y) 2 Vern. 83.

(z) *Read v. Snell*, 2 Atk. 642.

(a) *Marshall v. Blew*, 2 Atk. 217.

(b) *Clarges v. Albemarle*, 2 Vern. 247.

(c) *Graham v. Londonderry*, 3 Atk. 393.

(d) *Brinkman v. Brinkman*, 3 Atk. 394, cited in *Graham v. Londonderry*.

(e) 3 Atk. 393. Lord Hardwicke in

this case mentioned the case of Countess Cowper, in which several trinkets (which, it is presumed, were not intended to be worn, like paraphernalia, as ornaments to her person) had been given to her by Lord Cowper himself in his lifetime, and they were held by Sir Joseph Jekyll to be her separate estate. See also this case again noticed by his lordship, in 1 Atk. 271. *Ante*, p. \*668.

But with respect to jewels, &c., presented to the wife by the husband himself before marriage, there was before the Married Women's Property Act no exemption from the liability to his creditors: for immediately on the marriage, the law gave them to the husband, and he could not be considered as a trustee for them for her separate use afterward (*f*).

As we have already seen any woman married since the Married Women's Property Act is entitled to hold and dispose of, in the same manner as if she were a *feme sole*, as her separate property, all personal property whensoever and from whomsoever she may acquire it, and her husband has no interest in such property, nor is such property liable to his creditors.

(*f*) *Ridout v. Lord Plymouth*, 2 Atk. 105.

† *Wife's separate property.* For changes made in such property by American statutes, see p. \*1277, n. These changes dispose, in general, of the husband's marital rights, while his right to succeed as administrator and next of kin or distributee are left unimpaired or are expressly established. On the death of the wife before the husband her separate property goes to her administrator, *Baldwin v. Carter*, 17 Conn. 201; and the husband must account to her administrator. *Nix v. Bradley*, 6 Rich. Eq. 43. In equity a trust may be created for the sole and separate use of a married woman, or in contemplation of her marriage. In Pennsylvania, such trust is valid during coverture, but fails or becomes "dry" on the death of the husband, and the property belongs to the widow free from the trust. But on her death before him, his possession being that of a trustee only, the property will go to her representatives, and not to his. *Walker v. Walker*, 9 Wall. 743; *Baldwin v. Carter*, 17 Conn. 201; *Gover v. Owings*, 16 Md. 91.

Property in the possession of the wife at her death goes to her surviving husband as distributee under the intestate laws, *McCosker v. Golden*, 1 Bradf. 64; *Farie's Appeal*, 23 Pa. St. 29; although she had a power of appointment which she failed to exercise. *Stewart v. Stewart*, 7 Johns. Ch. 29. But the husband's right is personal and he may surrender it, *Bent v. Bent*, 44 Vt. 555; and when a surrender is made by him, the property shall not be liable to the claims of the husband's creditors. *Teague v. Downs*, 69 N. C. 280.

Securities of the wife, though in the name of the husband, go to her administrator. *Leland v. Whitaker*, 23 Mich. 324. A wife is entitled, as against the administrator of her husband, to the proceeds of land bought with her money, when the deed was taken without her knowledge in the name of the husband. *Dayton v. Fisher*, 34 Ind. 356. As to the wife's choses in action, see p. \*759, n., *ubi infra*.



## \*SECTION IV.

*Of donations mortis causa.*†

It will be proper to close the subject of the estate of an executor or administrator in the chattels personal of the deceased in possession, by considering another species of interest in the property of the deceased, which vests neither in the personal representative, nor in his heir, nor in his widow. This is called a *Donatio Mortis Causa*, and is thus defined in the civil law, from which both the doctrine and the denomination are borrowed: *Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accepit; sin autem supervivisset is, qui donavit, reciperet; vel si eum donationis pœnituisset; aut prior decesserit is, cui donatum sit (g).*

To constitute a *donatio mortis causa*, there must be three attributes: 1. The gift must be with a view to the donor's death. 2. It must be conditioned to take effect only on the death of the donor by his existing disorder. 3. There must be a delivery of the subject of the donation.

Attributes of a  
*donatio mortis causa*:

1. The gift must be made with a view to the donor's death (*h*). If a gift be not made by the donor in peril of \*death, *i. e.* with relation to his decease by illness affecting him at the time of the gift, it cannot be supported as a donation *mortis causa* (*i*). Where it appears that the donation was made whilst the donor was ill, and only a few days or weeks before his

1. The gift must be made by the donor in peril of death.

† See American note at end of this Section.

(*g*) Inst. lib. 10, tit. 7. The correctness of this definition, and the inaccuracy of that given by Swinbourne, Pt. 1, s. 7, pl. 2, is noticed by Lord Loughborough, in *Tate v. Hilbert*, 2 Ves. 119. The description of a *donatio mortis causa* given by Lord Cowper, is, "where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but

if he recovers, then does the property thereof revert to him:" *Hedges v. Hedges*, Prec. Chanc. 269.

(*h*) *Duffield v. Elwes*, 1 Bligh, N. S. 530. The evidence must be clear that the donor gave it in contemplation of death. The burden of proof is necessarily on the donee, and no case ought to prevail unless it is supported by evidence of the clearest and most unequivocal character. *Cosnahan v. Grice*, 15 Moo. P. C. 215.

(*i*) *Tate v. Hilbert*, 2 Ves. 121. *Gardiner v. Parker*, 3 Madd. 185. See also *Edwards v. Jones*, 1 Myln. & Cra. 236. *Post*, p. \*683.

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death, it will be presumed that the gift was made in contemplation of death (*k*), and in the donor's last illness (*l*).

2. The gift must be conditioned to take effect only on the death of the donor by his existing disorder (*m*). But, although it is an essential incident to a donation *mortis causa* that it be subject to a condition, that, if the donor live, the thing shall be restored to him, yet it is not necessary that the donor should expressly declare that the gift is to be accompanied by such a condition : for if a gift be made during the donor's last illness, the law infers the condition that the donee is to hold the donation only in case the donor die of that indisposition (*n*). Thus in *Gardiner v. Parker* (*o*), A., being confined to his bed, gave to B. a bond for 1,800*l.* two days before his death, in the presence of a servant, saying, "There, take that, and keep it : " The question was between the donee and executors of A. : And Sir John Leach, V.-C., decided in favor of the donation, observing that the doubt originated in the donor not having expressed that the bond was to be returned if he recovered : but that the bond being given in the extremity of sickness, and in contemplation of death, the intention of the donor was to be inferred that the bond shall be holden \*as a gift only in case of his death ; and that if a gift be made in the expectation of death, there is an implied condition that it is to be held only in the happening of that event.

Still, if from all the circumstances of the gift, there is sufficient evidence to rebut the ordinary presumption, and to make it appear that the gift was unconditional, it cannot be supported as a donation *mortis causa* (*p*). Accordingly in *Edwards v. Jones* (*q*), Mary Custance, the obligee of a bond given in the year 1819, for 300*l.*, signed the following indorsement not under seal, on the bond, five days before her death : "I, Mary Custance, of the town of Aberystwith, in the county of Cardigan, widow, do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto,

(*k*) *Gardiner v. Parker*, 3 Madd. 184.

(*l*) 1 *Rop. Leg.* 21, 3rd edition. In *Blount v. Burrow*, as reported in 1 *Ves.* 546, *Eyre, C. B.*, seems to be of opinion, that there must be positive evidence that the gift was made in the last illness : but this *dictum* is not found in the report of the case in 4 *Bro. C. C.* 72, and does not seem supported by any other authorities.

(*m*) *Irons v. Smallpiece*, 2 *Barn. & Ald.* 553. *Tate v. Leithhead*, *Kay*, 658. *Staniland v. Willott*, 3 *Mac. & G.* 664, 675.

(*n*) 1 *Rop. Leg.* 4, 3rd edit.

(*o*) 3 Madd. 184.

(*p*) See *Walter v. Hodge*, 2 *Swanst.* 92.

(*q*) 1 *Mylne & Cra.* 226.

unto and to the use of my niece, Esther Edwards, of Llanilar, in the said county of Cardigan, widow, with full power and authority for the said Esther Edwards to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon; as witness my hand, this 25th day of May, 1830;” Immediately after the indorsement had been signed, Mary Custance delivered the bond, or caused it to be delivered, to Esther Edwards, and it remained in her hands: Mary Custance died on the 30th of May, 1830, having in the year 1829 made her will, in which she did not mention the bond, or dispose of the residue of her estate, but she appointed an executor: It was argued on the part of Esther Edwards that if this gift could not be established as a *donatio inter vivos*, by reason of the act being incomplete, it might still take effect as a *donatio mortis causa*: But Lord Chancellor Cottenham held, that in order to be good as a *donatio mortis causa*, the gift must have been made in contemplation of death, and intended to take effect only after the donor’s decease; and that if it appeared from the circum\*stances of the transaction, that the donor intended to make an immediate and irrevocable gift, that would destroy the title of the party who claimed as a donee *mortis causa*: His lordship further observed, that a party making a *donatio mortis causa* does not part with the whole interest, save only in a certain event, and it is of the essence of such a gift, that it shall not otherwise take place: Such a donation leaves the whole title in the donor, unless the event occurs which is to divest him: Here, however, there was an actual assignment, by which the donor, Mrs. Custance, transferred all her right, title, and interest to her niece; which was in itself sufficient to exclude the possibility of treating this as a *donatio mortis causa*.

3. There must be a delivery of the subject of the donation. The general rule upon this head is, that to substantiate the gift, there must be an *actual* tradition or delivery of the thing to the donee himself (*r*), or to someone else for the donee’s use (*s*). The possession of it must be transferred in point of fact. The purse, the ring, the jewel, or the watch, must be given into the hands of the donee, either by the donor himself or by his order. Thus, in *Bunn v. Markham* (*t*), Sir G. Clifford had written upon the parcels containing the property in question the names of the parties for whom they were intended, and had requested his natural

(*r*) *Ward v. Turner*, 2 Ves. Sen. 431.  
*Irons v. Smallpiece*, 2 B. & A. 553.  
*Powell v. Hellicar*, 26 Beav. 261.

(*s*) *Drury v. Smith*, 1 P. Wms. 404.  
(*t*) 7 Taunt. 231.

son to see the property delivered to the donees : It was, therefore, manifestly his intention that it should pass to them : yet as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift.

A further requisite to give effect to the donation is, that the deceased should, at the time of the delivery, not only part with what constitutes a delivery : the possession, but also with the dominion over the subject of the gift (*u*). Thus, in *Reddell v. Dobree* (*x*), \*A., the deceased, being in a declining state of health, delivered to Charlotte R. a locked cash-box, and told her to go at his death to his son for the key ; and that the box contained money for herself, and entirely at her disposal after he was gone, but that he should want it every three months whilst he lived : The box was twice delivered to the deceased by his desire, and he delivered it again to Charlotte R., and it was in her possession at his death : The box was afterward broken open by her, and contained a check for 500*l.*, drawn by a third party in favor of the deceased, and inclosed in a cover, indorsed with the name of Charlotte R., and the key (which the son of the deceased had refused to deliver to her), had a piece of bone attached to it, with her name written on it : Sir L. Shadwell, V.-C., held that there was no *donatio mortis causa* ; for that there was nothing more than that to a certain extent the deceased put Charlotte R. in possession of the box, but retained to himself the absolute power over the contents.

But it is no objection that the gift was not made to the donee free from incumbrance, but charged with the performance of a particular purpose (*y*). Accordingly it was held in the case of *Hills v. Hills* (*z*), that a gift may be good as a *donatio mortis causa*, although it be coupled with a trust that the donee shall provide for the funeral of the donor.

Again, though a delivery to a third party for the donee's use may be good (*a*), yet a mere delivery to an agent, in the character of agent *for the giver*, is not sufficient (*b*).

But there are cases where the nature of the thing will not admit of a corporeal delivery ; and then, it should seem, that a delivery of the *means* of coming at the possession or making

(*u*) *Hawkins v. Blewitt*, 2 Esp. N. P. C. 663.

(*x*) 10 Sim. 244.

(*y*) *Blount v. Burrow*, 4 Bro. C. C.

75. See *Hambrooke v. Simmons*, 4 Russ. Ch. C. 25.

(*z*) 8 M. & W. 401.

(*a*) See *supra*, note (*s*).

(*b*) *Farquharson v. Cave*, 2 Coll. 356.

use of the thing given will be sufficient (c). Thus the delivery of the key of a trunk has been decided to is incapable of actual transfer :

\*amount to the delivery of a trunk and its contents (d). So the delivery of the key of a warehouse or other place, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods for the purpose of a *donatio mortis causa* (e). But in these cases it is to be observed, that the key is not to be considered in the light of a symbol, in the name of the thing itself ; but the delivery of it has been allowed as the delivery of the possession, because it is the way of coming at the possession or to make use of the thing (f).

Banknotes may be the subject of *donatio mortis causa*, because the property is transferred by the delivery (g). And on the same principle it should seem that all negotiable instruments which require nothing more than delivery to pass to the donee the money secured by them, may be the subjects of donations *mortis causa*. For since it has been so adjudged of banknotes, there appears no reason why exchequer notes or promissory notes, payable to the bearer, or bills of exchange, or exchequer bills, indorsed in blank should not have the capability : for in all those cases the property passes to the donee by delivery (h).

there may be a *donatio mortis causa* of banknotes :

or of other negotiable instruments which pass by delivery :

(c) Ward v. Turner, 2 Ves. Sen. 441.

(d) Jones v. Selby, Prec. Chan. 300.

Ward v. Turner, 2 Ves. Sen. 441. Re Mustapha, Times L. R., viii., 160.

(e) Ward v. Turner, 2 Ves. Sen. 443. Smith v. Smith, 2 Stra. 955.

(f) Ward v. Turner, 2 Ves. Sen. 443. Bunn v. Markham, 7 Taunt. 224.

(g) Miller v. Miller, 3 P. Wms. 356.

(h) 1 Rep. Leg. 16, 3rd edition. Unindorsed negotiable instruments payable to order may be the subject of a *donatio mortis causa*. Thus, a promissory note payable to order may be the subject of a *donatio mortis causa*, and will pass thereby though unindorsed by the donor : Veal v. Veal, 27 Beav. 303. See also Rankin v. Weguelin, 29 L. J., Ch. 323, note. This was expressly followed in the case of Re Mead, 15 C. D. 651, in which a testator shortly before his death gave to his wife two

bills of exchange which were payable to himself or order : they did not fall due until after his death, and they had not been indorsed by him. It was held that there had been a valid *donatio mortis causa* of the bills. A check payable to the donor or order, and without having been indorsed by him, given by the donor during his last illness to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor or order : Clement v. Cheesman, 27 C. D. 631. As to whether in such a case the donee must sue in the name of the donor's executor or whether he can compel the executor to indorse to him as if he had given value, 45 & 46 Vict. c. 61, s. 31 (4), *Quære*. See Chalmers on Bills of Exchange, 3rd edit., p. 119. But the ground on which unindorsed negotiable instruments may be the subject of

\*So a bond may be a subject of *donatio mortis causa*, because the property is considered to pass by the delivery (*i*).

It has been a matter of considerable discussion, whether a mortgage or of a mortgage deed: of the mortgage deeds: but the question may now be regarded as settled in the affirmative by the decision of the House of Lords in *Duffield v. Hicks* (*k*), reversing the decision of Sir J. Leach, who had held that there was no good *donatio mortis causa* by the delivery of mortgage deeds. But on appeal to the House of Lords, their lordships held that the property in the deeds and the right to recover the money secured by them, passed by the delivery, followed by the death of the donor, and that the real and personal representatives of the donor were trustees for the donee to make the gift effectual. The decree of his honor was accordingly reversed (*l*).

And in the case of *Witt v. Amis* (*m*), the Court of Queen's Bench held, that there was no distinction between a policy of insurance and a mortgage or bond, as regards its capability of being made the subject of a *donatio mortis causa*, and, therefore, that a policy may be the subject of a gift of that nature. This decision was adopted by Romilly, M. R. (*n*), who held or of a banker's deposit note: also to the same effect as to money due on a banker's deposit note (*o*).

But where no property, legal or equitable, is transferred to the donee by delivery of the subject, there can be no valid *donatio mortis*

a *donatio mortis causa* is not that a property is transferred at law by delivery, but that the property is so transferred by the delivery of the instrument as to give a title to the donee to the assistance of a court of equity to make the donation complete. It is in accordance with the principles laid down in the decision in the House of Lords in *Duffield v. Hicks*, 1 Bligh. N. S. 498, that unindorsed negotiable instruments have been held to be the subject of a *donatio mortis causa*. At one time, however, a contrary opinion seems to have prevailed. See *Miller v. Miller*, 3 P. Wms. 356, and *Tate v. Hilbert*, 2 Ves. 111.

(*i*) *Ashton v. Dawson*, 2 Coll. 363, n. (*c*). *Snellgrove v. Baily*, 3 Atk. 214. *Ward v. Turner*, 2 Ves. Sen. 441, 442.

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*Gardiner v. Parker*, 3 Madd. 184, ante, p. \*682. But such a donation cannot be regarded as a satisfaction of a debt due from the donor to the donee: *Clavering v. Yorke* (reported in a note to 2 Coll. 363).

(*k*) 1 Bligh. (N. S.) 498.

(*l*) See also *Staniland v. Willott*, 3 Mac. & G. 676.

(*m*) 1 Best & Sm. 109.

(*n*) *Amis v. Witt*, 33 Beav. 619.

(*o*) See *Accord. Moore v. Moore*, L. R. 18 Eq. 474. *Re Dillon*, 44 C. D. 76. See further *Moore v. Darton*, 4 De G. & Sm. 517, in which case a receipt had been given by a borrower to a lender as follows: "Received of D. £500, to bear interest at 4 per cent. per annum." And *Knight-Bruce, V.-C.*, held that the

*causa*. Thus in *Ward v. Turner (p)*, Lord Hardwicke held that the delivery of *receipts* for South Sea annuities was not such a delivery of the annuities themselves as to support the gift of them as a *donatio mortis causa*: but he intimated that an actual transfer of the stock would have been sufficient to effectuate the intended donation (*q*). but not of receipt for stock:

A promissory note made by a man in his last illness, cannot operate as a *donatio mortis causa* to the payee (*r*), for it has not that reference to the death of the donor which is essential to such a gift (*s*). The same has been decided as to a check on a banker; which is an order for the payment of money, that may take effect immediately, and in the lifetime of the donor; so that is (generally speaking) altogether inconsistent with the nature of a donation *mortis causa* (*t*). Notes drawn by the deceased in his last illness; not the subject of *donatio mortis causa* nor (generally speaking) checks on bankers:

delivery of this receipt to an agent of the borrower by the lender on his death-bed stating that he wished the debt to be canceled was a sufficient *donatio mortis causa*, on the ground, *semble* that the document was essential to the proof of the contract of loan.

(*p*) 2 Ves. Sen. 431.

(*q*) Railway stock cannot be the subject of *donatio mortis causa*. *Moore v. Moore*, L. R. 18 Eq. 474.

(*r*) *Tate v. Hilbert*, 2 Ves. 111. *Holiday v. Atkinson*, 5 B. & C. 501. In the latter of these cases Lord Tenterden expressed his opinion that the intention to avoid the legacy duty would not be a sufficient consideration for a promissory note; for then the note would not be payable till after the donor's death: *ib.* 503.

(*s*) See *ante*, pp. \*681, \*682.

(*t*) *Tate v. Hilbert*, 2 Ves. 120. See also *Tate v. Leithead*, Kay, 658. *Ante*, p. \*682. However, a check under some circumstances has been considered the subject of a *donatio mortis causa*: as where the testator in his illness drew a bill on a goldsmith for the payment of a sum to A. the wife of B., and delivered it to A. with a written indorsement to

buy her mourning: *Lawson v. Lawson*, 1 P. Wms. 441. (But see the remarks of Lord Loughborough in 2 Ves. 121.) So in *Bouts v. Ellis*, 17 Beav. 121 (affirmed on appeal, 4 De G. M. & G. 249), a testator, four days before his death, said to his wife, "I am a dying man; you will want money before my affairs are wound up:" On the following day he gave his wife a crossed check, and on the next day but one, remembering that it was crossed, he asked a friend who visited him to take it and give the wife another for it, which the friend did: The testator's check was paid before, and the other check after his death: And it was held by Romilly, M. R., and by the Lords Justices, that the transaction constituted a good *donatio mortis causa*. But the delivery of the donor's check on his banker, *which was not presented before the donor's death*, was held not a good *donatio mortis causa*: *Hewitt v. Kaye*, L. R. 6 Eq. 198. Where the delivery by a donor, in his last illness, of a check on his bankers was accompanied by a delivery of his banker's passbook, and the check *was not presented until after the donor's death*, it was held by Bacon, V.-C., that the gift was not a good *donatio*

\*It may now be expedient to examine in what respects a *donatio mortis causa* differs from a legacy, and from a gift *inter vivos*; whence it will appear how important the distinction is between these three kinds of donations.

A *donatio mortis causa* differs from a legacy in these respects :

<p>1. Probate unnecessary:</p> <p>2. Executor's assent unnecessary.</p>	<p>1. Probate of it is unnecessary, for such a gift takes effect from delivery; so the donee claims the subject of it as a gift from the donor in his lifetime, and not under a testamentary act (<i>u</i>).</p> <p>2. For the reason just given, no assent or other act on the part of the executor or administrator is necessary to perfect the title of the donee (<i>x</i>). In fact the distinction between a <i>donatio mortis causa</i>, and a legacy under a nuncu-</p>
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*mortis causa*: Re Beak's Estate, L. R. 13 Eq. 734. Re Mead, 15 C. D. 651. Where a check was given by A. to B., and presented without delay, and the bankers had sufficient assets of A., but refused payment because they doubted the signature, and the next day A. died, the check not having been paid, it was held to be a complete gift *inter vivos* of the amount of the check: Bromley v. Brunton, L. R. 6 Eq. 275. See also Rolls v. Pearce, 5 C. D. 730, where a check drawn by a testator payable to his wife or her order, and indorsed by her and paid into a foreign bank against the amount of which she drew, was held to be a good *donatio mortis causa*, although it was not presented for payment at the bank on which it was drawn until after the testator's death. The result of the cases on the question how far the gift of a check of the donor can be the subject of a *donatio mortis causa* would seem to be that the mere delivery of a check which is not paid in the donor's lifetime does not constitute a *donatio mortis causa*, for it is payment which constitutes the necessary delivery: Hewitt v. Kaye, L. R. 6 Eq. 198. Re Beak's Estate, L. R. 13 Eq. 734. Whereas in the case of a bill, promissory note, bond, I O U, or check of a third person, it is the delivery of

the instrument itself which operates as a delivery of the money secured by it. It is to be observed in the case of Bouts v. Ellis (*ubi sup.*), that the check was paid before the death of the donor, and in Lawson v. Lawson (*ubi sup.*), the gift by delivery of the bill was in the nature of an appointment. Generally the giving of a check will not operate as an appropriation *inter vivos* in favor of the donee (Hopkinson v. Forster, L. R. 19 Eq. 74), although in Bromley v. Brunton (*ubi sup.*), it was held on the facts of that case that there was a complete gift *inter vivos* of the amount of the check. There seem, however, to be some cases in which the delivery of a check which is not paid in the donor's lifetime is allowed to operate as a *donatio mortis causa*. One of them would seem to be the case where the check is in the lifetime of the donor negotiated or paid away by the donee for valuable consideration: Rolls v. Pearce, 5 C. D. 730, or where the money is received immediately after the death of the testator before the banker was apprised of it: Tate v. Hilbert, 2 Ves. 111. But the gift would in these cases seem to be validated rather as a mere donation than as a *donatio mortis causa*.

(*u*) 1 Rep. Leg. 12, 3rd edition. Rigden v. Vallier, 2 Ves. Sen. 258.

(*x*) Tate v. Hilbert, 2 Ves. 120.



pative will is, that the former is claimed against the executor, and the other, from the executor (*y*).

A *donatio mortis causa* differs from a gift *inter vivos* in these respects (*y*), in which it resembles a legacy: 1. It is \*ambulatory, incomplete and revocable during the testator's life. The revocation may either be affected by the recovery of the donor from his disorder (*z*), or by resumption of the possession of the subject (*a*). But he cannot revoke the donation by a subsequent will: for, on the death of the donor, the title of the donee becomes, by relation, complete and absolute from the time of delivery (*b*). It may, however, be satisfied by a legacy given to the donee (*c*). 2. It is liable to the duties imposed on legacies, by the express provisions of the stat. 8 & 9 Vict. c. 76, s. 4, which enacts that every gift which shall have effect as a donation *mortis causa* shall be deemed a legacy within the meaning of those acts (*d*). 3. It is liable to the debts of the testator upon deficiency of assets (*e*).

How it differs from a gift *inter vivos*:

1. It is revocable:

2. Liable to legacy duty: Stat. 8 & 9 Vict. c. 76, s. 4.

3. To debts.

In *Hayslep v. Gymer* (*f*), an action of debt was brought for money had and received to the use of the plaintiff: It appeared that the defendant was executor of a Mrs. Wilkinson, and the plaintiff lived in Mrs. Wilkinson's house till the time of her death: On the reading of Mrs. Wilkinson's will, the defendant asked the plaintiff whether she had not possession of something given to her by Mrs. Wilkinson, and how she had obtained it: She produced a parcel, which contained banknotes of the value of

Evidence of a *donatio mortis causa*.

(*y*) There was formerly another point in which a *donatio mortis causa* differed from a gift *inter vivos*, viz., that it might be made to the wife of the donor. This difference no longer exists, as since the M. W. P. Act, 1882, a married woman can receive and hold as her separate property any gift made to her, whether by her husband or any other person. As to former law, see *Lawson v. Lawson*, 3 P. Wms. 356. *Tate v. Leithead*, Kay, 658.

(*z*) *Ante*, p. \*682.

(*a*) *Ward v. Turner*, 2 Ves. Sen. 433. *Bunn v. Markham*, 7 Taunt. 232, by Gibbs, C. J.

(*b*) *Jones v. Selby*, Prec. Chanc. 300.

(*c*) *Jones v. Selby*, Prec. Chanc. 300. See *Johnson v. Smith*, 1 Ves. Sen. 314.

(*d*) And by 44 Vict. c. 12, § 38 (2), amongst the personal property to be included in the account on which probate duty is payable is "any property taken as a *donatio mortis causa* made by any person dying on or after 1 June, 1881."

(*e*) *Smith v. Casen*, mentioned in *Drury v. Smith*, 1 P. Wms. 406. *Ward v. Turner*, 2 Ves. Sen. 434.

(*f*) 1 Adol. & Ell. 162.

220*l.*, and said that Mrs. Wilkinson had given them to her a fortnight before her death, telling her they would be useful to her, after her (Mrs. Wilkinson's) death; and that no one was present at the time: \*According to one witness, the defendant then said that he should keep the parcel till the plaintiff required it: according to another, simply that he should keep it: The plaintiff had Mrs. Wilkinson's keys during her illness, and superintended the economy of the house: other property of Mrs. Wilkinson's to a considerable amount was shown to have been in the power of the plaintiff, which was found by the executors undisturbed: Mrs. Wilkinson did not take to her bed more than a week before her death: During that week the plaintiff showed the notes, in her own possession, to a witness: The action was brought to recover back these notes: The defendant's counsel objected that there was not evidence to go to the jury, of the property of the notes being in the plaintiff: The judge having left the whole evidence to the jury, they found a verdict for the plaintiff: A motion was afterward made to enter a nonsuit, because there was no evidence at all of property in the notes, except the plaintiff's own account of the matter: But the Court of K. B. refused to disturb the verdict, on the ground that there was some evidence to go to the jury, though slight, and that the declaration made by the plaintiff herself was admissible evidence in her favor by reason of acquiescence (though of trifling weight) in its truth by the defendant, and also as being part of the *res gestæ*, on the occasion of the defendant's obtaining the notes (*g*).

*Donatio mortis causa* not abolished by Wills Act.

It may be added in conclusion that the Wills Act (1 Vict. c. 26) has not, either in words or in effect, abolished such donations (*h*).

(*g*) In this case Littledale and Parke, JJ., expressed their opinion that it made no difference whether the de-

livery of the notes was a gift absolutely or a *donatio mortis causa*.

(*h*) *Moore v. Darton*, 4 De G. & Sm. 517.

† "Sound policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged." *Ridden v. Thrall*, 125 N. Y. 572, 581. Such gifts are not favored by the courts. *Delmotte v. Taylor*, 1 Redf. 417; *Rockwood v. Wiggim*, 16 Gray 402; *Michenor v. Dale*, 23 Pa. St. 59; *Hatch v. Atkinson*, 56 Me. 326. But where the

question arises between the next of kin on a distribution, the validity of a *donatio mortis causa* to one of them will not be so rigorously inquired into as where the interests of creditors are involved. *Fowler v. Lockwood*, 3 Redf. 465.

It is indispensable to the validity of such a gift that it be made in contemplation of the death of the donor.

Kirk v. McCusker, 3 N. Y. Misc. 277; Blanchard v. Sheldon, 43 Vt. 512. This may, however, be inferred and need not be expressed. Virgin v. Gaither, 42 Ill. 39; Baker v. Williams, 34 Ind. 547. But it is not necessary that the donor should die immediately after the gift is made. Wells v. Tucker, 3 Binn. 366. "Such gifts are inchoate and not perfected until the death of the donor." Parker v. Marston, 27 Me. 196, 203. "Such a gift does not become perfect until the death of the donor." Parish v. Stone, 14 Pick. 198, 203. "A *donatio mortis causa* does not pass a title immediately, but it is only to take effect on the death of the donor." Grover v. Grover, 24 Pick. 261, 266. On his recovery the gift fails, although he afterward die from the cause then threatening. Weston v. Hight, 17 Me. 287. And he may revoke it before his death. Merchant v. Merchant, 2 Bradf. 432. And it will be revoked by whatever would revoke a will, *e. g.*, in Connecticut, by the subsequent birth of a child of the donor. Bloomer v. Bloomer, 2 Bradf. 339. On the other hand, such gift is not necessarily defeated by a will subsequently made, Nicholas v. Adams, 2 Whart. 17; and still less by an order of the Probate Court requiring the administrator to account for the subject of the gift as property of the intestate estate. Lewis v. Bolitho, 6 Gray 137.

*Delivery* by the donor is essential to the gift. Kirk v. McCusker, 3 N. Y. Misc. 277; Ridden v. Thrall, 125 N. Y. 572; Harris v. Clark, 3 Id. 93, 113; Conklin v. Conklin, 20 Hun 278; Turner v. Brown, 6 Id. 331; Basket v. Hassell, 107 U. S. 602; Gescheidt v. Drier, 47 N. Y. St. Rep. 410; Parish v. Stone, 14 Pick. 204; Case v. Dennison, 9 R. I. 88; Murray v. Cannon, 41 Md. 466; McKenzie v. Downing, 25 Ga. 669; Estate of Trough, 75 Pa. St. 115; Zimmerman v. Streeter, Id. 147; Egerton v. Egerton, 2 C. E. Gr. 418. And the

donee's subsequent possession is not sufficient proof of such delivery. Kenny v. Public Administrator, 2 Bradf. 319. But a good delivery may be made without actual manual transmission, Wing v. Merchant, 57 Me. 383; *e. g.*, of a debt due from the donee by executing a receipt for it, Gray v. Barton, 55 N. Y. 68; or destroying the bond or other evidence of it, Gardner v. Gardner, 22 Wend. 520; as well as by surrender or delivery to the donee of such evidence. Lee v. Boak, 11 Gratt. 182. So, it may be by symbol, *e. g.*, by delivery of the memorandum or certificate of a deposit, Champney v. Blanchard, 39 N. Y. 111; or of a key to the trunk containing the gift, Coleman v. Parker, 114 Mass. 30; Jones v. Brown, 34 N. H. 439; or to a third person for the donee. Marshall v. Berry, 13 Allen 45; Coutant v. Schuyler, 1 Paige 316; Southerland v. Southerland, 5 Bush 591. Delivery is a question of fact, Hunt v. Hunt, 119 Mass. 474; not requiring legal formalities, such as the indorsement of a negotiable note. Wing v. Merchant, 57 Me. 383. See, however, Bradley v. Hunt, 5 Gill & J. 54. But no delivery is sufficient if the intention to make a gift is wanting. Shurtleff v. Francis, 118 Mass. 154. And where the alleged gift was certain bank books, over which the donor exercised control after the gift and prior to her death, the gift was not sustained as *donatio causa mortis*. Kirk v. McCusker, 3 N. Y. Misc. 277. To constitute such a gift, it is essential that possession should be retained by the donee until the donor's death. Dunbar v. Dunbar, 80 Me. 152; Craig v. Craig, 3 Barb. Ch. 78; Champney v. Blanchard, 39 N. Y. 111, 116.

The subject of the gift may be the note of a third person, Grover v. Grover, 24 Pick. 261; with a collateral mortgage duly assigned, Chase v. Redding, 13 Gray 418; or merely delivered. Hackney v. Vrooman, 62 Barb. 650. So,

a savings bank book, *Tillinghast v. Harris v. Clark*, 3 N. Y. 93 ; or check. *Wheaton*, 8 R. I. 536 ; but not the *Second National Bank v. Williams*, 13 donor's own note, *Whitaker v. Whitaker*, 52 N. Y. 373 ; or unaccepted draft, *Mich.* 282.













